No. 22-1795

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

COLLEEN REILLY; BECKY BITER,

Plaintiffs–Appellants

v.

CITY OF HARRISBURG; HARRISBURG CITY COUNCIL;
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
in Case No. 1:16-cv-00510-SHR before The Honorable Sylvia H. Rambo

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BRIEF OF PLAINTIFFS–APPELLANTS

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DISCLOSURE

Plaintiffs–Appellants are individuals and, therefore, have no corporate affiliations or financial interests to report.

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JURISDICTION

The district court had jurisdiction over Plaintiffs–Appellants' federal civil rights claims under 28 U.S.C. §§ 1331 and 1343(a). The district court entered its order denying summary judgment for Plaintiffs and granting summary judgment for Defendants–Appellees ("Harrisburg" or the "City") on March 28, 2022. (R.163, JA3.) Plaintiffs timely filed their notice of appeal on April 27, 2022. (R.164, JA1.)

ISSUES

The primary question for the Court is whether the district court erred in denying Plaintiffs summary judgment, which question necessarily includes:

1. Whether the unequivocal testimony of Harrisburg's designated Rule 30(b)(6) witnesses on the City's application and enforcement of its buffer zone ordinance establishes the City's official policy for purposes of *Monell* liability in an as-applied First Amendment challenge. (R.139, Pls.' Summ. J. Br., at 8–13; R.151, Defs.' Summ. J. Opp'n Br., at 23–35; R.162, Mem. Op., at 8–14, JA11–JA17.)

2. Whether a single act of enforcement of the City's unconstitutional buffer zone ordinance policy is sufficient to establish the City's *Monell* liability in an as-applied First Amendment challenge. (R.139, Pls.' Summ. J. Br., at 8–

13; R.151, Defs.' Summ. J. Opp'n Br., at 23–35; R.162, Mem. Op., at 8–14, JA11–JA17.)

3. Whether the City's buffer zone ordinance policy, as interpreted, applied, and actually enforced against Plaintiffs, violates the First Amendment as a substantial burden on Plaintiffs' speech that cannot satisfy strict scrutiny or intermediate scrutiny. (R.139, Pls.' Summ. J. Br., at 13–40; R.151, Defs.' Summ. J. Opp'n Br., at 23–41; R.162, Mem. Op., at 8–14, JA11–JA17.)

4. Whether the City's buffer zone ordinance policy, as interpreted, applied, and actually enforced against Plaintiffs, violates the First Amendment as a substantial burden on Plaintiffs' free exercise of religion that cannot satisfy constitutional scrutiny. (R.139, Pls.' Summ. J. Br., at 40–41; R.151, Defs.' Summ. J. Opp'n Br., at 41; R.162, Mem. Op., at 6 n.3, JA9 n.3.)

5. Whether the City's buffer zone ordinance policy, as interpreted, applied, and actually enforced against Plaintiffs, violates the First Amendment as a substantial burden on Plaintiffs' free assembly that cannot satisfy constitutional scrutiny. (R.139, Pls.' Summ. J. Br., at 41; R.151, Defs.' Summ. J. Opp'n Br., at 23–35; R.162, Mem. Op., at 14 n.10, JA17 n.10.)

RELATED CASES

This case is before the Court for the third time. In the first appeal (No. 16-3722), the Court vacated the district court's denial of injunctive relief against

enforcement of the City's buffer zone ordinance on the ground that the district court improperly shifted the narrow tailoring burden to Plaintiffs. *See Reilly v. City of Harrisburg*, 858 F.3d 173 (3d Cir. 2017). In the second appeal (No. 18-2884), the Court affirmed the district court's denial of preliminary injunctive relief in an unpublished opinion endorsing the district court's narrowing construction of the City's buffer zone ordinance, insofar as the Court "concluded that the Ordinance [facially] permitted sidewalk counseling." *Reilly v. City of Harrisburg*, 790 F. App'x 468, 471, 474 (3d Cir. 2019).

THE CASE

I. INTRODUCTION.

This case is well traveled, with two round trips to this Court and, in between, a two-day evidentiary hearing in the district court. Plaintiffs challenge the constitutionality of City of Harrisburg Ordinance No. 12-2012, Harrisburg Code Chapter 3-371, "Interference With Access To Health Care Facilities" (JA259, the "Ordinance"), which Harrisburg *actually applied* to prohibit Plaintiffs' protected speech on the public sidewalks outside Harrisburg's abortion clinics. On Plaintiffs' motion to preliminarily enjoin Harrisburg's unconstitutional enforcement of the Ordinance, both the district court and this Court held the Ordinance to be *facially* constitutional under narrowing constructions, but only to the extent

that the Ordinance does not *facially* prohibit Plaintiffs' peaceful sidewalk counseling. Neither the district court nor this Court, however, addressed Plaintiffs' *as-applied* challenges. There remains only one set of facts, and neither the district court's nor this Court's narrowing construction changes the facts of how Harrisburg actually interpreted, actually applied, and actually enforced the Ordinance to prohibit Plaintiffs' protected speech, in violation of their constitutional rights. To be sure, throughout the six years of this litigation, Harrisburg has maintained its prohibitive Ordinance *policy*, which Plaintiffs challenge as applied to them.

Harrisburg interprets and enforces its buffer zone Ordinance to prohibit speech—including peaceful, one-on-one counseling and leafletting—on 70 feet of public sidewalk in front of the Harrisburg Planned Parenthood abortion facility. Plaintiffs, Colleen Reilly and Becky Biter, are sidewalk counselors who seek to engage women approaching Planned Parenthood by standing or walking with them in peaceful, one-on-one conversations, to provide them information which may lead them to choose an alternative to abortion.

The City's Ordinance policy, as actually applied to Plaintiffs, is a content- (if not viewpoint-) based restriction on essential First Amendment expression in a quintessential public forum. The City has never even attempted to satisfy the requisite strict scrutiny of its Ordinance policy as applied to Plaintiffs' sidewalk counseling, and the policy, as applied, fails even intermediate scrutiny for lack

of narrow tailoring. The Court should reverse the district court's denial of summary judgment for Plaintiffs (and grant of summary judgment for Defendants) on Plaintiffs' First Amendment claims, and remand to the district court for entry of judgment declaring the City's Ordinance policy unconstitutional as applied, permanently enjoining enforcement against Plaintiffs, and awarding Plaintiffs nominal damages for the City's violations of their constitutional rights.[1]

II. FACTS.[2]

Plaintiffs are sidewalk counselors who seek to "come alongside" women approaching the Harrisburg Planned Parenthood facility on the public sidewalk and, while standing or walking together, offer them one-on-one counseling and literature to empower them to choose life for their unborn children. (R.134, Pls.' Statement Undisp. Facts Supp. Mot. Summ. J. ("Facts"), ¶¶ 1–19, JA985–989.) Plaintiffs have refrained from doing the sidewalk counseling they want to do, however, because of the Harrisburg buffer zone Ordinance, making it a criminal

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[1] In denying Plaintiffs preliminary relief on free speech grounds, the Court reached legal conclusions rejecting Plaintiffs' facial (but not as-applied) First Amendment challenges to the buffer zone Ordinance on the premise of a prospective narrowing construction of the Ordinance. Plaintiffs renewed their facial challenges below and reiterate them here for purposes of future review, but focus on their as-applied challenges in this brief.

[2] Plaintiffs summarize the material facts here but discuss them in detail in their Argument, *infra*. Plaintiffs also commend to the Court, in its entirety, Plaintiffs' Statement of Undisputed Facts in Support of Motion for Summary Judgment filed below. (R.134, JA983–JA1010.)

offense to "knowingly congregate, patrol, picket or demonstrate in a zone extending 20 feet from any portion of an entrance to, exit from, or driveway of [an abortion] facility." (Facts, ¶¶ 20–56, JA989–1001.) In effect, the Ordinance covers a continuous 70 feet of public sidewalk along the front and across the driveway of Planned Parenthood. (Facts, ¶¶ 20–25, JA989–992.) Harrisburg has unequivocally interpreted and actually enforced the Ordinance to ban Plaintiffs' one-on-one sidewalk counseling and leafletting within the buffer zone, and has defended the Ordinance in both this Court and the Third Circuit as prohibiting Plaintiffs' peaceful speech. (Facts, ¶¶ 26–41, JA992–JA997.)

The City actually enforced the Ordinance against Plaintiffs' sidewalk counseling and leafletting when its police ordered Plaintiff Colleen Reilly to move her sidewalk counseling beyond the boundary of the buffer zone—so far away from the Planned Parenthood entrance as to completely silence her intended expression. (Facts, ¶¶ 35–36, JA995.) While she was merely "handing out literature and talking to clients coming into the office," the police "advised [her] of the ordinance on protesting . . . and the buffer zone related to the ordinance," and "gave [her] a warning that she would be cited if she violates the ordinance in the future." (*Id.*) Moreover, the City's designees who testified on the interpretation, application, and enforcement of the Ordinance confirmed that the City

considers any one-on-one, side-by-side conversation "about anything of substance" within the buffer zone to be "congregating" and "a violation." (Facts, ¶ 27, JA992.) Furthermore, throughout this litigation the City has unapologetically defended the Ordinance as prohibiting Plaintiffs' sidewalk counseling, even pressing at the preliminary injunction hearing that Plaintiff Becky Biter's merely entering the buffer zone to quietly and consensually console a crying Planned Parenthood patron "violated the buffer zone." (Facts, ¶¶ 26–41, JA992–JA997.) The City has never rescinded its threat to cite Plaintiffs for conducting their counseling within the buffer zone; nor has the City ever clarified, amended or modified the Ordinance; nor has the City ever disavowed its prior interpretation and application of the Ordinance.

When Planned Parenthood began offering abortions in Harrisburg in 2012, "two to four" protestors began showing up once per week on the public sidewalk outside the facility. (Facts, ¶ 57, JA1002.) Planned Parenthood did not like the effect of this trifling group on its clients, so it drafted and proposed a buffer zone ordinance to "protect the dignity" and "emotional well-being" of "patient[s] … getting so upset by the insults that are being hurled at them that they might be incited to violence," and to protect "the health and welfare" of protesters from potentially violent listeners. (Facts, ¶¶ 57–65, JA1002–1004.)

Prior to enacting the Ordinance, the City never considered any less speech-restrictive alternatives, despite having ample opportunity to do so. (Facts, ¶¶ 66–81, JA1004–JA1008.) The City gave no consideration, serious or otherwise, to whether stepped-up enforcement or revision of numerous existing laws, prosecutions under those laws, targeted injunctions, or private causes of action could have alleviated the purported protest problems the Ordinance was ostensibly intended to address. (*Id.*) Nor did the City consider enacting an ordinance that expressly excluded peaceful sidewalk counseling from the definitions of "demonstrate" or "congregate." (*Id.*)

Instead, as its first and only measure, the City adopted Planned Parenthood's buffer zone ordinance, and then interpreted, applied, and enforced it to prohibit not only the allegedly obstructive and offensive conduct of protesters, but also the peaceful, quiet, one-on-one sidewalk counseling of Plaintiffs Reilly and Biter, on over 70 feet of public sidewalk. (Facts, ¶¶ 20–41, JA989–JA997.) Worse, the City admits its policy of enforcing the Ordinance to ban peaceful conversations "of substance" but not casual conversations, and to ban leafletting about abortion alternatives but not commercial solicitations. (Facts, ¶¶ 26–41, JA992–JA997.)

