CASE NO. 16-3722
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' OPENING BRIEF

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DISCLOSURE STATEMENT

Pursuant to 3d Cir. R. 26.1.1, the undersigned hereby states that there are no affiliate corporations or subsidiaries that have issued shares or debt securities to the public, and there is no publicly held company that owns any part of the Appellants.

/s/ Mary E. McAlister
Mary E. McAlister

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JURISDICTIONAL STATEMENT

The District Court had jurisdiction under 28 U.S.C. §1331 because Plaintiffs raised questions under the United States Constitution and 42 U.S.C. §1983. The order denying Plaintiffs' motion for a preliminary injunction is an appealable interlocutory decision under 28 U.S.C. §1292(a)(1).

The District Court's order was issued on August 31, 2016, and the notice of appeal was filed on September 26, 2016. The appeal is timely under Fed. R. App. P. 4(a)(1)(A).

STATEMENT OF ISSUES ON REVIEW

1. Whether the District Court erred in shifting to Plaintiffs the burden of proof on narrow tailoring, and in denying a preliminary injunction even after the court determined (a) that Plaintiffs had sufficiently alleged that Harrisburg Ordinance No. 12-2012 is not narrowly tailored, and (b) that Defendants failed to sufficiently show narrow tailoring under *Bruni v. City of Pittsburgh*, 824 F.3d 353, 369 (3d Cir. 2016), even after supplementing the record.

This issue was addressed by the District Court at pages 000018 and 000034-000035 of the Appendix.

2. Whether the District Court erred when it determined that Harrisburg Ordinance No. 12-2012 need only satisfy intermediate scrutiny without addressing

the Ordinance's prohibition of protected First Amendment speech in quintessential public fora.

The Court acknowledged that the Ordinance affected speech in public fora at page 000005 of the Appendix, and determined that the Ordinance need only satisfy intermediate scrutiny at pages 000014 and 000031 of the Appendix without analyzing how the classification of the forum for speech affects the determination of the level of constitutional scrutiny.

3. Whether the District Court erred when it determined that Harrisburg Ordinance No. 12-2012, which establishes anti-speech buffer zones that prevent congregating, patrolling, picketing and demonstrating against medical procedures for 20 feet around every entrance, exit and driveway of every health care facility in Harrisburg, but excepts health facility workers, is a content-neutral time, place and manner regulation subject only to intermediate scrutiny.

This issue was addressed by the District Court at pages 000014 and 000031 of the Appendix.

4. Whether the District Court erred when it determined that Plaintiffs failed to show a substantial likelihood of prevailing on the merits of their claim that Harrisburg Ordinance 12-2012 is unconstitutionally overbroad.

This issue was addressed by the District Court at pages 000035-000036 of the Appendix.

STATEMENT OF RELATED CASES

Plaintiffs state that there are no related cases pending before this court or the District Court.

STATEMENT OF THE CASE

Plaintiffs are asking this Court to reverse the District Court's denial of a preliminary injunction against Harrisburg Ordinance No. 12-2012 ("Ordinance"), which creates multiple anti-speech buffer zones around all entrances, exits and driveways of health care facilities throughout the city. Amid pejorative comments about Plaintiffs having "fringe" viewpoints (Appx 000013-000014) and only "euphemistically" being sidewalk counselors (Appx 000003), the District Court declared that it was "unwilling to disturb the status quo and prematurely enjoin the protection of access to health care" offered by the Ordinance when Plaintiffs failed to show a likelihood of prevailing on the merits. (Appx 000036-00037). The District Court concluded that Plaintiffs did not show a likelihood of success on the issue of whether the Ordinance is narrowly tailored, but only after improperly shifting the burden of proof on narrow tailoring from Defendants–**whom the court acknowledged did not meet that burden**–to Plaintiffs. (Appx 000034-00035).

Plaintiffs filed a Verified Complaint under 42 U.S.C. §1983, seeking injunctive and declaratory relief, nominal damages and attorneys' fees on the grounds that the Ordinance violates Plaintiffs' First Amendment rights of free

speech, free exercise of religion and freedom of assembly, and Fourteenth Amendment rights to Due Process and Equal Protection. (Appx 000045). Plaintiffs filed a motion for preliminary injunction on March 31, 2016 (Appx 000139). After the motion for preliminary was fully briefed (Dkts. 15, 18), Defendants requested leave to supplement the record for the preliminary injunction motion. (Appx 000163). After receiving an extension of time, Defendants submitted declarations from present and former employees of Planned Parenthood Advocates, law enforcement and a former City Council member. (Appx 000177-000200). On the same day, Plaintiffs filed declarations in support of the injunction. (Appx 000201-000225).

Defendants filed a motion to dismiss on April 19, 2016. (Dkt #16). The District Court took both the motion for preliminary injunction and motion to dismiss under advisement and on August 31, 2016 issued a Memorandum Opinion (Appx 000003) and Order (Appx 000038) denying the preliminary injunction and denying in part and granting in part the motion to dismiss.

Plaintiffs are appealing the District Court's denial of the preliminary injunction. While the District Court's disposition of the motion to dismiss is not presently appealable, because the court based its denial of the preliminary injunction on determinations made as part of its analysis of the motion to dismiss, Plaintiffs

will necessarily reference some of the District Court's discussion on the motion to dismiss in their briefing on the preliminary injunction.

STATEMENT OF FACTS

I. Plaintiffs' Peaceful Sidewalk Counseling And Leafletting.

Plaintiffs Colleen Reilly and Becky Biter[1] are residents of the City of Harrisburg who have for many years peacefully counseled women about alternatives to abortion by engaging in sidewalk counseling and leafletting on public sidewalks and streets near the city's two abortion clinics. (Appx 000062-000066). Plaintiffs' sincerely held religious beliefs hold that abortion is the intentional destruction of human life and compel them to counsel women about the true nature of abortion, offer them alternatives to killing their unborn children, provide reasons for choosing life and explain to them the dangers and detrimental effects of abortion. (Appx 000061). Because of the personal nature of their messages and the emotional stress that the pregnant women are experiencing, Plaintiffs engage in calm, one-on-one conversations and provide written materials to women who want to receive them. (Appx 000061-000062). Plaintiffs do not engage in loud confrontations with expectant mothers because their experience has shown that the most effective way of connecting with women and couples facing unplanned pregnancies is to engage

[1] Rosalie Gross, a fellow sidewalk counselor, was also a Plaintiff in the original action, but has entered a voluntary dismissal without prejudice and is not part of this appeal. (Dkt. #46).