III. PROCEDURAL HISTORY.

Plaintiffs commenced this case in 2016 by filing their Verified Complaint (R.1, JA33–JA52) under 42 U.S.C. § 1983, seeking injunctive and declaratory relief and nominal damages, on the grounds that the Harrisburg buffer zone Ordinance violates Plaintiffs' First Amendment rights of free speech (Count I), free exercise of religion (Count II), and freedom of assembly (Count III), and Plaintiffs' Fourteenth Amendment rights of equal protection (Count IV) and due process (Count V). Plaintiffs also moved for preliminary injunctive relief on their free speech claims, seeking to enjoin Harrisburg's enforcement of the Ordinance.

The City opposed preliminary injunctive relief and moved to dismiss the Complaint. The district court issued a memorandum opinion and order denying preliminary injunctive relief and dismissing Plaintiffs' Fourteenth Amendment claims (Counts IV, V), but denying dismissal of Plaintiffs' First Amendment claims (Counts I–III).[3] (R.44, reported at *Reilly v. City of Harrisburg*, 205 F. Supp. 3d 620 (M.D. Pa. 2016) [hereinafter *Reilly I*]; R.45.)

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[3] In the summary judgment order on appeal, the district court stated that it had intended to dismiss Plaintiffs' free exercise claim (Count II) also, but did not due to a scrivener's error. (R.162, Mem. Op., JA9 n.3.) As shown herein, however, Plaintiffs are entitled to judgment as a matter of law on their free exercise claim because it was not dismissed, and the City failed to offer any substantial argument in opposition. (Argument Pt. II, *infra*.)

Plaintiffs appealed the denial of preliminary injunctive relief (R.47). This Court vacated the *Reilly I* order because the district court had improperly shifted to Plaintiffs the City's burden of proving the constitutionality of the buffer zone, and remanded to the district court to give the City "the opportunity to meet their burden of showing that the ordinance is narrowly tailored appropriate to the government interest involved." *Reilly v. City of Harrisburg*, 858 F.3d 173, 180 (3d Cir. 2017) [hereinafter *Reilly II*].

On remand, the district court held a two-day evidentiary hearing on Plaintiffs' preliminary injunction motion (R.68, JA598–JA795; R.69, JA796–JA956), and again issued a memorandum opinion and order denying the motion. (R.111, reported at *Reilly v. City of Harrisburg*, 336 F. Supp. 3d 451 (M.D. Pa. 2018) [hereinafter *Reilly III*]; R.112.) The court employed a narrowing construction of the buffer zone Ordinance, concluding that the undefined terms "congregate, patrol, picket or demonstrate" only "restrict aggressive acts of demonstration and protest around the clinic property," such that "the Ordinance does not, by its terms, prohibit many aspects of the 'counselling' touted by Plaintiffs," and that the Ordinance essentially permits Plaintiffs "to peacefully offer counselling, as they testified to desire"—*i.e.*, to "individually enter the buffer zone as long as they are not protesting, demonstrating, patrolling, or congregating." *Reilly III*, 336 F. Supp. 3d at 455, 459 n.3, 472, 473; *see also id.* at 463 ("[T]he Ordinance does not

bar a single individual from walking into the buffer zone and calmly handing a pamphlet to an individual.")).)

Holding the Ordinance to be content neutral *as construed*, the district court applied intermediate scrutiny and held Plaintiffs were not likely to succeed on the merits of their free speech challenge because, "[a]lthough Plaintiffs have demonstrated that the Ordinance substantially burdens their First Amendment rights, Defendants have met their burden to show that the Ordinance was narrowly tailored to achieve a legitimate governmental interest . . . ." *Id.* at 471. But the court did not address Plaintiffs' as-applied challenge to the Ordinance, which was based on the City's unequivocal interpretation and application of the Ordinance to prohibit even individual sidewalk counseling and leafleting within the buffer zone, and actual enforcement of the Ordinance against Plaintiffs' individual sidewalk counseling and leafleting. (Facts, ¶¶ 26–41, JA992–JA997.)

Plaintiffs appealed the second denial of preliminary injunctive relief. (R.113.) This Court affirmed in an unpublished, nonprecedential opinion, insofar as the Court "concluded that the Ordinance permitted sidewalk counseling." *Reilly v. City of Harrisburg*, 790 F. App'x 468, 471, 474 (3d Cir. 2019) [hereinafter *Reilly IV*].[4] In endorsing the district court's narrowing construction, this Court relied

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[4] "This disposition is not an opinion of the full Court and pursuant to I.O.P. 5.7 does not constitute binding precedent." *Reilly IV*, 790 F. App'x at 469 n.*.

on its own recent opinion in a Pittsburgh buffer zone case involving a substantially identical ordinance, *Bruni v. City of Pittsburgh*, 941 F.3d 73 (3d Cir. 2019) [hereinafter *Bruni II*], explaining:

> Looking at the plain meaning of the ordinance's language, we concluded that the proscribed activities—congregating, patrolling, picketing, and demonstrating—did not encompass the sidewalk counseling in which the plaintiffs engaged. As such, we found the ordinance "readily susceptible" to a narrowing construction under the doctrine of constitutional avoidance.

Reilly IV, 790 F. App'x at 473. *As so construed*, the Court held the Harrisburg Ordinance survives intermediate scrutiny as a content-neutral restriction on Plaintiffs' speech. *Id.* at 475–78. But, like the district court, this Court did not address Plaintiffs' as-applied challenge, based on the City's unequivocal interpretation and application of the Ordinance to prohibit even individual sidewalk counseling and leafleting within the buffer zone, and actual enforcement against Plaintiffs' individual sidewalk counseling and leafleting. (Facts, ¶¶ 26–41, JA992–JA997.) The Court denied Plaintiffs' petition for rehearing, and the Supreme Court denied Plaintiffs' petition for writ of certiorari. *Reilly v. City of Harrisburg*, 141 S. Ct. 185 (2020).

Returning to the district court, the parties filed cross-motions for summary judgment. (R.133, 137.) The district court entered a memorandum opinion and order denying summary judgment for Plaintiffs and granting summary judgment for the City. (R.162, Mem. Op., JA4–JA17 (the "SJ Opinion")), reported at

Reilly v. City of Harrisburg, No. 1:16-CV-510, 2022 WL 906205 (M.D. Pa. Mar. 28, 2022); R.163, Order, JA3 (the "SJ Order").) Plaintiffs filed this appeal from the SJ Order on April 27, 2022. (R.164, Not. Appeal, JA1–JA2.)

IV. ORDER ON APPEAL.

In denying summary judgment to Plaintiffs and granting summary judgment to the City on Plaintiffs' as-applied First Amendment claims, the district court recognized that "Plaintiffs' sidewalk counseling, to the extent it consists of peaceful one-on-one conversations and leafletting, is core political speech that merits the apex of constitutional protection" (SJ Op., JA11–JA12), and that "[t]he City does not argue any justification for restricting peaceful one-on-one conversations and leafletting." (SJ Op., JA11.) The court also acknowledged, however, that the City's representatives testified to the City's policy of prohibiting sidewalk counseling within the buffer zone (SJ Op., JA15 n.8), that the City's counsel argued that the City prohibits sidewalk counseling within the buffer zone (*id.*), and that Harrisburg police enforced the City's Ordinance against Plaintiff Reilly for sidewalk counseling within the buffer zone. (SJ Op., JA5, JA16.) Nevertheless, the court concluded that Plaintiffs did not show that the police officers acted according to a City policy prohibiting sidewalk counseling within the buffer zone. (SJ Op., JA13–JA17.) Thus, the district court did not apply any level of constitutional scrutiny to the City's actual enforcement of the

Ordinance against Reilly's sidewalk counseling within the buffer zone and resultant chilling of Plaintiff Biter's sidewalk counseling within the buffer zone. (SJ Op., JA12 & n.6.)

SUMMARY OF THE ARGUMENT

Unlike in *Bruni II*, where the Court concluded Pittsburgh's enforcement of its ordinance against sidewalk counseling was merely assumed, 941 F.3d at 84–85 & n.12, Harrisburg Police actually enforced the City's Ordinance against Plaintiffs' sidewalk counseling, ordering Reilly to stop leafletting and conversing with Planned Parenthood patrons in the buffer zone and threatening to cite her if she did it again. (Facts, ¶ 35, JA995.) Harrisburg has never rescinded that threat. Moreover, Harrisburg's designated representatives unequivocally testified to the City's policy of enforcing the Ordinance against sidewalk counseling in the buffer zone, ratified the Harrisburg Police Bureau's enforcement of the Ordinance against Reilly, and doggedly defended the Ordinance as a sidewalk counseling prohibition in this Court and the district court. (Facts, ¶¶ 26–41, JA992–JA997.) Thus, Harrisburg's actual Ordinance policy, as applied to Plaintiffs, would not have been acceptable to the *Bruni II* Court:

> No doubt, if the Ordinance by its terms did prohibit one-on-one conversations about abortion but not about other subjects within the zone, **it would be highly problematic, particularly where, as here, the speech alleged to be prohibited occurs on a public sidewalk**

> **and constitutes one-on-one normal conversation and leaf-letting—core political speech entitled to the maximum protection afforded by the First Amendment**.

Bruni II, 941 F.3d at 85 (cleaned up) (emphasis added) (citing *Reed v. Town of Gilbert*, 576 U.S. 155 (2015), *McCullen v. Coakley*, 573 U.S. 464 (2014), and *Bruni v. City of Pittsburgh*, 824 F.3d 353 (3d Cir. 2016) [hereinafter *Bruni I*]). Harrisburg's Ordinance, as actually interpreted and applied by Harrisburg, does precisely what the Court held it cannot do. As shown *infra*, Harrisburg's Ordinance policy in fact "prohibit[s] one-on-one conversations about abortion but not about other subjects within the zone," and therefore is not due the content-neutral treatment extended to the Pittsburgh ordinance in *Bruni II*. Rather, as applied, Harrisburg's Ordinance policy is a content-based restriction on Plaintiffs' speech subject to strict scrutiny, which standard the policy cannot survive and the City has not even attempted to meet.

Plaintiffs are entitled to summary judgment on their as-applied challenges to the Harrisburg buffer zone Ordinance policy as violating Plaintiffs' First Amendment rights of free speech (Count I), free exercise of religion (Count II), and free assembly (Count III) because "there is no genuine dispute as to any material fact and [Plaintiffs] are entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a).

STANDARD OF REVIEW

The Court reviews de novo the district court's grant and denial of cross-motions for summary judgment, considering each movant's case. *See Rains v. Cascade Indus., Inc.*, 402 F.2d 241, 245 (3d Cir. 1968). Summary judgment is required "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). To avoid summary judgment, the nonmoving party must establish a factual issue that is both material ("might affect the outcome of the suit under the governing law") and genuine ("such that a reasonable jury could return a verdict for the nonmoving party"). *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

ARGUMENT

I. THE DISTRICT COURT'S SUMMARY JUDGMENT ORDER SHOULD BE REVERSED BECAUSE PLAINTIFFS ARE ENTITLED TO JUDGMENT AS A MATTER OF LAW ON THEIR AS-APPLIED FIRST AMENDMENT SPEECH CHALLENGE TO THE CITY'S ORDINANCE POLICY.