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. (Appx 000062). Plaintiffs' years of experience have shown 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. (Appx. 000062).

Plaintiff Becky Biter has been a sidewalk counselor outside the Hillcrest Clinic about three days per week, and outside the Planned Parenthood Clinic about once a week for the last year. (Appx 000065). Ms. Biter shares her experience of having had two abortions and suffering grief, anguish and guilt until she found healing and forgiveness from God. (Appx 000201-000202). Ms. Biter has found that it is most advantageous to share her personal experience with abortion in a one-on-one setting and to provide pro-life literature that explains the negative and detrimental health effects resulting from abortions. (Appx 000065).

Plaintiff Colleen Reilly has been a regular pro-life counselor outside the Hillcrest Clinic for about 10 years. (Appx 000063). Ms. Reilly engages women in conversation, offering life-affirming information and literature as the women enter the abortion clinics. (Appx 000220). Prior to the adoption of the Ordinance, Ms. 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. (Appx 000064). She was often able to give out three to seven pieces of literature and have multiple personal conversations with individuals entering the Hillcrest Clinic each day she counseled. (Appx 000064). Ms. Reilly is aware of multiple people who changed their minds and decided against having an abortion after she spoke with them and provided them with pro-life literature. Therefore, in multiple instances, her speech within the public fora was the difference between life and death for several unborn children. (Appx 000063).

Neither Plaintiff has ever blocked or impeded any pedestrian, clinic patient, clinic employee or anyone else during their sidewalk counseling. (Appx 000063, 000065). They have no criminal history, and have never been subject to any injunctions in connection with their sidewalk counseling outside the Harrisburg abortion clinics. (Appx 000063, 000065).

II. Defendants Impose Anti-Speech Buffer Zones Around Clinics.

On November 13, 2012, the Harrisburg City Council adopted Ordinance No. 12-2012, which supplemented the Harrisburg Code of Ordinances by adding Chapter 3-371, entitled "Interference With Access To Health Care Facilities." (Appx 000050). The Ordinance creates multiple anti-speech "buffer zones" around each "health care facility" in Harrisburg, defined as "any hospital, medical office,

physical or psychological therapy facility or clinic licensed by the Commonwealth of Pennsylvania Department of Health:"

> §3-371.4.A. 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.

(Appx 000098). If a health care facility has multiple entrances, exits, or driveways, then the Ordinance creates multiple buffer zones, one for each entrance, exit, or driveway. (Appx 000051). According to the Pennsylvania Department of Health, there are at least 78 licensed health care facilities in the City of Harrisburg. (Appx 000051). Therefore, "congregating," "patrolling," "picketing" and "demonstrating" are prohibited in potentially hundreds of zones throughout the city. (*Id.*). The Ordinance does not define "congregate," "patrol," "picket" or "demonstrate." (Appx 000097-000098).

The City Council carved out an exception not only for "police and public safety officers, fire and rescue personnel, or other emergency workers in the course of their official business," but also for "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 (Appx 000098).

Defendants describe the purposes of the Ordinance in § 3-371.2:

> 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.

(Appx 000097). The Ordinance states that it "shall apply to all persons equally regardless of the intent of their conduct or the content of their speech." (Appx 000097). However, the legislative findings and purposes only restrict certain "First Amendment activity," *i.e.*, the right to picket or demonstrate **against** certain medical procedures, while leaving unrestricted the right to picket or demonstrate in favor of certain medical procedures, seen in the exception for employees or agents assisting those coming to the facility. (Appx 000097). Violations of the Ordinance carry fines of $50 for the first violation, $150 for the second within five years, $300 for the third

within five years, and at least $300 (with no cap) and/or imprisonment for up to 30 days for fourth and subsequent violations. (Appx 000098).

III. Defendants Did Not Consider Less Restrictive Alternatives Prior To Enacting The Ordinance.

There is no evidence in the record that Defendants evaluated any options other than imposing an anti-speech buffer zone. (Appx 000177-000200). To the contrary, testimony included in the supplemental record presented after the preliminary injunction motion was fully briefed demonstrated that **the first and only action** that Defendants took to deal with the purported problems associated with Plaintiffs' free speech activities was to accept and adopt the Ordinance's language **prepared by Planned Parenthood**. (Appx 000198-000200). Former City Councilman Brad Koplinksi, who was among those who voted for the anti-speech buffer zone, testified that "the language was proposed to the City by Planned Parenthood based upon the language of Pittsburgh's Ordinance." (Appx 000199). He testified that a clear motivating factor for imposing the buffer zone was his discussions with Planned Parenthood representatives who said that they had confronted what they called "protestors" at the abortion clinics. (Appx 000198). Mr. Koplinski offered no evidence of any actual problems with women gaining access to the abortion clinics, but instead stated that the buffer zone was useful to help the city save money on law enforcement during a time when the city had financial trouble. (Appx 000198).

> We were in receivership at the time, and we focused on trying to financially stabilize the City's resources at all times. From that time to the current time, City has had substantial gun violence and other serious crimes that take up substantial resources. I was particularly concerned at that point, given the low police resources, that a confrontation at the health clinics would escalate due to a potentially significant time delay for any police response. During the City's financial woes, the police department faced significant resource deficiencies and had even dropped to only four officers on the street at one point. There were multiple occasions that the City was afraid it would not be able to make payroll even for police officers. Given the limited resources, the idea was to prevent confrontations in the first instance. (Appx 000199).

Chief of Police Thomas Carter confirmed Mr. Koplinski's testimony about staff shortages and financial issues at the police department and that having the anti-speech buffer zone is helpful in saving potential costs of responding to calls at the abortion clinics. (Appx 000196). **Chief Carter did not testify that the department had experienced resource diminution because of responding to confrontations at the abortion clinic, but only that if it had to respond (hypothetically) to such calls it would be a financial drain on the department**. (Appx 000197). The chief also said that cars often exceed the speed limit on the street outside the abortion clinics and having the buffer zone in place to prevent Plaintiffs and others from "blocking" the sidewalk and entrances increases public safety. (Appx 000197).

Neither the chief nor Mr. Koplinski provided any testimony of actual instances when Plaintiffs or other sidewalk counselors blocked entrances or sidewalks and threatened public safety. Instead, Mr. Koplinski testified similarly to the police chief that cars frequently exceed the speed limit on Front Street and that

if vehicles were to stop part way in the driveway to the Hillcrest clinic, then it might create a public safety hazard. (Appx 000199). That potentiality was why the City Council extended the anti-speech buffer zone to driveways. (Appx 000199).