A. Plaintiffs' As-Applied Challenge Satisfies *Monell* Because the City Actually Enforced its Official Buffer Zone Policy Against Plaintiffs' Sidewalk Counseling.

"[W]hen a First Amendment challenge is brought against a city, [the Court] must first determine what official city policy or custom is at issue for the purposes of § 1983, and then identify and apply the correct First Amendment

principles to that policy . . . ." *Porter v. City of Philadelphia*, 975 F.3d 374, 382 (3d Cir. 2020) (footnote omitted) (citing *Monell v. Dep't of Soc. Services of City of New York*, 436 U.S. 658, 690 (1978)). "A policy need not be passed by a legislative body, or even be in writing, to constitute an official policy for the purposes of § 1983." *Id.* at 383. "To be sure, 'official policy' often refers to formal rules or understandings—often but not always committed to writing—that are intended to, and do, establish fixed plans of action to be followed under similar circumstances consistently and over time." *Pembaur v. City of Cincinnati*, 475 U.S. 469, 480–81 (1986).

In an as-applied challenge, a plaintiff need not demonstrate a pattern of application or enforcement "where there is direct evidence of an explicit policy to implement a facially neutral law in an unconstitutionally discriminatory way." *Brown v. City of Pittsburgh*, 586 F.3d 263, 293 n.37 (3d Cir. 2009). Thus, "once a municipal policy is established, it requires only *one* application to satisfy *fully Monell*'s requirement that a municipal corporation be held liable only for constitutional violations resulting from the municipality's official policy." *Pembaur*, 475 U.S. at 478 (cleaned up) (emphasis added). Demonstrating a pattern of enforcement is only necessary when attempting to prove a policy circumstantially—i.e., by custom—in the absence of direct evidence of the policy. *See id.*;

see also Monell, 436 U.S. at 691. Here, the direct and undisputed evidence establishes that Harrisburg's official city policy is to enforce its Ordinance against peaceful, one-on-one sidewalk counseling within the buffer zone, and that the City actually enforced the Ordinance against Plaintiffs' sidewalk counseling in accordance with the policy. (R.1, V.Compl., ¶¶ 14, 17, 26, 70, 75, JA37, JA38, JA40, JA51, JA53; R.13-2, Defs.' Br. Opp'n Prelim. Inj., at 22, 28; R.59-1, Moody Dep., JA127 (8:1–11), JA130–JA131 (19:16–22:22), JA132 (27:7–18), JA133–JA136 (31:8–42:3), JA137 (48:8–13); R.59-4, Grover Dep., JA158 (14:4–18), JA159 (18:24–19:11); R.59-10, Tr. Oral Arg. (3d Cir. No. 16-3722), JA287 (31:20–32:20); R.60-2, Ordinance, JA290–JA291; R.68, Grover Hr'g, JA727:5–JA728:5, JA728:18–JA729:17, JA750:20–25, JA753:14–21; R.68, Mauldin Hr'g, JA810:24–JA813:6, JA813:25–JA814:15; R.69, Biter Hr'g, JA891:14–24, JA911:21–JA913:5, JA914:18–JA917:15; R.69, Hr'g, JA981:17–JA983:13; R.134-1, Br. Appellees (3d Cir. No. 16-3722), JA1043; R.134-2, Br. Appellees (3d Cir. No. 18-2884), JA1045; *Reilly III*, 336 F. Supp. 3d at 463.)

1. The unrefuted testimony of the Harrisburg's designated officials is direct and conclusive evidence of the City's policy of enforcing the buffer zone Ordinance against sidewalk counseling.

The City's official policy to enforce the Ordinance against sidewalk counseling was articulated consistently and unequivocally by Harrisburg's

representatives specifically designated by the City to testify on Ordinance application and enforcement. (R.59-1, Moody Dep., JA127 (8:1–11), JA130–JA131 (19:16–22:22), JA132 (27:7–18), JA133–JA136 (31:8–42:3), JA137 (48:8–13); R.59-5, Grover Dep., JA158 (14:4–18), JA159 (18:24–19:11); R.68, Grover Hr'g, JA750:20–25, JA753:14–21; R.69, Hr'g, JA981:17–JA983:13.) Neil Grover, Harrisburg's Solicitor and Rule 30(b)(6) designee on "the City's interpretation, application, and enforcement of the [O]rdinance" "post passage" (R.59-5, Grover Dep., JA158 (14:4–18), JA159 (18:24–19:11)), testified that he was "**sure**" that the Ordinance "**prevents [Plaintiffs] from being in the buffer zone and doing what they want**." (R.68, Grover Hr'g, JA753:14–21 (emphasis added)). Grover also testified that "if two persons are having a conversation walking side-by-side, moving in the same direction" within the buffer zone, "**they're congregating**" in violation of the Ordinance if they "[are] talking about anything of substance." (R.59-5, Grover Dep., JA159 (18:24–19:11) (emphasis added).) Grover expressly denied that the City's Ordinance policy permits quiet, one-on-one sidewalk counseling inside the buffer zone:

> Q. So is it your testimony that **a person may enter the buffer zone and engage in a quiet conversation with a woman approaching the entrance to the abortion clinic?**
>
> A. **No**, but I do not believe that **the fact that they can't walk in that area**, just like they can't walk in a crosswalk to cross the street, curtails their activity.

(R.68, Grover Hr'g, JA750:20–25 (emphasis added).)

Deric Moody, a Harrisburg Police Bureau Captain and another Rule 30(b)(6) designee on "the [C]ity's application and enforcement of the [O]rdinance" (R.59-1, Moody Dep., JA127 (8:1–11)), testified that "if an individual were within that 20-feet buffer zone . . . and was **merely quietly engaging in conversation with a patient entering or leaving that clinic**," "then yeah, that would be—that could be considered **a violation**," and, "if a person **merely entered the 20-foot zone and initiated a one-on-one conversation with a person about abortion**," "my answer would remain the same. . . . [T]echnically it would be—**it's a violation** again." (R.59-1, Moody Dep., JA130–JA131 (19:16–22:22) (emphasis added)). The City controverted none of its 30(b)(6) testimony below.

The district court committed grave error in dismissing out of hand all of the City's Rule 30(b)(6) testimony on its enforcement policy as "after-the-fact interpretations of the Ordinance, which were formulated in response to hypothetical enforcement scenarios," and then concluding that "there is no evidence in the record of any relevant written or unwritten policy, other than the Ordinance itself." (R.162, SJ Op., JA13, JA15.) To be sure, in an as-applied challenge, there is *no better evidence* of what the City's Ordinance enforcement policy *is* than the testimony of its designated Rule 30(b)(6) witnesses on the subjects of application and enforcement of the Ordinance. *See, e.g.*, *Hoye v. City of Oakland*, 653 F.3d

835, 849–851 (9th Cir. 2011) (recognizing propriety and importance of 30(b)(6) witness's testimony on city's "'policies, procedures, and interpretations relating to enforcement' of the Ordinance" at issue); *id.* at 850 n.12 ("[A]ll of the questions were asked in an attempt to ascertain the City's enforcement policy. In a sense, questions about a general policy are, by their very nature, **always hypothetical**: a policy provides what officers should do under certain hypothetical circumstances. We would be setting an impossibly high bar for plaintiffs if we were to require them to establish a municipality's policy and then to exclude as inadmissible a responsible **police official's testimony as to what the municipality's policy is**." (emphasis added)); *Davila v. N. Reg'l Joint Police Bd.*, 370 F. Supp. 3d 498, 537 (W.D. Pa. 2019) ("Indeed, district courts from across the country **routinely consider Rule 30(b)(6) deposition testimony as evidence of operative municipal practices, policies, and customs for *Monell* claim purposes**. . . . [T]he policymakers designated [the police chief] to speak for them, under oath, in his testimony." (emphasis added) (citations omitted)); *cf Porter*, 975 F.3d at 383–84 (observing "uncontroverted evidence from multiple witnesses . . . that the City had an unwritten policy" and therefore concluding it "was an official policy of the City for purposes of § 1983 liability under *Monell*.").

The district court also erred in categorizing Captain Moody's 30(b)(6) testimony as lacking clarity on the City's enforcement policy. (R.162, SJ Op., JA14–JA15.) Captain Moody testified unequivocally that sidewalk counseling within the buffer zone violated the City's policy. (R.59-1, Moody Dep., JA130–JA131 (19:16–22:22) (stating "it's a violation" "if a person merely entered the 20-foot zone and initiated a one-on-one conversation with a person about abortion"). His testimony explained that is police discretion in how to *respond* to a buffer zone violation, but he did not testify that there was any police discretion in deciding whether sidewalk counseling in the buffer zone is a violation. (R.59-1, Moody Dep., JA134–JA136 (35:25–43:10) (testifying "what the person was saying" in the buffer zone "could" "make a difference" in "what course of action [he] would take" in response, "But it doesn't negate that you would be in violation . . . .").)

2. The unrefuted record evidence establishes the City's actual enforcement of its official buffer zone policy against Reilly's protected speech and resultant chilling of Biter's protected speech.

To succeed in an as-applied challenge of a governmental policy under the First Amendment, a plaintiff must show "the law has in fact been (or is sufficiently likely to be) unconstitutionally *applied* to [her]." *McCullen*, 573 U.S. at 485 n.4. The unrebutted record facts show Harrisburg police actually enforced the policy against Reilly in 2014, ordering her to permanently stop counseling

(*i.e.*, to stop "handing out literature and talking to clients") within the buffer zone[5] or else be cited for violating the Ordinance. (R.60-3, Police Dispatch Incident Report, JA292; R.62-8, Reilly Map, JA320; R.69, Reilly Hr'g, JA964:11–JA965:20.) The police enforcement intimidated Reilly into abandoning her sidewalk counseling and leaving the area, not coming back for an extended period, and then standing well outside the buffer zone on the limited occasions that she returned. (R.62-8, Reilly Map, JA320; R.69, Reilly Hr'g, JA925:22–JA926:12, JA964:11–JA967:22.) Moreover, Reilly's undisputed testimony is that being forced down the sidewalk to the police's preferred location interferes with and reduces the effectiveness of her desired sidewalk counseling. (R.62-8, Reilly Map, JA320; R.69, Biter Hr'g, JA939:3–JA940:7; R.69, Reilly Hr'g, JA926:7–20, JA967:23–JA968:23, JA970:3–12.)

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[5] That the police ignorantly, recklessly, or indifferently over-enforced the *boundaries* of the buffer zone (R.62-8, Reilly Map, JA320; R.69, Reilly Hr'g, JA964:11–JA965:20 ("25 to 30 feet from the door and the driveway")) does not create a jury issue on what *conduct* the City's policy prohibited within the buffer zone. The City's undisputed Ordinance policy prohibited sidewalk counseling within the buffer zone, and the officers enforced the undisputed policy against Reilly. While the officers over-enforced the buffer zone against Reilly as to its boundaries, as to the conduct prohibited within the buffer zone the officers applied and enforced the Ordinance policy precisely how the City's witnesses testified it should be applied and enforced.

Furthermore, the City's actual enforcement of its Ordinance policy against Reilly, coupled with its declaring and defending the policy in court, make it sufficiently likely for purposes of an as-applied challenge that the policy would be applied to Biter's sidewalk counseling as well. Biter's as-applied First Amendment challenge of the Ordinance policy requires no more. *See McCullen*, 573 U.S. at 485 n.4. Indeed, the testimony is unrebutted that, with one emergency exception at Planned Parenthood, Biter voluntarily curbed her protected counseling to avoid citation. (R.62-28, Planned Parenthood video, JA328; R.68, Mauldin Hr'g, JA819:2–JA820:3; R.69, Biter Hr'g, JA911:21–JA917:17, JA932:22–JA940:7:7, JA943:18–JA945:10, JA961:4–JA962:1.)

That the City has not (yet) enforced its policy against Biter is immaterial. Biter was entitled to take the City at its word when the City in 2014 overtly threatened any further buffer zone counseling by her colleague with citation. Biter was not required to test the City's resolve, and to continually give the City opportunities to do what its police officers promised. "When a plaintiff has alleged an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and there is exists a credible threat of prosecution thereunder, [she] should not be required to await and undergo criminal prosecution as the sole means of seeking relief." *Babbitt v. United Farm Workers Nat. Union*, 442 U.S. 289, 298 (1979).

Beyond chilling Biter's protected speech with its unconstitutional threat of enforcement, the City also displayed its hostility to Biter's sidewalk counseling in court. At the preliminary injunction hearing, the City pressed that Biter's merely entering the buffer zone on one occasion, in an emergency, to quietly and consensually console a crying Planned Parenthood patron, "violated the buffer zone." (R.69, Biter Hr'g, JA911:21–JA913:5, JA914:18–JA917:15.) The City cannot unequivocally declare its Ordinance policy through its officials' sworn testimony (Pt. I.A.1, *supra*), press that same policy against Biter in open court, and then deny that the policy applies to Biter or fault Biter for acceding to its threats.

The undisputed record is that Reilly believed the police officers' threat of citation if she ever attempted to engage in sidewalk counseling within the buffer zone in the future. (R. 69, Reilly Hr'g, JA965:21–JA967:22.) It stands to reason that neither Reilly, Biter (who knew Reilly from their sidewalk counseling together), nor the small group of counselors lead by Biter would attempt sidewalk counseling within the buffer zone after Reilly had been credibly threatened with citation by police. (R.62-28, Planned Parenthood video, JA328; R.63-1, Reilly Dep., JA375:1–9; R.63-2, Biter Dep., JA460:18–24; R.68, Mauldin Hr'g, JA819:2–JA820:3; R.69, Biter Hr'g, JA889:17–22, JA891:21–JA917:17, JA944:10–JA945:10, JA951:4–19.) The City never retracted that threat, and

never notified Reilly or her colleagues that the policy changed to permit sidewalk counseling in the buffer zone. *Monell* does not require Plaintiffs to continually test the City's policy and resolve by picking fights with Harrisburg police to generate enforcement actions—they were entitled to take the police's word for it. As a matter of law, having established what the City's policy is (Pt. I.A.1, *supra*), "it requires only one application to satisfy fully *Monell*'s requirement." *Pembaur*, 475 U.S. at 478.

The district court erred in concluding that Plaintiffs rely *solely* on the July 2014 enforcement action against Reilly to establish the City's unconstitutional policy, and in rejecting Plaintiffs' as-applied claim because there were no further instances of enforcement. (R.162, SJ Op., JA5, JA12, JA16.) Plaintiffs establish above both that the City had a policy prohibiting peaceful sidewalk counseling and leafleting within the buffer zone, and a clear enforcement of the established policy. If "single incident" concepts apply, they are satisfied. *See, e.g.*, *Brown*, 586 F.3d at 292–93 ("Proof of a single incident of unconstitutional activity is not sufficient to impose liability under *Monell,* **unless proof of the incident includes proof that it was caused by an existing municipal policy** . . . . A single incident of police misbehavior by a single policeman is insufficient **as *sole* support** for an inference that a municipal policy or custom caused the incident." (cleaned up) (bold emphasis added)).

3. The City subsequently ratified its Police Bureau's enforcement of the City's unconstitutional Ordinance policy.

Although the City did not officially relax its Ordinance policy after enforcing it against Reilly, Planned Parenthood purportedly perceived an abatement of enforcement in 2015, ostensibly in response to the Supreme Court's decision invalidating a buffer zone law in *McCullen*. (R.68, Grover Hr'g, JA727:5–JA728:5, JA728:18–JA729:17; R.68, Mauldin Hr'g, JA810:24–JA813:6, JA813:25–JA814:15.) In 2016, however, the City Solicitor directed Harrisburg police to fully enforce the Ordinance "as they were" prior to the perceived 2015 abatement. (R.68, Grover Hr'g, JA727:5–JA728:5, JA728:18–JA729:17; R.68, Mauldin Hr'g, JA814:13–15 (emphasis added).) Thus, in 2016, the City ratified the same Ordinance enforcement policy applied to Reilly in 2014, and has never since altered it. (R.68, Grover Hr'g, JA727:5–JA728:5, JA728:18–JA729:17; R.68, Mauldin Hr'g, JA810:24–JA813:6, JA813:25–JA814:15.) Moreover, Captain Moody, testifying as the City's 30(b)(6) designee on application and enforcement of the Ordinance, specifically ratified the Harrisburg Police Bureau's enforcement against Reilly as "the proper course" by "a very sound-minded officer . . . and a very good community police officer." (R.59-1, Moody Dep., JA132 (27:7–18), JA133–JA136 (31:8–43:10.) *See McGreevy v. Stroup*, 413 F.3d 359, 367 (3d Cir. 2005) ("[T]he municipality will be liable if an official with

authority has ratified the unconstitutional actions of a subordinate, rendering such behavior official for liability purposes.”).

4. The City has declared and defended its Ordinance policy prohibiting Plaintiffs’ sidewalk counseling at all stages of this action, including in its summary judgment briefing to the district court.

In all stages of this action the City has declared and defended its Ordinance policy against Plaintiffs’ sidewalk counseling within the buffer zone, even in its summary judgment briefing to the district court below—after this Court held that the Ordinance does not facially prohibit Plaintiffs’ sidewalk counseling. (R.13-2, Defs.’ Br. Opp’n Prelim. Inj., at 22, 28; R.59-10, Tr. Oral Arg. (3d Cir. No. 16-3722), JA287 (31:20–32:20); R.69, Biter Hr’g, JA891:14–24, JA911:21–JA913:5, JA914:18–JA917:15; R.134-1, Br. Appellees (3d Cir. No. 16-3722), JA1043; R.134-2, Br. Appellees (3d Cir. No. 18-2884), JA1045; R.151, Defs.’ Summ. J. Opp’n Br., at 42–43.) Beginning with its Brief in Opposition to Preliminary Injunction (R.13-2), the City confirmed that it interprets and applies the Ordinance to prohibit counseling within the buffer zone: “**As in *Bruni***,[[6]] Plaintiffs can still engage in counseling, **just not within the small buffer zone**.”

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[6] The prohibitions in Pittsburgh’s buffer zone ordinance at issue in *Bruni* are identical to Harrisburg’s: “‘No person or persons shall knowingly congregate, patrol, picket or demonstrate in [the buffer] zone . . . .’” *Bruni II*, 941 F.3d at 77.

(R.13-2, Defs.' Br. Opp'n Prelim. Inj., at 22 (emphasis added).) The City further confirmed that "Plaintiffs are adequately able to communicate their message **from outside the small buffer zone**." (R.13-2, Defs.' Br. Opp'n Prelim. Inj., at 28 (emphasis added).) The City avowed to this Court the same buffer zone policy prohibiting sidewalk counseling in the first interlocutory appeal in this case (No. 16-3722), first in the City's Brief of Appellees, stating, "Plaintiffs can still engage in counseling, **just not within the small buffer zone**" (R.134-1, Br. Appellees (3d Cir. No. 16-3722), JA1043 (emphasis added)). Then, at oral argument, the City's counsel admitted that a person wishing to "hand out a leaflet that said don't go in there because this is an abortion clinic" "would be covered" by the Ordinance. (R.59-10, Tr. Oral Arg. (3d Cir. No. 16-3722), JA287 (31:20–32:20).)

In the City's Brief in the second interlocutory appeal to this Court (No. 18-2884), after the district court had determined prospectively that "the Ordinance does not bar a single individual from walking into the buffer zone and calmly handing a pamphlet to an individual," *Reilly III*, 336 F. Supp. 3d at 463, the City maintained that its Ordinance policy limits Plaintiffs' sidewalk counseling in the Harrisburg buffer zone such that a Plaintiff may stand stationary inside the buffer zone and hand a leaflet to a passerby who keeps moving, but would be guilty of "congregating" under the Ordinance policy if the passerby stopped to

stand with the Plaintiff to converse, or if the Plaintiff walked with the passerby to converse (R.134-2, Br. Appellees (3d Cir. No. 18-2884), JA1045)—both of which are essential to the purpose and design of Plaintiffs' sidewalk counseling. (Facts ¶ 34 (citing Facts ¶¶ 9–13), ¶ 54 ("Plaintiffs desire to be able to provide sidewalk counseling by approaching and **standing with or walking alongside women inside the buffer zone**." (emphasis added)).)

This Court rejected any facial interpretation of the Ordinance that could support the City's official policy prohibiting conversations within the buffer zone: "The Ordinance as properly interpreted does not prohibit sidewalk counseling—or any other peaceful one-on-one conversations about any subject or for any purpose—in the zone." *Reilly IV*, 790 F. App'x at 475. Nevertheless, **the City continues to maintain its policy against peaceful conversations within the buffer zone**, telling the district court in its summary judgment briefing that Plaintiffs would be guilty of "congregating" under the Ordinance **"if they stood or walked with other individuals inside the zone"** (R.151, Defs.' Summ. J. Opp'n Br., 42–43; R.160, Defs.' Summ. J. Reply Br., at 36)—one or both of which (standing or walking) is necessary to have a conversation within the zone. Thus, even after the this Court's narrowing construction, the City has never

abandoned its official Ordinance policy prohibiting Plaintiffs' sidewalk counseling—peaceful, one-on-one conversations while standing or walking—within the buffer zone.

B. The City's Ordinance Policy Violates the First Amendment as Applied to Plaintiffs Because It Substantially Burdens Plaintiffs' Speech and Fails Narrow Tailoring Under Strict or Intermediate Scrutiny.

1. The City does not even attempt to argue that its Ordinance policy satisfies the First Amendment as actually applied to Plaintiffs.

As the district court correctly noted, "The City does not argue any justification for restricting peaceful one-on-one conversations and leafletting." (R.162, SJ Op., JA11.) Thus, the City has not even attempted to prove that its Ordinance policy, *as actually applied* to Plaintiffs, satisfies the First Amendment. The City has, therefore, waived the argument.[7] *See Kiewit E. Co., Inc. v. L & R Const. Co., Inc.*, 44 F.3d 1194, 1203–04 (3d Cir. 1995).

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[7] The City's failure to seek summary judgment on Plaintiffs' free exercise and free assembly claims below also forecloses entry of judgment against Plaintiffs on those claims.