There was no testimony or documentary evidence of any efforts by Defendants to consider alternatives to censoring Plaintiffs' speech. The only testimony that in any way referenced other measures was Mr. Koplinski's assertion that "Other measures [not identified] would have been reactive only to confrontations that had already begun to escalate." (Appx 000199). He also offered his opinion that based upon his experiences in other cities FACE (Freedom of Access to Clinics Entrances) Acts would not prevent confrontations or prevent the blockage of driveways. (Appx 000199-000200). He did not testify that the City Of Harrisburg actually discussed such acts or any other similar measure, just that he believed that such an act would not prevent problems. (Appx 000199-000200).

The only other testimony offered by Defendants were statements from present or former employees of Planned Parenthood, which was the author of the language used by the City and owner of one of the two abortion clinics benefitting from the Ordinance. (Appx 000180-000193). Those statements offered anecdotes about the employees having uncomfortable encounters with those expressing opposition to abortion and being concerned about staff safety and access. (Appx 000180-000193). However, **there was no testimony of any patient actually being prevented from**

entering the clinics. (Appx 000180-000193). The Planned Parenthood employees offered their impressions of the fairness of the anti-speech buffer zone and their opinion that Plaintiffs' activities were not being burdened. Appx 000180-000193).

In other words, Defendants reacted to complaints from Planned Parenthood workers who felt uncomfortable when encountering Plaintiffs and others exercising their First Amendment rights by accepting ordinance language from Planned Parenthood, listening to comments from people who wanted the language adopted and then adopting it. (Appx 000198-000200).

IV. The District Court Found That Defendants Have Not Shown That They Closely Examined Other Measures And Ruled Them Out For Good Reason.

The District Court noted the dearth of evidence in the record, even after Defendants supplemented it, with regard to Defendants' supposed efforts to narrowly tailor the Ordinance. (Appx 000034-000035). Specifically, the court noted that "Defendants have **merely stated** that, at the time the Ordinance was enacted, Harrisburg was in receivership, the police department was at times down to only four officers patrolling the streets, and on multiple occasions there was concern that payroll would not be met." (*Id*.) (emphasis added). Quoting specifically this Court's controlling standard on narrow tailoring recently announced in *Bruni v. City of Pittsburgh*, 824 F.3d 353, 370 (3d Cir. 2016), the District Court specifically found that,

> **it is unclear what specific 'other measures' were considered [by Defendants], and whether they were 'closely examined and ruled out for good reason.'**

(Appx 000035) (quoting *Bruni*, 824 F.3d at 370) (emphasis added).

V. The Draconian Effects Of The Anti-Speech Zones On Plaintiffs' First Amendment Activities.

Since the enactment of the Ordinance, Plaintiffs have been forced to move outside the public sidewalks, streets and other high traffic areas where they previously engaged in peaceful conversations, in some cases **more than 50 feet** from the entrances to the clinics, which has significantly hindered their ability to counsel women about alternatives to abortions and to distribute pro-life literature. (Appx 000064). The multi-layered anti-speech zones around every entrance, exit and driveway make it impossible for Plaintiffs to hand literature to cars entering the driveway, and render it nearly impossible to engage in one-on-one personal conversations, even with those who want to receive the information. (Appx 000064). Plaintiffs cannot reach people entering the driveway on foot without raising their voices to a level that may alarm the women and make them less receptive to Plaintiffs' life-affirming messages. (Appx 000064).

As a result of the Ordinance, on the days she counsels at the Hillcrest Clinic, Ms. 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. (Appx 000064). On some days, she has no personal conversations and

distributes no literature. (Appx 000065). The Ordinance has forced Ms. Reilly to move outside of the sidewalk area next to the driveways and has "impeded [her] ability to counsel women seeking abortions and distribute pro-life literature." (Appx 00220).

> The distance makes it impossible for me to hand literature to cars entering the driveway, and hinders my ability to engage in one-on-one personal conversations, even with those who want to receive my life affirming information and counseling. Moreover, I cannot reach persons entering the driveway by car or on foot without raising my voice, which, in my experience, may alarm the women and make them less receptive to my message. In other words, I cannot speak with my intended audience in a conversational tone because of the Ordinance.

(Appx 000220-000221).

The anti-speech zones created by the Ordinance also prohibit Ms. Biter from being close enough to women entering the Harrisburg abortion clinics to share her personal testimony and message of love, mercy and forgiveness with those who are entering or exiting the abortion clinics. (Appx 000065-000066). The buffer zones created by the Ordinance mean that Ms. Biter cannot stand close enough to the driveway to hand literature to persons arriving by car. (Appx 000203). "Enforcement of the Ordinance prohibits any ability to distribute life affirming literature to vehicles arriving to the Clinic by way of the driveway off North Front Street." (Appx 000204). "Moreover, standing in these [approved] areas prevents me from speaking to anyone arriving at the Clinic in my desired soft, peaceful, and conversational tone

unless they walk right by me, which very rarely occurs," since more than 90 percent of the visitors arrive by car. (Appx 000204).

The Ordinance thus effectively prohibits Plaintiffs from being able to distribute literature to vehicles arriving at the Clinics, the method by which 80 to 90 percent of patients arrive. (Appx 000204, 000223). Because the anti-speech zones extend so far around the driveways and entrances, even including public sidewalks and streets, Plaintiffs are foreclosed from speaking to anyone arriving at the Clinic in the soft, peaceful, and conversational tone necessary to communicate their message, effectively chilling and outright foreclosing their speech. (Appx 000204, 000223).

SUMMARY OF THE ARGUMENT

This Court should reverse the District Court's decision because the District Court committed numerous procedural and substantive errors when it denied Plaintiffs' motion for a preliminary injunction. After determining that Plaintiffs had sufficiently alleged that the Ordinance is not narrowly tailored for purposes of Defendants' motion to dismiss, the District Court then held that Plaintiffs had not met the burden of showing a substantial likelihood that the Ordinance was not narrowly tailored. The District Court made that determination only after acknowledging that Defendants had failed to demonstrate that the Ordinance is narrowly tailored. Thus, the District Court impermissibly placed the narrow tailoring

burden on Plaintiffs, not Defendants. This shifting of the burden for purposes of a preliminary injunction is contrary to established Supreme Court precedent which holds that the burdens of proof in preliminary injunctions track the burdens at trial. *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 429 (2006).