2. The City's policy of applying the Ordinance as a content-based restriction on Plaintiffs' speech is presumptively unconstitutional and triggers strict scrutiny, which the policy cannot survive.

a. The City admits its Ordinance application policy only bans discussions "of substance" in the buffer zones.

"Government regulation of speech is content based if a law": (1) "defin[es] regulated speech by particular subject matter"; (2) "regulates speech by its function or purpose"; (3) "cannot be justified without reference to the content of the regulated speech"; and (4) was "adopted by the government because of disagreement with the message the speech conveys." *Reed,* 576 U.S. at 164.

The first (and conclusive) indicator that the City's Ordinance policy is content-based is the City's admission through its Rule 30(b)(6) designee that the Ordinance only bans discussions "of substance," as opposed to what the City's enforcers might deem to be insubstantial discussions in the buffer zone. Neil Grover, the City's corporate designee on "the City's interpretation, application and enforcement of the ordinance," testified unequivocally that "if two persons are having a conversation walking side-by-side, moving in the same direction" within the buffer zone, "**they're congregating**" in violation of the Ordinance if they "[are] talking about anything of substance." (R.59-5, Grover Dep., JA159 (18:24–19:11) (emphasis added); Pt. I.A.1, *supra*.) Thus, the only way for Harrisburg police to know whether two people walking through the buffer zone are

violating the City's Ordinance policy is to listen to the topics discussed or ideas expressed between them to determine whether they are discussing "anything of substance," or whether they are discussing something the City deems acceptably insubstantial.

If the City's enforcement policy is not a content-based speech regulation, it is difficult to imagine what is. *See, e.g.*, *Holder v. Humanitarian Law Project*, 561 U.S. 1, 27 (2010) (holding statute content-based and subject to strict scrutiny because "Plaintiffs want to speak . . . and whether they may do so . . . depends on what they say."); *Reed*, 576 U.S. at 163 ("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.").

b. The City further admits its Ordinance application policy bans only some substantive discussions in the buffer zone while allowing others.

Even if the City's unrebutted admission that its Ordinance policy only bans discussions "of substance" were somehow not enough to render the policy content based, the City has gone even farther and admitted that its policy only bans *some* substantive speech. At the *Reilly II* oral argument, the City's counsel admitted that a person wishing to "hand out a leaflet that said don't go in there because this is an abortion clinic" "would be covered" by the Ordinance, while a person handing out a "leaflet that says I'd like you to consider my business" would not

be restricted. (R.59-10, Tr. Oral Arg. (3d Cir. No. 16-3722), JA287 (31:20–32:20)). Such admissions of counsel at oral argument are binding on the counsel's client. *See, e.g.*, *McCaskill v. SCI Mgmt. Corp.*, 298 F.3d 677, 680 (7th Cir. 2002); *Kohler v. Inter-Tel Tech.*, 244 F.3d 1167, 1170 n.3 (9th Cir. 2001); *U.S. Trust Co. of N.Y. v. Shapiro*, 835 F.2d 1007, 1009 (2d Cir. 1987).

How the City interprets, applies, and enforces its Ordinance policy is a key *factual* question, as to which proof was gathered in discovery, including through the testimony of the City's Rule 30(b)(6) designees. (*See* Pt. I.A.1, *supra*.) The City's counsel's admissions in court are fully consistent with the policy Harrisburg's police officers actually enforced against Reilly. (R.60-3, Police Dispatch Incident Report, JA292; R.62-8, Reilly Map, JA320; R.69, Reilly Hr'g, JA964:11–JA965:20.) Moreover, the City's counsel's admission, and the City's actual enforcement against Plaintiffs, demonstrate that the City's Ordinance policy requires police to distinguish peaceful pro-life pamphleting in the buffer zone from peaceful commercial pamphleting in the buffer zone to determine whether a violation is occurring. The only way for police to know whether pamphleteers are violating the Ordinance policy is to know what their pamphlets say.

c. Because the City's Ordinance policy is content-based, it is presumptively unconstitutional and must overcome strict scrutiny.

The district court's *Reilly III* decision explains why the City's Ordinance policy prohibiting some speech "of substance" in the buffer zone, based on the purpose of the speech, is presumptively unconstitutional and subject to strict scrutiny:

> An ordinance is subject to strict scrutiny if it is a content-based restriction on speech. An ordinance restricting speech is content based and subject to strict scrutiny if it: **(1) defines speech by particular subject matter; (2) defines regulated speech by its function or purpose**; (3) cannot be justified without reference to the content of the regulated speech; or (4) was adopted by the government because of disagreement with the message the speech conveys. Under strict scrutiny, the challenged law is presumptively unconstitutional and may be justified only if the government proves that it is narrowly tailored to serve compelling state interests, and the content-based restriction must be the least restrictive or least intrusive means of serving the government's interests.

336 F. Supp. 3d at 458 (cleaned up) (emphasis added) (citing *Reed*, 576 U.S. at 163; *Bruni I*, 824 F.3d at 363.

3. Harrisburg's application of the Ordinance policy to Plaintiffs substantially burdens their speech because it forecloses Plaintiffs' sidewalk counseling on over 70 feet of public sidewalk.

In this First Amendment challenge, the City bears the ultimate burden of proof on the ultimate question of the constitutionality of its Ordinance policy. *See Reilly II*, 858 F.3d at 180. Upon Plaintiffs' showing that the Ordinance policy restricts protected speech, the City "must justify its restriction on speech under

whatever level of scrutiny is appropriate (intermediate or strict) given the restriction in question." *Id.* at 180 n.5. In *McCullen*, the Supreme Court unanimously held that the exact same type of peaceful, one-on-one, personal speech and leafletting that Plaintiffs wish to engage in outside of abortion facilities, known as sidewalk counseling, 573 U.S. at 472–73, is "the essence of First Amendment expression," "lie[s] at the heart of the First Amendment," and "no form of speech is entitled to greater constitutional protection." *Id.* at 488–89. Even without a total ban, "[w]hen the government makes it more difficult to engage in these modes of communication, it imposes an especially significant First Amendment burden." *Id.* (emphasis added).

In *McCullen*, a statutory buffer zone of "35 feet of any portion of an entrance, exit or driveway of a reproductive health care facility," 573 U.S. at 471, operated in such a way at the main clinic that "petitioners are effectively excluded from a 56-foot-wide expanse of the public sidewalk in front of the [Boston Planned Parenthood] clinic." *Id.* at 473. All nine justices—including the staunchest defenders of abortion rights—agreed that this imposed "serious burdens" on plaintiffs' sidewalk counseling because it "compromise[d] [their] ability to initiate the close, personal conversations that they view as essential to 'sidewalk counseling.'" *Id.* at 487. This "extreme step of closing a substantial portion of a

traditional public forum to all speakers" was intolerable under the First Amendment. *Id*. at 497.

The City's Ordinance policy, as applied to Plaintiffs, forecloses their speech on 70 feet of public sidewalk. (R.23, Spatz Decl., JA100; R.60-9, Spatz Decl., JA296; R.68, Martin Hr'g, JA764:11–JA766:19; *see also Reilly III*, 336 F. Supp. 3d at 464 ("'effectively 70-foot' barrier").) Moreover, the Ordinance policy prevents Plaintiffs from effectively counseling on the sidewalk at the northern boundary of the buffer zone because that is too far from the Planned Parenthood facility to determine whether passersby are heading to the facility, and the buffer zone prevents Plaintiffs from walking with women towards the facility to effectively counsel, leaflet, or even converse with them. (R.62-10, Biter Map, JA321; R.69, Biter Hr'g, JA909:9–JA910:1, JA937:20–JA940:7, JA941:9–JA942:22; R.69, Reilly Hr'g, JA926:7–12.) Similarly, when standing in front of the facility at the southern end of the buffer zone, Plaintiffs cannot effectively walk north to meet and counsel women approaching the facility from the north or from the driveway. (R.62-8, Reilly Map, JA320; R.69, Biter Hr'g, JA939:3–JA940:7; R.69, Reilly Hr'g, JA970:3–12.)

The City's Ordinance policy also prevents Plaintiffs from effectively counseling on the sidewalk at the southern boundary of the buffer zone because, though closer to the Planned Parenthood front door, Plaintiffs do not have sufficient

time walking alongside the approaching women to effectively determine whether they are approaching Planned Parenthood and then counsel or leaflet them before the buffer zone requires Plaintiffs to stop and break off their conversations. (R.62-8, Reilly Map, JA320; R.69, Reilly Hr'g, JA296:7–20, JA967:23–JA968:23.)

When engaging women inside the buffer zone from a distance outside the buffer zone, Plaintiffs cannot provide the sidewalk counseling they desire to provide or otherwise share the message they want to share without having to raise their voices, which defeats the purpose and design of sidewalk counseling. (R.69, Biter Hr'g, JA932:22–JA934:4; R.69, Reilly Hr'g, JA964:1–4.) Plaintiffs desire to be able to provide sidewalk counseling by approaching and standing with or walking alongside women inside the buffer zone, but they refrain, and have actually missed opportunities to do so, for fear of prosecution for violating the buffer zone. (R.69, Biter Hr'g, JA939:24–JA940:7, JA944:6–9; R.69, Reilly Hr'g, JA969:15–JA970:17, JA972:9–11.)

In sum, Plaintiffs confirmed that they would be able to engage in more of the kind of communication that they want to engage in—up close and personal—if the buffer zone policy were not in place. In *McCullen*, the Supreme Court unanimously validated the exact concerns faced by Plaintiffs here, and unanimously invalidated the exact burdens imposed by the City's Ordinance policy here:

> McCullen explained that she often cannot distinguish patients from passersby outside the Boston clinic in time to initiate a conversation before they enter the buffer zone. And even when she does manage to begin a discussion outside the zone, she must stop abruptly at its painted border, which she believes causes her to appear "untrustworthy" or "suspicious." Given these limitations, 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.

573 U.S. at 487 (cleaned up). And, with respect to leafleting, the Supreme Court in *McCullen* validated the exact same concern advanced by Plaintiffs here, and invalidated the same kind of burden on sidewalk leafleting:

> The buffer zones have also made it substantially more difficult for petitioners to distribute literature to arriving patients. As explained, because petitioners in Boston cannot readily identify patients before they enter the zone, they often cannot approach them in time to place literature near their hands—the most effective means of getting the patients to accept it.

Id. at 488 (cleaned up). Like the *McCullen* buffer zone, the Court should hold unconstitutional the burdens imposed on Plaintiffs' speech by Harrisburg's application of its buffer zone policy.

4. The City failed to meet its burden on narrow tailoring because it lacks a meaningful record showing that it seriously considered and reasonably rejected less restrictive alternatives to its policy prohibiting sidewalk counseling.

a. The City has the burden of adducing a meaningful record showing that it seriously and closely considered less restrictive alternatives but rejected them for good reason.

After the Supreme Court's decision in *McCullen*, and this Court's decisions in *Bruni I* and *Reilly II*, it is clear that the City has the burden of proving that its Ordinance policy is narrowly tailored. This burden is not a slight one:

> Because the City has available to it the same range of alternatives that *McCullen* identified—anti-obstruction ordinances, criminal enforcement, and targeted injunctions—it must justify its choice to adopt the Ordinance. To do so, the City would have to show either that substantially less-restrictive alternatives were tried and failed, or that the alternatives were **closely examined** and ruled out **for good reason**.