The District Court also erred when it concluded that the Ordinance needed to satisfy only intermediate scrutiny to withstand Plaintiffs' First Amendment challenge. That conclusion was in error because the District Court did not address the fact that the Ordinance restricts archetypal First Amendment activity (picketing and leafletting) in quintessential public fora (streets and sidewalks), which means that it must be subject to strict scrutiny review. *Boos v. Barry*, 485 U.S. 312, 321–22 (1988); *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983). The District Court's determination that the Ordinance need only satisfy intermediate scrutiny was also in error because it was based on the court's improper classification of the Ordinance as a content-neutral regulation. In fact, under prevailing Supreme Court precedent, the Ordinance is a content-based restriction on speech that must be subjected to strict scrutiny. *Reed v. Town of Gilbert*, 135 S.Ct. 2218, 2231 (2015).

Finally, the District Court erred when it concluded that Plaintiffs failed to show a substantial likelihood of prevailing on the merits on their overbreadth claim.

The sweeping scope of the Ordinance, significantly broader than the one at issue in *Bruni*, has the same chilling effect on speech that the Supreme Court found invalid in *Members of City Council of City of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 799-801 (1984). Based on these substantive and procedural errors, Plaintiffs ask this Court to reverse the District Court's denial of a preliminary injunction.

ARGUMENT

To be entitled to a preliminary injunction, Plaintiffs had to demonstrate that: 1) they are reasonably likely to prevail eventually in the litigation; 2) they are likely to suffer irreparable injury without relief; 3) denying them injunctive relief would harm them more than it would harm Defendants and 4) granting relief would serve the public interest. *Tenafly Eruv Ass'n, Inc. v. Borough of Tenafly*, 309 F.3d 144, 157 (3d Cir. 2002). As was true with the district court in *Tenafly*, the District Court here ended its analysis after concluding that Plaintiffs did not show that their claims are reasonably likely to succeed. *Id.*

However, the District Court reached that conclusion by improperly shifting the burden of proof and misapplying prevailing precedent. The District Court found that Plaintiffs sufficiently alleged that the Ordinance is not narrowly tailored (Appx 000018) and that Defendants failed to demonstrate that the Ordinance is narrowly tailored. (Appx 000035). Instead of finding that Plaintiffs had, therefore, showed a

likelihood of success on the merits, the District Court announced that the burden of proof on the issue of narrow tailoring should shift to Plaintiffs and that Plaintiffs–who had sufficiently alleged that the Ordinance was not narrowly tailored–in fact failed to show that they were likely to prevail on the issue of narrow tailoring. (Appx 000034-000035). This is reversible error.

I. THE DISTRICT COURT ERRED WHEN IT CONCLUDED THAT PLAINTIFFS FAILED TO DEMONSTRATE A LIKELIHOOD OF SUCCESS ON THE ISSUE OF NARROW TAILORING.

A. In First Amendment Cases, This Court Engages in Plenary, De Novo Review Of Orders Denying Preliminary Injunctions.

"Ordinarily, when reviewing a decision to grant or deny a preliminary injunction, this court reviews a district court's findings of fact for clear error, conclusions of law de novo, and the ultimate decision to grant or deny the preliminary injunction for an abuse of discretion." *McTernan v. City of York, Penn.*, 577 F.3d 521, 526 (3d Cir. 2009) (citing *Child Evangelism Fellowship of N.J. v. Stafford Twp. Sch. Dist.*, 386 F.3d 514, 524 (3d Cir. 2004). "However, when First Amendment rights are implicated, this court must conduct an independent examination of the factual record as a whole." *Id*. Accordingly, "[i]n a preliminary injunction appeal, we review legal questions, including plaintiffs' likelihood of success on the merits of their First Amendment claims, de novo." *Conchatta, Inc. v. Evanko*, 83 F. App'x 437, 441 (3d Cir. 2003).

B. The District Court Erred When It Concluded That Plaintiffs Failed To Show A Likelihood Of Success On The Merits, After Finding That Defendants Did Not Demonstrate Narrow Tailoring As Required By *Bruni*.

The District Court found that Plaintiffs made a prima facie showing that the Ordinance is not narrowly tailored, and that Defendants did not show narrow tailoring as required by this Court under *Bruni v. City of Pittsburgh*, 824 F.3d 353, 369 (3d Cir. 2016). (Appx 000018, 000035). That should have been the end of matter, and should have resulted in the granting of preliminary injunctive relief. Yet, instead of concluding that Plaintiffs showed a likelihood of success on the merits, the District Court found that Plaintiffs failed to meet their burden of showing that the Ordinance is not narrowly tailored. (Appx 000035). The District Court's conclusion not only defies logic, but also this Court's and United States Supreme Court's precedent regarding the burden of proof in preliminary injunction cases. While the District Court correctly concluded that Defendants failed to meet **their** burden on narrow tailoring under *Bruni*, it erred when it then effectively shifted that burden back to Plaintiffs. (*Id.*).

As was true of Pittsburgh's ordinance in *Bruni* and Massachusetts' statute in *McCullen v. Coakley*, 134 S.Ct. 2518, 2529 (2014), the Harrisburg Ordinance restricts speech in quintessential public fora—streets and sidewalks—and so strikes "at the heart of speech protected by the First Amendment." *Bruni*, 824 F.3d at 366 (citing *McCullen* 134 S.Ct. at 2529). When the government makes it more difficult

to engage in modes of communication—such as normal conversation and leafletting on a public sidewalk—that have historically been more closely associated with the transmission of ideas than others, it imposes an especially significant First Amendment burden. *Id.* at 366-67. Imposing such a burden requires more than a superficial representation regarding alternatives. *Id.* Instead, **the government** must "**'demonstrate** that alternative measures that burden substantially less speech would fail to achieve the government's interests.'" *Id.* at 367 (emphasis added) (quoting *McCullen*, 134 S.Ct. at 2540). '"[I]t is not enough for [the City] **simply to say** that other approaches have not worked.'" *Id.* at 369 (emphasis added) (quoting *McCullen*, 134 S.Ct. at 2540). Instead, the city must justify its choice to adopt the Ordinance by showing either that substantially less-restrictive alternatives were tried and failed, or that the alternatives were **closely examined and ruled out for good reason**. *Id.* at 370.

As was true in *Bruni*, Defendants here failed "to show either that substantially less-restrictive alternatives were tried and failed, or that the alternatives were closely examined and ruled out for good reason." (Appx 000034). Unlike the City of Pittsburgh, however, Defendants here failed to make the required showing even after having the opportunity to supplement the record. (Appx 000177-000200). Defendants submitted more than 20 pages of testimony specifically aimed at meeting their burden to show narrow tailoring under *Bruni*. (Appx 000177-000200).