Bruni I, 824 F.3d at 369–70 (emphasis added). Critically, this Court has held that *McCullen* requires municipalities to "**seriously** consider[] and reasonably reject[]" alternatives, *id*. at 371, and not merely to say that they have done so, but to create "a meaningful record":

> the municipality may not forego a range of alternatives—which would burden substantially less expression than a blanket prohibition on Plaintiffs' speech in a historically-public forum—**without a meaningful record** demonstrating that those options would fail to alleviate the problems meant to be addressed.

Id. (emphasis added); *see also McCullen*, 573 U.S. at 496 ("Given the vital First Amendment interests at stake, **it is not enough for Massachusetts simply to say**

that other approaches have not worked." (emphasis added)). On the record before this Court, the City cannot possibly meet its high burden.

b. The Ordinance was conceived and crafted by Planned Parenthood and presented to the City by Planned Parenthood's ideological ally on the City Council.

The Harrisburg Planned Parenthood began offering abortions at the end of 2011. (R.59-7, Shumaker Dep., JA208 (11:6–13); R.68, Mauldin Hr'g, JA798:12–JA799:3; R.69, Stevens Hr'g, JA833:5–23.) The commencement of abortions drew two to four protesters, with a maximum of four, once per week. (R.59-7, Shumaker Dep., JA208 (11:25–12:17); Doc.68, Mauldin Hr'g, JA798:12–22, JA817:14–18, JA818:5–8; R.69, Stevens Hr'g, JA833:21–JA834:14) Only one of the protesters—Rosalie Gross—was alleged to be "very aggressive upon folks entering the Planned Parenthood facility" and to "yell" at them. (R.68, Mauldin Hr'g, JA799:4–JA800:5.) None of the other protesters "yelled or expressed their view in the same volume and tone as Gross." (R.68, Mauldin Hr'g, JA816:1–JA817:5.)

Purportedly in response to the once-weekly, two-to-four protesters, Planned Parenthood crafted the Ordinance, and presented it to Councilman Koplinski—a former abortion rights activist. (R.59-7, Shumaker Dep., JA223 (69:2–71:6); R.68, Koplinski Hr'g, JA656:17–JA657:4, JA668:19–JA669:1.) Councilman Koplinski was generally aware of the weekly demonstrations at Planned

Parenthood but did not see any need himself to initiate legislation to deal with them. (R.68, Koplinski Hr'g, JA707:5–14.) Nevertheless, Koplinski presented Planned Parenthood's Ordinance to the City Council, which enacted it in November 2012. (R.68, Koplinski Hr'g, JA668:19–JA671:3.) Thus, the Ordinance was borne out of Planned Parenthood's purported problems with First Amendment activities, not the City's.

c. The City has utterly failed to establish a legitimate need for its sweeping Ordinance policy banning peaceful sidewalk counseling on 70 feet of public sidewalk.

None of the justifications offered for enacting the City's Ordinance—e.g., "aggressive acts of demonstration and protest around the clinic property" *Reilly III*, 336 F. Supp. 3d at 459 n.3, group bullying and intimidation, *id.* at 463, loud advocacy, *id.*, accosting unwilling patients, *id.*, or "large-scale protest[s] and counter protest[s]," *id.* at 470—justify the City's sweeping Ordinance policy prohibiting Plaintiffs' sidewalk counseling. Plaintiffs' peaceful, one-on-one counseling and leafleting, by definition, could not cause the purported harms claimed by the City.

d. The City's meager legislative record contains no meaningful, serious or close consideration of any alternatives to its Ordinance policy.

Although the Ordinance came up for consideration at three council meetings, the first and third involved only "perfunctory" matters and no debate or testimony. (R.68, Koplinski Hr'g, JA672:2–16, JA680:2–JA683:5.) The only substantive consideration of the Ordinance took place at the second meeting, at which only five people spoke on the Ordinance—two witnesses curated by Planned Parenthood, and three City Council members. (R.59-5, Koplinski Dep., JA177–JA181 (125:13–138:21, 140:13–24); R.68, Koplinski Hr'g, JA682:20–JA683:5; R.88, Pls.' Post-Hr'g Br., JA1007–JA1011.) The second meeting was audio-recorded and reduced to a 12-page transcript within the deposition of Councilman Koplinski, filed below. (R.59-5, Koplinski Dep., JA177–JA181 (125:13–138:21, 140:13–24); R.68, Koplinski Hr'g, JA682:20–JA683:5; R.88, Pls.' Post-Hr'g Br., JA1007–JA1011.) This transcript, therefore, contains the entirety of what the City considered in enacting the Ordinance—there is nothing else. Thus, the entire "meaningful record" required by *McCullen*, *Bruni I*, and *Reilly II* is the 12-page transcript, and it is utterly devoid of the constitutionally-required "serious consideration" and "close examination" of less restrictive alternatives to the Ordinance.

At the preliminary injunction hearing, former Councilman Koplinski admitted "there was no testimony received at all about alternative enforcement of existing laws instead of passing the new buffer zone" throughout the City's entire pre-enactment consideration of the Ordinance. (R.68, Koplinski Hr'g, JA702:23–JA703:22.)

Harrisburg's Police Chief was present at the council meeting where the Ordinance was considered. (R.60-31, audio recording, JA306 (51:00–57:20); R.68, Koplinski Hr'g, JA700:16–JA701:6.) During another portion of that meeting, **not** related to the Ordinance, Chief Ritter was asked by council members whether police could increase enforcement of the loud music and trash ordinances. (R.60-31, audio recording, JA306 (51:00–57:20) (unofficial transcript at R.88, Pls.' Post-Hr'g Br., JA1012–JA1013).) Chief Ritter did not mention any difficulties or lack of resources in enforcement of local ordinances. (*Id.*) Instead, he indicated that he would assign additional personnel in a specific area where loud music was a problem (*id.*), and that he would even assign personnel to help the City's code enforcement with the trash ordinance (*id.*). Chief Ritter was not asked a single question during the brief discussion of the buffer zone Ordinance. (R.59-5, Koplinski Dep., JA178–JA181 (126:21–138:2); R.60-31, audio recording, JA306 (34:50–48:30); Doc. 68, Koplinski Hr'g, 72JA700:16–JA701:6.) Councilman Koplinski acknowledged that he and his colleagues "certainly

could have" asked Chief Ritter about "increased enforcement" of any existing laws and ordinances to deal with alleged problems at Planned Parenthood, but chose not to. (R.68, Koplinski Hr'g, JA702:23–JA703:17.)

Under *McCullen*, *Bruni I* and *Reilly II*, these are case-ending admissions. The City cannot possibly carry its burden of showing a "meaningful record" of its "serious consideration" and "close examination" of alternatives to the Ordinance, having admitted that at the only council meeting involving any testimony or debate, it did not consider "at all" any alternative enforcement of existing laws. One thing that is clear after *McCullen*, *Bruni I*, and *Reed* is that "it is not enough for [Harrisburg] simply to say that other approaches have not worked." *McCullen*, 573 U.S. at 496. The City asks the Court to find that it "seriously considered" and "closely examined" alternatives to the Ordinance, as required by *McCullen* and *Bruni I*, by not taking any testimony "at all," and by not discussing any alternatives. If this abysmal record can survive the rigorous "meaningful record" requirement imposed by *McCullen* and *Bruni I*, then no City could ever fail narrow tailoring.

e. The City's consideration of alternatives would not have been superfluous.

Most tellingly, as discussed above, then-Police Chief Ritter was present at the council meeting, but he was not asked any questions at all about the Ordinance, including any questions about the police department's ability to enforce existing

laws at abortion clinics in light of financial constraints. But, three minutes after the council's discussion of the Ordinance concluded, council members peppered Chief Ritter with questions about police enforcement of other ordinances, including noise and trash ordinances. Those questions and answers reveal, unequivocally, that if the City's police could not enforce "minor statutes" because of financial difficulties, someone forgot to inform council members and Chief Ritter:

> 51:00 - Council Member: Chief, would you come back . . . . I have one question I meant to ask you . . . . **How are we doing as far as enforcing the . . . noise ordinance, and also the trash ordinance**?
>
> 51:18 - Chief Ritter: **Loud music ordinance**?
>
> 51:20 - Council Member: Yes.
>
> 51:21 - Chief Ritter: **Yeah, the police do enforce that**. As far as trash, uh, you know, we don't really focus on that as much. . . . .
>
> 51:29 - Chief Ritter: **Loud--loud music ordinance, yes we do, uh, as far as like, uh, vehicles with loud music--our officers are--are on a regular basis stopping those vehicles, citing those individuals for loud music. If we get calls for residents, uh, you know we also cite individuals on those.** I don't have the statistics in front of me but I can find those and forward those to you at a later date.
>
> 51:50 - Council Member: Could you?
>
> 51:51 - Chief Ritter: Yes. . . . .
>
> 53:37 - Council Member: **Tell 'em to come up in our neighborhood. They--they make my windows shake every day.** Early in the morning, from 7 in the morning 'til—'til we go to sleep at night. Seriously. **It's—it's not a joke. I'm serious.**

53:47 - Chief Ritter: **We'd have to put someone to kind of like--stationed in that certain area** . . . .

53:49 - Council Member: You know if you put 'em right around that area you'd find cars flying down 5th Street at 50 miles-an-hour and the boom boxes blastin' 'cause they shake the windows--between 7 and 11. . . . .

54:11 - Chief Ritter: **I'll send someone up in that area to check that out**. …

56:10 - Council Member: I have a question for Chief. Um, this new ordinance--you know me and trash. And you and I have spoken that when you have a violation--say you get a complaint for noise--I really would like for your officer--since this is now gonna be the new law of the land--to do that secondary, you know, offense, and say, "Hey, by the way—" I don't need you to patrol the whole entire property, but if you clearly walk up and see that they have six mattresses on their porch and--and you know their--their roof is falling down and, you know, they're clearly in codes violations, if we can, you know, that would really help with, you know, writing it up, and since my leg's been bum, the codes officer--codes officers really been happy that they haven't gotten anything from me, because I would write it--walk around and write 'em up myself, but--

56:59 - Chief Ritter: **Yeah, we're willing to help them**--

57:00 - Council Member: **That would be really great**--

57:01 - Chief Ritter: --'cause they're—they're short of personnel over there too, so, uh **we can also, uh, extend that hand and help them out with the codes violations**.

(R.60-31, audio recording, JA306 (51:00–57:20) (unofficial transcript at R.88, Pls.' Post-Hr'g Br., JA1012–JA1013).)

f. The City has utterly failed to consider other alternatives.

The City had numerous less restrictive options at its disposal for dealing with the supposed problems of unlawful protestors at Harrisburg's abortion clinics. As demonstrated above, the 12-page transcript of the City Council meeting conclusively demonstrates that it failed to seriously consider them and rejected them for no good reason. Plaintiffs provide here a non-exhaustive list of alternative, less restrictive measures that the City failed to consider.

i. Existing local ordinances and state statutes.