However, the District Court correctly concluded that Defendants' supplemental submission did not establish the factual record necessary to meet this Court's standard under *Bruni*:

> Here, Defendants have **merely stated** that, at the time the Ordinance was enacted, Harrisburg was in receivership, the police department was at times down to only four officers patrolling the streets, and on multiple occasions there was concern that payroll would not be met. (Doc. 32-1, p. 19.) "Given the limited resources, the idea was to prevent confrontations in the first instance. Other measures would have been reactive only to confrontations that had already begun to escalate." (*Id*. at p. 20.) Further, it was determined by Harrisburg City Council that the federal Freedom of Access to Clinics Entrances Act "would not have worked to prevent confrontations at the clinics or slowing and stopping traffic." (*Id*.). While this testimony shows that Harrisburg City Council did to some degree consider less restrictive alternatives, **it is unclear what specific "other measures" were considered, and whether they were "closely examined and ruled out for good reason."** *Bruni*, 824 F.3d at 370.

(Appx 000035) (emphasis added).

Nevertheless, even though Defendants had not made the clear showing required under *Bruni*, the District Court denied injunctive relief, concluding that "at the preliminary injunction stage, it is Plaintiffs who have the burden of clearly establishing a probability of success on the merits. Based on the record before the court, Plaintiffs have failed to carry that burden." (*Id.*). The District Court did not cite any legal authority for its conclusion, nor did it explain how Plaintiffs failed to carry their burden on likelihood of success given Defendants' failure to establish sufficient narrow tailoring. (*Id*.) Defendants' inability to show narrow tailoring

necessarily means, under *Bruni*, that Plaintiffs have a sufficient likelihood of success on the merits, since the Ordinance cannot ultimately survive unless it is narrowly tailored.

The District Court's failure to cite any authority for its shifting of the burden of proof from Defendants to Plaintiffs is a telling omission, since the Supreme Court has determined that "the burdens at the preliminary injunction stage track the burdens at trial." *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 429 (2006) (citing *Ashcroft v. Am. Civil Liberties Union*, 542 U.S. 656, 666 (2004)). In *Ashcroft* the Supreme Court expressly held that **the burden is on the government at the preliminary injunction stage to demonstrate the constitutionality of a speech-restrictive ordinance**. 542 U.S. at 665. Since the Government bears the burden of proof on the ultimate question of a statute's or ordinance's constitutionality, those challenging the law must be deemed likely to prevail unless the Government has shown that less restrictive alternatives were tried or at least carefully considered and were found less effective than the challenged ordinance. *Id.* at 666. *See also, Marcavage v. City of Philadelphia, Pennsylvania*, 271 F. App'x 272, 274 (3d Cir. 2008) ("when the government restricts speech, the government bears the burden of proving the constitutionality of its actions").

As the District Court acknowledged, Defendants did not make this showing. (Appx 000035). Instead, Defendants merely "proved" that they enacted an ordinance

at the request of, and drafted by, Planned Parenthood to ease the alleged discomfort of Planned Parenthood's employees and to save the city money. (Appx 000198-000200). Absent proof of consideration (*i.e.*, "close examination") and rejection ("for good reason") of less restrictive alternatives, Plaintiffs must be deemed likely to prevail on the merits. This Court should reverse the District Court's determination and find that Plaintiffs have satisfied their burden of showing a likelihood of prevailing on the merits because Defendants have not proven that the Ordinance is sufficiently narrowly tailored.

II. THE DISTRICT COURT ERRED WHEN IT DETERMINED THAT THE ORDINANCE IS SUBJECT ONLY TO INTERMEDIATE SCRUTINY.

The District Court's burden-shifting error on narrow tailoring is independently sufficient for reversal. However, an additional independent ground for reversal is the District Court's application of the incorrect level of constitutional scrutiny to the challenged Ordinance.

A. The Standard of Review Is De Novo.

As discussed more fully in section I(A), *supra*, denials of preliminary injunctive relief in First Amendment cases, including questions of law related thereto, are reviewed by this Court de novo. *McTernan*, 577 F.3d at 526; *Conchatta, Inc.*, 83 F. App'x at 441.

B. The District Court's Application Of Intermediate Scrutiny Is In Error Because The Ordinance Bans Archetypal First Amendment Activities In Quintessential Public Fora And So Must Be Subject To Strict Scrutiny.

Plaintiffs' speech on a controversial subject through one-on-one conversation and leafletting on public streets and sidewalks stands at the apex of First Amendment protection, both in terms of subject matter and forum, and therefore any ordinance limiting that speech should be subject to strict scrutiny. *Boos v. Barry*, 485 U.S. 312, 321–22 (1988); *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983). The District Court wholly ignored the nature of Plaintiffs' First Amendment activities and the nature of the fora in which Plaintiffs engaged in speaking and leafletting when it subjected the Ordinance to more deferential intermediate scrutiny.

As this Court reiterated in *Bruni*, "while the First Amendment does not guarantee a speaker the right to any particular form of expression, some forms—such as normal conversation and leafletting on a public sidewalk—have historically been more closely associated with the transmission of ideas than others." 824 F.3d at 366-67. In particular, "'handing out leaflets in the advocacy of a politically controversial viewpoint [such as abortion alternatives] ... is the essence of First Amendment expression'; '[**n]o form of speech is entitled to greater constitutional protection**.'" *McCullen*, 134 S.Ct. at 2536 (emphasis added) (quoting *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 347 (1995) and *Schenck v. Pro-Choice Network of W. N.Y.*, 519 U.S. 357, 377 (1997) ("Leafletting and commenting on

matters of public concern are classic forms of speech that lie at the heart of the First Amendment")). "When the government makes it more difficult to engage in these modes of communication, it imposes an especially significant First Amendment burden." *Bruni*, 824 F.3d at 367 (quoting *McCullen*, 134 S.Ct. at 2536).

Not only are Plaintiffs engaging in activity that lies at the heart of the First Amendment, but they are also engaging in that activity on public streets and sidewalks, quintessential public fora subject to the highest level of constitutional protection. *Id.* at 366. As the Supreme Court explained in *McCullen*:

> By its very terms, the Massachusetts Act regulates access to "public way[s]" and "sidewalk[s]." …Such areas occupy a "special position in terms of First Amendment protection" because of their historic role as sites for discussion and debate. *United States v. Grace*, 461 U.S. 171, 180 (1983). These places—which we have labeled "traditional public fora"—"'have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.'" *Pleasant Grove City v. Summum*, 555 U.S. 460, 469…(2009) (quoting *Perry Ed. Assn. v. Perry Local Educators' Assn.*, 460 U.S. 37, 45… (1983)).
>
> It is no accident that public streets and sidewalks have developed as venues for the exchange of ideas. Even today, they remain one of the few places where a speaker can be confident that he is not simply preaching to the choir. With respect to other means of communication, an individual confronted with an uncomfortable message can always turn the page, change the channel, or leave the Web site. Not so on public streets and sidewalks. There, a listener often encounters speech he might otherwise tune out. In light of the First Amendment's purpose "to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail," *FCC v. League of Women Voters of Cal.*, 468 U.S. 364, 377 (1984) (internal quotation marks omitted), this aspect of traditional public fora is a virtue, not a vice.

134 S.Ct. at 2528-29.

As was true with the Massachusetts statute in *McCullen* and the Pittsburgh ordinance in *Bruni*, the Harrisburg ordinance strikes at the heart of the First Amendment and threatens the uninhibited marketplace of ideas by restricting the most protected forms of speech from the most protected venues. Consequently, "the rights of the state [here, the City of Harrisburg] to limit expressive activity are sharply circumscribed." *Perry*, 460 U.S. at 45. The city cannot prohibit all communicative activity and cannot exclude speech based upon content unless it can demonstrate that the regulation is necessary to serve a compelling state interest and narrowly drawn to achieve that end, *i.e.*, survive strict scrutiny. *Id.* The District Court failed to address the nature of the forum affected by the Ordinance and the nature of Plaintiffs' activities. Instead, the court focused on the city's purported interests in orderly traffic flow, property rights and access to abortion clinics, none of which were adequately substantiated. (Appx 000016). As a result, the District Court erroneously concluded that an Ordinance that inhibits Plaintiffs from engaging in the most protected form of First Amendment activity, *i.e.*, leafletting, in the most protected of fora, *i.e.*, streets and sidewalks (Appx 000204, 000223), need only satisfy intermediate scrutiny. This Court should reverse that erroneous determination.

C. The District Court Erred When It Concluded That The Ordinance Is Content Neutral Subject Only To Intermediate Scrutiny.

The District Court's use of intermediate scrutiny was also in error because it was based on the court's flawed conclusion that the Ordinance is content neutral. (Appx 000014). To the contrary, under the standards elucidated in *Reed* and *McCullen,* the Ordinance creates a content-based restriction which means that it is presumptively unconstitutional unless it can satisfy strict scrutiny. *Reed,* 135 S.Ct. at 2226.

Government regulation of speech is content based "if a law applies to particular speech because of the topic discussed or the idea or message expressed." *Id.* at 2227. In making that determination, a court considers whether a regulation of speech "on its face" draws distinctions based on the message a speaker conveys. *Id.* "Some facial distinctions based on a message are obvious, defining regulated speech by particular subject matter, and others are more subtle, defining regulated speech by its function or purpose." *Id.* "Both are distinctions drawn based on the message a speaker conveys, and, therefore, are subject to strict scrutiny." *Id.* Furthermore, even if a regulation is facially content-neutral, it will be regarded as content-based and subject to strict scrutiny if it "cannot be 'justified without reference to the content of the regulated speech,'" or was adopted by the government "because of disagreement

with the message [the speech] conveys." *Id.* (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)).

Under any of the tests described in *Reed* the Ordinance would be subject to strict scrutiny analysis, not the intermediate scrutiny review in which the District Court engaged. The Ordinance regulates "speech" based upon its function or purpose, *i.e.*, expressing disagreement with a medical procedure [abortion], by proscribing not all speech but only congregating, patrolling, picketing and demonstrating (Appx 000098), activities which function as means of expressing opinions related to particular issues. In fact, as this Court said in *Bruni*, such activities lie at the heart of the rights protected by the First Amendment. 824 F.3d at 366-67. Defendants further telegraphed their intent to restrict speech based on its purpose, *i.e.*, content, when they referenced only activities aimed at opposing certain medical procedures as needing regulation. (Appx 000097). In drawing attention only to opposition to "medical procedures" and excepting clinic employees (who assumedly would support the "medical procedures"), Defendants sent the message that only those who disagree with the pro-"procedure" message would be subject to fines or jail. The "procedure" that is the subject of the Ordinance is not explicitly stated, but is easily inferred from the fact that Planned Parenthood, an abortion provider, supplied the language. (Appx 000199). The subject of the Ordinance is also inferred from the fact that the impetus for adopting it was complaints from

Planned Parenthood employees that they had to encounter pro-life speakers and the encounters made them uncomfortable. (Appx 000180-000199). The inescapable conclusion is that Defendants enacted the Ordinance to restrict those like Plaintiffs who disagree with the pro-abortion message expressed by the ordinance's author, Planned Parenthood, and other abortion providers.

The exception for clinic employees further supports that conclusion, as discussed in *McCullen*, 134 S.Ct. at 2533. The Supreme Court recognized that government can use exceptions, such as the one for clinic employees and agents in the Ordinance here, to surreptitiously tip the scales in favor of certain viewpoints. 134 S.Ct. at 2533. The Court did not find sufficient evidence of such a motive in the Massachusetts statute. *Id.* However, substantial differences between that statute and the Ordinance and between their respective exemptions lead to a different conclusion here. The statute in *McCullen* prohibited entering into or standing in the buffer zones during business hours. *Id.* at 2526. Therefore, it was necessary to create exceptions for clinic employees and others who had to enter into or stand within the buffer zones to do their jobs. *Id.* at 2533. In fact, the exceptions were specifically limited to performing tasks authorized by their employers. *Id.* "There is no suggestion in the record that any of the clinics authorize their employees to speak about abortion in the buffer zones." *Id.* Therefore, the Court said, the "scope of their employment" limitation seemed designed to protect only job duties, not speech activities. *Id.*

In this case, by contrast, the Ordinance's focus on expressive conduct and particularized description of the nature of the speech being regulated points to the type of imbalance that creates a presumption of content discrimination. The Ordinance targets expressive conduct, not merely standing near an abortion clinic. (Appx 000097-000098). More specifically the Ordinance restricts only certain expressive activities, *i.e.*, patrolling, congregating, picketing and demonstrating in the designated zones. (Appx 000098). Still more specifically, the Ordinance is aimed only at patrolling, congregating, picketing and demonstrating "against certain medical procedures," implicitly, abortion. (Appx 000097). Unlike the statute in *McCullen*, the Ordinance here does not prevent clinic workers from entering or exiting their workplace or otherwise performing their duties, so it is not necessary to carve out an exception in order for them to do their jobs. If the purpose of the Ordinance is to protect access to clinics and the safety of patients, as the City claims (Appx 000097), then the prohibition against "congregating," "patrolling," "picketing" and "demonstrating" should apply to all. Clinic employees congregating, patrolling, picketing and demonstrating within 20 feet of entrances to abortion clinics would cause just as much disruption as would the same conduct by others, such as Plaintiffs, so excepting them from the Ordinance would not further its stated purpose. In light of the fact that Planned Parenthood provided the ordinance language to the City (Appx 000199), that expressive conduct, not merely standing,

is restricted and that only conduct that challenges medical procedures (Appx 000097) is affected, the exception for clinic workers points to an intent to muzzle only those speaking against abortion, *i.e.*, to discriminate on the basis of content.