Prior to enacting the Ordinance, the City had at least seven state and local statutes they could have used against the alleged "two to four" weekly protestors, if they impeded access, threatened violence, or otherwise broke the law: (1) anti-trespassing statute (18 Pa. C.S. § 3503); (2) anti-harassment statute (18 Pa. C.S. § 2709); (3) anti-assault statute (18 Pa. C.S. § 2701); (4) anti-disorderly conduct statute (18 Pa. C.S. § 5503); anti-obstruction statute (18 Pa. C.S. § 5507); (5) City ordinance prohibiting disturbing the peace, including blocking streets and driveways (Chapter 3-341, R.60-38, JA317–JA318); (6) City ordinance prohibiting noise disturbances (Chapter 3-343, R.60-37, JA314–JA316); and (7) City ordinance prohibiting malicious loitering and prowling (Chapter 3-339, R.60-36, JA312–JA313).

The 12-page transcript of the City Council meeting demonstrates that the City did not specifically consider any of these laws at all, let alone "seriously consider" or "closely examine" them. More importantly, the City never brought a single prosecution against any protestor under existing law. This is not a case where the City was swamped with a new prosecution each week, but a case exactly like *McCullen*, where Massachusetts' failure to "identify [] a single prosecution brought under those laws within the last 17 years" meant that its buffer zone was not narrowly tailored. 573 U.S. at 494. The same outcome should obtain here.

ii. FACE lawsuits brought by abortion facility or victims.

The 12-page transcript of the City Council meeting, and the record in this case, both demonstrate that the City never considered the use of the federal FACE statute by the abortion clinics and any purported victims of unlawful intimidation or obstruction. The Freedom of Access to Clinic Entrances Act, 18 U.S.C. § 248, expressly provides a private cause of action to "[a]ny person aggrieved by reason of the conduct prohibited by" that statute. *Id*. at § 248 (c)(1)(A). Injunctive relief, compensatory damages, punitive damages and even attorney's fees and expenses are all recoverable. *Id*. at § 248 (c)(1)(B). If Rosalie Gross or anyone else was afflicting Planned Parenthood or any of its patients,

volunteers, or staff, Planned Parenthood itself or any individually aggrieved party could sue under FACE. And this would not have cost the City a dime.

It is no wonder the City never considered this option—Councilman Koplinski, who boasted of his prior experience and expertise with FACE (R.59-5, Koplinski Dep., JA180 (135:23–136:20), did not know a private cause of action is available. (R.68, Koplinski Hr'g, JA691:10–JA692:14.) Koplinski also purportedly dismissed FACE as a bad option because he thinks FACE cases are hard to prove. (R.59-5, Koplinski Dep., JA180 (135:23–136:20).) The Supreme Court says this is an insufficient basis for eschewing targeted FACE lawsuits in favor of buffer zones. *McCullen*, 573 U.S. at 495. Moreover, Koplinski does not even know how many successful actions were brought in the 15 years prior to enactment of the Ordinance. (R.68, Koplinski Hr'g, JA691:7–9.) Councilman Koplinski's ignorance of the law does not excuse the City Council from its constitutional burden to "seriously consider" and "closely examine" less restrictive options before burdening or outlawing protected speech.

iii. Targeted injunction against violators.

The City never considered obtaining targeted injunctions against any violators, if they indeed existed. This Court previously found that the City "did not [even] consider personal injunctions against [any of the four] protesters," let alone actually pursue such relief. *Reilly III*, 336 F. Supp. 3d at 470. The Court

also found that the City "offer[ed] no evidence of the cost to seek such injunctions or any reasons why they are beyond the typical expenses of the City's Legal Bureau." *Id.*

iv. Enforcing a new, less restrictive Ordinance policy targeting only non-protected conduct.

The City also never considered the enactment of a new local ordinance targeting only non-protected conduct instead of Plaintiffs' speech. If the City did not like an aspect of FACE, it could have passed its own statute, like the City of New York did. *See McCullen*, 573 U.S. at 491 ("If the Commonwealth is particularly concerned about harassment, it could also consider an ordinance such as the one adopted in New York City that not only prohibits obstructing access to a clinic, but also makes it a crime 'to follow and harass another person within 15 feet of the premises of a reproductive health care facility.'")

The City also could have passed other local ordinances to supplement or correct any perceived deficiencies in existing laws, and to allow sidewalk counseling to continue to take place on public sidewalks. Here, as in *McCullen*, the City never considered anything like this. The Ordinance policy here must fail for the same reasons.

5. The Ordinance policy cannot pass intermediate scrutiny because it burdens substantially more speech than is necessary to further any legitimate interest of the City.

Even if the City's admitted Ordinance policy could be considered content-neutral, it cannot survive even intermediate scrutiny because prohibiting peaceful, one-on-one sidewalk counseling and leafleting serves no legitimate purpose identified by the City. (R.162, SJ Op., JA11 ("The City does not argue any justification for restricting peaceful one-on-one conversations and leafletting . . . .").) Therefore, the policy burdens far more speech than necessary under the First Amendment. *See Reilly IV*, 790 F. App'x at 476 ("To be narrowly tailored, a regulation must not 'burden substantially more speech than is necessary to further the government's legitimate interests.'").

First, because the City's Ordinance policy imposes a significant burden on Plaintiffs' speech—prohibiting all sidewalk counseling inside the buffer zone—the City "must show that it tried or seriously considered substantially less restrictive alternatives, such as arrests or targeted injunctions." *Reilly IV*, 790 F. App'x at 473 (cleaned up) (quoting *Bruni II*, 941 F.3d at 89). As shown above, the City never tried or seriously considered any alternatives to its Ordinance policy. Rather, the City simply asserted that enforcing existing laws does not work. This is insufficient to satisfy the City's narrow tailoring burden under intermediate scrutiny.

Second, none of the City's purported justifications for its Ordinance—e.g., preventing the blocking of clinic entrances or violent confrontations—are served by a ban on peaceful, one-on-one counseling, which could not plausibly give rise to the type of objectionable conditions outside abortion facilities ostensibly justifying the Ordinance.

II. PLAINTIFFS ARE ENTITLED TO JUDGMENT AS A MATTER OF LAW ON THEIR AS-APPLIED FREE EXERCISE CHALLENGE BECAUSE THE CITY'S ORDINANCE POLICY SUBSTANTIALLY BURDEN'S PLAINTIFFS' FREE EXERCISE OF RELIGION AND CANNOT SURVIVE STRICT SCRUTINY.

It is undisputed that Plaintiffs engage in sidewalk counseling as a matter of religious exercise. (R.134, Facts, ¶¶ 1–19, JA1016–JA1020.) And it cannot be disputed that the City's Ordinance policy substantially burdens their religious exercise by prohibiting their sidewalk counseling in the buffer zone. As applied to Plaintiffs, the Ordinance policy is neither neutral nor generally applicable, for it disparately prohibits Plaintiffs' religiously motivated, pro-life speech within the buffer zone while allowing similarly peaceful nonreligious speech. Thus, the Ordinance policy, as applied to Plaintiffs, violates the Free Exercise Clause of the First Amendment unless it satisfies strict scrutiny. *See Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 532 (1993). As shown above, the Ordinance policy cannot satisfy strict scrutiny, and therefore violates Plaintiffs' free exercise rights.

The City's only argument below against Plaintiffs' entitlement to summary judgment on their free exercise claim is that the claim was dismissed. (R.151, Defs.' Summ. J. Opp'n Br., at 41.) Contrary to the City's assertion, however, Plaintiffs' surviving as-applied claims include their free exercise claim (Count II). Admittedly, there is an incongruity between the district court's first opinion, *Reilly I*, in which the Court stated, "Accordingly, the court finds that Plaintiffs have not stated a free exercise claim and it will be dismissed," 205 F. Supp. 3d at 634, and the court's corresponding order (R.45), which expressly denied the City's motion to dismiss as to Counts I–III.[8] In any event, it was clear that the district court's proposed dismissal of the free exercise claim was based on the court's facial analysis of the Ordinance, not Plaintiffs' as-applied claim. *See Reilly I*, 205 F. Supp. 3d at 634. Accordingly, Plaintiffs' as-applied free exercise claim survived dismissal, and the City has waived any other argument against summary judgment on the claim.

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[8] *See* note 3, *supra*.

III. PLAINTIFFS ARE ENTITLED TO JUDGMENT AS A MATTER OF LAW ON THEIR AS-APPLIED FREE ASSEMBLY CHALLENGE BECAUSE THE CITY'S ORDINANCE POLICY SUBSTANTIALLY BURDEN'S PLAINTIFFS' FREE ASSEMBLY AND CANNOT SURVIVE ANY LEVEL OF CONSTITUTIONAL SCRUTINY.

"Inasmuch as free assembly is a special form of free speech, the philosophy of the latter applies." *Comm. for Indus. Org. v. Hague*, 25 F. Supp. 127, 138 (D.N.J. 1938). For the same reasons the City's Ordinance policy, as applied, violates Plaintiffs' First Amendment rights to free speech, the policy also violates Plaintiffs' rights to free assembly. The City's only argument below against Plaintiffs' entitlement to summary judgment on their free assembly and association claim is that the district court already ruled that the Ordinance is constitutional to the extent it restricts Plaintiffs' freedom of assembly. (R.151, Defs.' Summ. J. Opp'n Br., at 41–43.) The City misses the point badly. As shown above (Pt. I.A.2, *supra*), the City has never abandoned its official policy prohibiting Plaintiffs' sidewalk counseling—peaceful, one-on-one conversations while standing or walking—within the buffer zone, even though this Court held such assembling or associating in twos is facially allowed under the Ordinance. The City can cite no authority for the proposition that its policy prohibiting peaceful assembling or associating in twos within the buffer zone is constitutional, and the City has waived any other argument against summary judgment on the claim.

IV. THE CITY'S CONSTITUTIONAL VIOLATIONS ENTITLE PLAINTIFFS TO JUDGMENT AS A MATTER OF LAW FOR DECLARATORY RELIEF, PERMANENT INJUNCTIVE RELIEF, AND DAMAGES.

Under § 1983, the City is liable to Plaintiffs for violating Plaintiffs' constitutional rights "in an action at law, suit in equity, or other proper proceeding for redress." 42 U.S.C. § 1983. "Local governing bodies, therefore, can be sued directly under § 1983 for monetary, declaratory, or injunctive relief where, as here, the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers." *Monell*, 436 U.S. at 690 (footnote omitted). Thus, Plaintiffs are entitled to a judgment declaring the City's Ordinance policy unconstitutional as applied, permanently enjoining enforcement against Plaintiffs, and awarding Plaintiffs nominal damages for the City's violations of their constitutional rights. *See, e.g.*, *Alpha Painting & Constr. Co., Inc. v. Delaware River Port Auth. of Pennsylvania New Jersey*, 822 F. App'x 61 (3d Cir. 2020) ("In an action under § 1983, nominal damages serve to vindicate past violations of a plaintiff's rights . . . .").

CONCLUSION

For the foregoing reasons, the Court should reverse the district court's summary judgment for Defendants and denial of summary judgment for Plaintiffs, and remand the case for entry of judgment for Plaintiffs as a matter of law.

Respectfully submitted:

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CERTIFICATE OF BAR MEMBERSHIP

The undersigned counsel certifies that he is a member of the bar of this Court.