The City's thinly masked attempt to silence only those speaking against abortion is a textbook example of content-based discrimination. As such, the Ordinance is presumptively unconstitutional and may be justified only if it can survive strict scrutiny, "which requires the Government to prove that the restriction furthers a compelling interest and is narrowly tailored to achieve that interest.' *Reed*, 135 S.Ct. at 2231. "If a less restrictive alternative would serve the [g]overnment's purpose, the legislature must use that alternative." *United States v. Playboy Entm't Grp.*, *Inc*., 529 U.S. 803, 813 (2000). As the District Court concluded, Defendants have not met their burden of showing that the Ordinance is narrowly tailored even under the more deferential intermediate scrutiny standard (Appx 000035). Therefore, the Ordinance cannot survive the more exacting strict scrutiny test and Plaintiffs have demonstrated that they are likely to prevail on the merits. The District Court's contrary conclusion should be reversed.

III. THE DISTRICT COURT ERRED WHEN IT FOUND THAT PLAINTIFFS FAILED TO SHOW LIKELIHOOD OF SUCCESS ON THE MERITS OF THEIR OVERBREADTH CLAIM.

A. The Standard of Review is De Novo.

As discussed more fully in section I(A), *supra*, denials of preliminary injunctive relief in First Amendment cases, including questions of law related

thereto, are reviewed by this Court de novo. *McTernan*, 577 F.3d at 526; *Conchatta, Inc.*, 83 F. App'x at 441.

B. The Ordinance's Prohibition Of Archetypal Free Speech Activities In Quintessential Public Fora At Hundreds of Locations In Harrisburg Demonstrates That The Ordinance Is Overbroad.

Because the District Court failed to address the Ordinance's suppression of archetypal First Amendment activities in quintessential public fora, it erroneously concluded that Plaintiffs were not likely to prevail on their claim that the Ordinance is constitutionally overbroad. When the Ordinance is analyzed within its proper context, it is apparent that it is precisely the kind of sweeping speech restriction that the Supreme Court has found to be constitutionally overbroad. *Broadrick v. Oklahoma*, 413 U.S. 601, 612 (1973). When a statute sweeps so broadly that it threatens to repeatedly chill the speech of many individuals, then it is vulnerable to being invalidated as overbroad. *Members of City Council of City of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 799-801 (1984). The doctrine "is predicated on 'a judicial prediction or assumption that the statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression.'" *Robinson v. State of N.J.*, 806 F.2d 442, 447 (3d Cir. 1986) (quoting *Taxpayers for Vincent*, 466 U.S. at 799)). A regulation is particularly vulnerable to an overbreadth claim when, as here, the challenged Ordinance almost completely forecloses "a venerable means of communication that is both unique and important."

City of Ladue v. Gilleo, 512 U.S. 43, 54 (1994). "Although prohibitions foreclosing entire media may be completely free of content or viewpoint discrimination, the danger they pose to the freedom of speech is readily apparent–by eliminating a common means of speaking, such measures can suppress too much speech." *Id.*

That is precisely the case here. The Ordinance prohibits entire categories of speech, *i.e.*., patrolling, picketing, congregating and demonstrating within 20 feet of all entrances, exits and driveways of 78 health centers throughout the City. (Appx 000051). Since health centers usually have multiple entrances, exits and driveways, the Ordinance forecloses speech at virtually hundreds of locations. (Appx 000051).

Moreover, as Plaintiffs detailed for the District Court in their Notice of Supplemental Authority following this Court's release of the *Bruni* decision (Appx 000166-000175), the Harrisburg Ordinance is **even broader and therefore more problematic** than was the buffer zone ordinance at issue in *Bruni*. In other words, similar to a lesser-included criminal offense, the Pittsburgh Ordinance creates a "lesser included" censorship than what is prohibited by Harrisburg's Ordinance. Thus, the problems recognized by this Court in *Bruni* are only magnified and expanded here, where the Ordinance is **even worse** because it prohibits even more First Amendment activity in quintessential public fora. For instance, the Harrisburg Ordinance is not only a greater distance (20 feet rather than 15 feet), but it also applies to driveways and exits as well, unlike the Pittsburgh ordinance which only

applied to entrances. Pittsburgh's ordinance would still allow Plaintiffs to hand leaflets to cars entering the Clinics' driveways, but Harrisburg's Ordinance now completely forecloses that speech which is critical to Plaintiffs' expression and mission. Because of the significantly wider expanse of restricted public space in Harrisburg (as compared to Pittsburgh), leafletting and personal conversations are especially burdened. Not only that, but the anti-speech zones around the abortion clinics in Pittsburgh were physically demarcated, unlike the speech zones around either of Harrisburg's abortion clinics. (Appx 000168).

The Ordinance restricts the most protected forms of speech from the most protected venues, thereby striking at the heart of the First Amendment. *Bruni*, 824 F.3d at 366 (citing *McCullen* 134 S.Ct. at 2529). As the District Court acknowledged, the Ordinance has the potential to restrict a wide range of picketing, demonstrating and leafletting activities:

> [T]he Ordinance does not merely apply to facilities that offer abortion services, but would also apply to prevent speech expressed in the form of "patrolling, picketing, or demonstrating" within the buffer zone outside of hospitals or other health care facilities within Harrisburg with regard to equally fringe viewpoints, such as opposition to blood transfusions, preventive vaccinations, or psychiatric care.

(Appx 000013-000014). Thus, the Ordinance not only restricts the First Amendment activities of Plaintiffs and fellow sidewalk counselors, but also of innumerable other Harrisburg residents who may want to express their opinions about particular health care issues. By eliminating this common means of expression, the Ordinance

suppresses too much speech, *i.e.*, is unconstitutionally overbroad. *City of Ladue*, 512 U.S. at 54. The District Court's contrary and contradictory conclusion was in error and should be reversed.

IV. THIS COURT SHOULD ANALYZE THE REMAINING PRELIMINARY INJUNCTION FACTORS AND FIND THAT THEY FAVOR PLAINTIFFS SO THAT A PRELIMINARY INJUNCTION SHOULD ISSUE.

Having improperly determined that Plaintiffs failed to show that they were likely to succeed on the merits, the District Court ended its analysis, relying upon this Court's decision in *Ulrich v. Corbett*, 614 F. App'x 572, 575 n.3 (3d Cir. 2015) (Appx 000036-00037). The District Court concluded that it did not need to consider the remaining preliminary injunction factors because "[w]here a plaintiff 'has failed to demonstrate the likelihood of success on the merits . . . [t]his failure alone establishes that [the plaintiff] is not entitled to a preliminary injunction.'" (Appx 000036, citing *id.*). Since the District Court erred in its determination that Plaintiffs failed to show a likelihood of success on the merits, its failure to address the remaining preliminary injunction factors was also in error. This Court should, therefore, correct the error by examining the remaining factors, which favor the Plaintiffs, and ordering that a preliminary injunction issue.

Where a district court has denied a motion for a preliminary injunction, this Court may order the injunction to issue if "the four factors required to grant a preliminary injunction are apparent on the record before us." *Tenafly*, 309 F.3d at

178. As was true in *Tenafly*, "[o]ur review of the record leaves us convinced that, in addition to the reasonable probability that the plaintiffs will ultimately prevail on their free exercise claim, the remaining three factors for injunctive relief—irreparable injury, the balance of hardships, and the public interest—also favor a preliminary injunction." *Id.*

A. The Preliminary Injunction Should Be Granted Because Plaintiffs Will Continue To Suffer Irreparable Harm Absent An Injunction.

Where, as here, Plaintiffs have shown a likelihood of success on the merits of a claim that their free speech rights are being violated, they *ipso facto* have suffered irreparable injury. *K.A. ex rel. Ayers v. Pocono Mountain Sch. Dist.*, 710 F.3d 99, 113 (3d Cir. 2013). "The United States Supreme Court and the Third Circuit Court of Appeals have held that '[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitute[s] irreparable injury.'" *Id.* (citing *Elrod v. Burns*, 427 U.S. 347 373-74 (1976)). No less is that irreparable harm here, where the restriction on Plaintiffs' speech that prohibits leafleting and face-to-face conversation "imposes an especially significant First Amendment burden" at the critical hour of need. *McCullen*, 134 S. Ct. at 2536; *see also Abu-Jamal v. Price*, 154 F.3d 128, 136 (3d Cir. 1998) ("[T]imeliness of speech is often critical."). Plaintiffs are not allowed to exercise their vital First Amendment rights on public sidewalks and streets. Consequently, Plaintiffs are suffering and will continue to suffer

irreparable harm if this Court does not issue the injunction to protect their constitutional rights. *See Beattie v. Line Mountain Sch. Dist.*, 992 F. Supp. 2d 384, 396 (M.D. Pa. 2014) ("Deprivation of a constitutional right alone constitutes irreparable harm as a matter of law.").

B. The Preliminary Injunction Should Be Granted Because An Injunction Will Not Cause Greater Harm To The Harrisburg Defendants.

In contrast to the hardships faced by Plaintiffs that "lie at the very core of those freedoms protected by the First Amendment," *Stilp v. Contino*, 743 F. Supp. 2d 460, 470 (M.D. Pa. 2010), the Harrisburg Defendants will suffer little, if any, harm from the issuance of the injunction. There is no substantial harm to the Harrisburg Defendants in granting the injunctive relief because the government "does not have 'an interest in the enforcement of an unconstitutional law.'" *ACLU v. Ashcroft*, 322 F.3d 240, 251 (3d Cir. 2003) (citation omitted). Moreover, the government remains free to enact other regulations "that are better tailored to serve [its] interests." *Swartzwelder v. McNeilly*, 297 F.3d 228, 242 (3d Cir. 2002) And, here the record is devoid of any harms that the Plaintiffs were causing or that the City was suffering prior to the enactment of the Ordinance, so a return to the status quo ante pending the outcome of this lawsuit will not harm Defendants.

C. The Public Interest Favors an Injunction.

Finally, the public interest favors granting an injunction because "it is incontrovertible that 'curtailing constitutionally protected speech will not advance the public interest.'" *Stilp*, 743 F. Supp. 2d at 470 (quoting *ACLU v. Reno*, 217 F.3d 162, 180 (3d Cir. 2000)). Indeed, "the enforcement of an unconstitutional law vindicates no public interest." *K.A.*, 710 F.3d at 114. Therefore, the public interest factor supports enjoinment of the Ordinance because it prohibits core First Amendment speech from quintessential public areas that should be most hospitable to such speech.

CONCLUSION

The District Court erred when it denied Plaintiffs' motion for preliminary injunction based on incorrect categorization of the Ordinance as a content-neutral restriction on speech subject only to intermediate scrutiny. The court further erred when it shifted the burden of proof on the issue of narrow tailoring to Plaintiffs after determining that Defendants failed to satisfy that burden. Finally, the court erred when it concluded that Plaintiffs failed to demonstrate a substantial likelihood of prevailing on the merits on the question of whether the Ordinance is overbroad.

For these reasons, Plaintiffs respectfully request that this Court reverse the District Court order denying a preliminary injunction.

Dated: November 29, 2016.

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CERTIFICATION OF BAR MEMBERSHIP

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

/s/ Mary E. McAlister
Mary E. McAlister

CERTIFICATE OF WORD COUNT COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), the undersigned certifies this Brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B).

1. Exclusive of the sections exempted by Fed. R. App. P. 32(a)(7)(B)(iii), the Brief contains 9,246 words, according to the word count feature of the software (Microsoft Word 2007) used to prepare the Brief.

2. The Brief has been prepared in proportionately spaced typeface using Times New Roman 14 point.

/s/ Mary E. McAlister
Mary E. McAlister

CERTIFICATE OF SERVICE AND VIRUS CHECK

I hereby certify that on this 29th day of November, 2016: (1) I caused Appellants' Opening 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 Forefront Client Security.

/s/ Mary E. McAlister
Mary E. McAlister

CERTIFICATE OF IDENTICAL COMPLIANCE

I hereby certify that the electronically filed version of Appellants' Opening Brief is identical to the paper copies provided to the Court on November 29, 2016.

/s/ Mary E. McAlister
Mary E. McAlister