DATED this September 1, 2022.

s/ Roger K. Gannam
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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMIT, TYPEFACE REQUIREMENTS, AND TYPE-STYLE REQUIREMENTS

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DATED this September 1, 2022.

s/ Roger K. Gannam
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CERTIFICATE OF SERVICE AND VIRUS CHECK

I hereby certify that a true and correct copy of the foregoing was filed electronically using the Court's Electronic Case Filing (ECF) system which will effect service by sending a Notice of Docket Activity (NDA) to all registered attorneys in the case. Prior to electronic submission a virus check was performed using FortiClient, and no virus was found.

DATED this September 1, 2022.

s/ Roger K. Gannam
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CERTIFICATE OF IDENTICAL COMPLIANCE

I hereby certify that the electronically filed version of this brief is identical to the paper copies provided to the Court.

DATED this September 1, 2022.

s/ Roger K. Gannam
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No. 22-1795

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

COLLEEN REILLY; BECKY BITER,

Plaintiffs–Appellants

v.

CITY OF HARRISBURG; HARRISBURG CITY COUNCIL;
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
in Case No. 1:16-cv-00510-SHR before The Honorable Sylvia H. Rambo

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JOINT APPENDIX VOLUME I
(Pages JA1 – JA17)

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

COLLEEN REILLY, et al.,	)	**Case No. 1:16-cv-00510-SHR**
	)	
Plaintiffs,	)	**District Judge Sylvia H. Rambo**
	)	
v.	)	
	)	
CITY OF HARRISBURG, et al.,	)	
	)	
Defendants.	)	

NOTICE OF APPEAL

Plaintiffs, Colleen Reilly and Becky Biter, appeal to the United States Court of Appeals for the Third Circuit from this Court's Memorandum opinion (Doc. 162) and Order (Doc. 163) entered March 28, 2022, granting Defendants' motion for summary judgment, denying Plaintiffs' motion for summary judgment, and dismissing Plaintiffs' remaining claims with prejudice.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was filed electronically with the court on April 27, 2022. Service will be effectuated by the Court's electronic notification system upon all counsel of record.

/s/ Roger K. Gannam
Roger K. Gannam
Attorney for Plaintiffs

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

COLLEEN REILLY, et al.,	:	**Civil No. 1:16-CV-510**
	:	
Plaintiffs,	:	
	:	
v.	:	
	:	
CITY OF HARRISBURG et al.,	:	
	:	
Defendants.	:	**Judge Sylvia H. Rambo**

O R D E R

AND NOW, this 28th day of March, 2022, upon consideration of the cross motions for summary judgment filed by Defendant City of Harrisburg (Doc. 133) and by Plaintiffs Colleen Reilly and Becky Biter (Doc. 138), and in accordance with the accompanying memorandum, **IT IS HEREBY ORDERED** that (1) Defendant's motion for summary judgment is **GRANTED**; (2) Plaintiffs' motion for summary judgment is **DENIED**; and (3) Plaintiffs' remaining claims are **DISMISSED** with prejudice.

The Clerk of Court is directed to close this case. **IT IS SO ORDERED.**

*s/Sylvia H. Rambo*
SYLVIA H. RAMBO
United States District Judge

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

COLLEEN REILLY, et al.,	:	**Civil No. 1:16-CV-510**
Plaintiffs,	:	
v.	:	
CITY OF HARRISBURG et al.,	:	
Defendants.	:	**Judge Sylvia H. Rambo**

M E M O R A N D U M

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

I. BACKGROUND

Plaintiffs are individual citizens of Pennsylvania who regularly engage in "sidewalk counseling" outside of two health care facilities in Harrisburg, Pennsylvania that provide, among other services, abortions.[1] Their sidewalk counseling activities include leafletting, prayer, and individual conversations with women who are attempting to enter the health care facilities in an effort to dissuade them from obtaining abortions. In November 2012, Harrisburg's City Council passed Ordinance No. 12–2012 entitled "Interference With Access To Health Care

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

Facilities ("the Ordinance"), which makes it illegal to "knowingly congregate, patrol, picket or demonstrate in a zone extending 20 feet from any portion of an entrance to, exit from, or driveway of a health care facility." *See* Harrisburg, Pa. Mun. Code § 3-371 (2015), http://ecode360.com/13739606.

Plaintiffs' claims stem from one occasion on which the Ordinance was enforced against Reilly. At a two-day evidentiary hearing held before the court in 2017, Reilly testified that on July 2, 2014, shortly after she arrived at Planned Parenthood to sidewalk counsel women entering the facility, two police officers arrived on scene and one officer advised her that the Ordinance required her to stay 25 to 30 feet away from the entrances. (Doc. 69 at 336:11–337:20.) After Reilly moved to a location well outside the buffer zone, the officer instructed her more than once to continue moving farther away from the facility. (*Id.*; Doc 135-18.) Reilly testified that she became frustrated with the officer and left the area. (Doc. 69 at 336:22–37:3.) A police report taken from the incident describes Reilly's activities as "handing out literature and talking to clients coming into the office," and indicates that the officer verbally warned Reilly that she would be "cited if she violates the ordinance in the future." (Doc. 60-3.) Reilly was never arrested or cited pursuant to the Ordinance. (Doc. 135 at ¶ 106; Doc. 153 at ¶ 106.)

In March 2016, Plaintiffs initiated this action and filed a complaint pursuant to 42 U.S.C. § 1983, alleging that the Ordinance is unconstitutional on its face and

as applied because it violates their First Amendment rights to free speech, free exercise, and free assembly, and their Fourteenth Amendment rights to equal protection and due process. (Doc. 1.) Plaintiffs also sought a preliminary injunction based on the alleged violation of their free speech rights. (Doc. 3.) Defendants opposed the preliminary injunction and moved to dismiss Plaintiffs' claims. (Docs. 15–16.) The court denied Plaintiffs' motion for a preliminary injunction and dismissed their equal protection, due process, and free exercise of religion claims. (Doc. 44, "*Reilly I.*") On appeal, the Third Circuit reversed the court's denial of a preliminary injunction and remanded for further consideration under the proper legal standard.[2] (Doc. 54-1, "*Reilly II.*") After conducting an evidentiary hearing and receiving supplemental briefing, the court again denied Plaintiffs' motion. (Doc. 111, "*Reilly III.*") The Third Circuit affirmed (Doc. 118-2, "*Reilly IV*"), and the Supreme Court subsequently denied Plaintiffs' petition for certiorari. (Doc. 121-1.) Without further developing the evidentiary record, Plaintiffs and the City filed cross motions for summary judgment, which have been fully briefed, and are ripe for review.

II. STANDARD OF REVIEW

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

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

The moving party bears the initial burden of demonstrating the absence of a disputed issue of material fact. *See Celotex*, 477 U.S. at 324. "Once the moving party points to evidence demonstrating no issue of material fact exists, the non-moving party has the duty to set forth specific facts showing that a genuine issue of material fact exists and that a reasonable factfinder could rule in its favor." *Azur v. Chase Bank, USA, Nat'l Ass'n*, 601 F.3d 212, 216 (3d Cir. 2010). The non-moving party may not simply sit back and rest on the allegations in its complaint; instead, it must "go beyond the pleadings and by [its] own affidavits, or by the depositions, answers to interrogatories, and admissions on file, designate specific facts showing that there

is a genuine issue for trial." *Celotex*, 477 U.S. at 324 (internal quotation marks omitted); *see also Saldana v. Kmart Corp.*, 260 F.3d 228, 232 (3d Cir. 2001). Summary judgment should be granted where a party "fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden at trial." *Celotex*, 477 U.S. at 322–23. "Such affirmative evidence—regardless of whether it is direct or circumstantial—must amount to more than a scintilla, but may amount to less (in the evaluation of the court) than a preponderance." *Saldana*, 260 F.3d at 232 (quoting *Williams v. Borough of West Chester*, 891 F.2d 458, 460–61 (3d Cir. 1989)).

"The rule is no different where there are cross-motions for summary judgment." *Lawrence v. City of Philadelphia*, 527 F.3d 299, 310 (3d Cir. 2008). Denial of one motion does not necessitate a grant of the other, and the movants do not, by virtue of their cross motions, waive their right for the court to consider whether genuine issues of material fact exist. *Id.* (citing *Rains v. Cascade Indus., Inc.*, 402 F.2d 241, 245 (3d Cir. 1968)). If neither party carries its burden, the court must deny summary judgment. *See Facenda v. N.F.L. Films, Inc.*, 542 F.3d 1007, 1023 (3d Cir. 2008).

III. <u>DISCUSSION</u>

Both motions request summary judgment on Plaintiffs' remaining § 1983 claims, which allege that the Ordinance violates First Amendment free speech and

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

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

In denying Plaintiffs' motion for a preliminary injunction, the court found that Plaintiffs' facial challenge to the Ordinance on free speech grounds was unlikely to succeed on the merits because, even though Plaintiffs demonstrated a burden on speech, the City met its burden to show that the Ordinance is content-neutral and narrowly tailored to achieve a legitimate government interest. (*Reilly III* at 38.) The Third Circuit affirmed that the Ordinance does not apply to sidewalk counseling, is not content-based or vague or overbroad, and is narrowly tailored to survive intermediate scrutiny. (*Reilly IV* at 9–11, 14.) The Third Circuit further observed that, as in *Bruni v. City of Pittsburgh*, 941 F.3d 73 (3d Cir. 2019), the Ordinance

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

does not create a significant burden on speech, and the City showed through declarations, documentary evidence, and in-court testimony that the "restriction did not burden substantially more speech than … necessary to further the government's legitimate interests." (*Id.* at 15 n.12, citations omitted.)

A statute's facial constitutionality is a legal issue, and no disputed facts remain that would impact the Ordinance's facial constitutionality and require factfinding by a jury. *See Brown v. City of Pittsburgh*, 586 F.3d 263, 288, 296 n.41 (3d Cir. 2009) (deciding an ordinance's facial validity on the merits at the preliminary injunction stage as a matter of law). Presented with no additional evidence or argument to alter its prior conclusion, the court finds as a matter of law that the Ordinance is constitutional on its face and incorporates its prior analysis herein. (*Reilly III* at 17–38; *see also Reilly IV* at 9–16.) *See also Bruni*, 941 F.3d at 88–92 (affirming the facial constitutionality of a nearly identical ordinance). Accordingly, the City is entitled to summary judgment on Plaintiffs' claims challenging the facial constitutionality of the Ordinance.[4]

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

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

To succeed on a claim challenging the constitutionality of a statute's application, the Plaintiffs must show as a threshold matter "that the law has in fact been (or is sufficiently likely to be) unconstitutionally applied to [them]." *See McCullen v. Coakley*, 573 U.S. 464, 485 n.4 (2014). In turn, the government has the ultimate burden of justifying its restriction based on the applicable level of scrutiny. *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, et al.*, 546 U.S. 418, 429 (2006). To impose liability on a municipality, Plaintiffs must demonstrate that it was the "moving force of the constitutional violation" through a custom, practice, or policy. *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 694 (1978); *see Brown*, 586 F.3d at 294 n.38.

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

Plaintiffs' sidewalk counseling, to the extent it consists of peaceful one-on-one conversations and leafletting, is core political speech that merits the apex of

does not restrict people from walking alongside one another. *See Bruni*, 941 F.3d at 87. Here too, the Ordinance imposes a similarly limited and justified free assembly burden.

constitutional protection.[5] To show that their protected activity was restricted, Plaintiffs point to a single incident in which they allege the Ordinance was improperly enforced against Reilly and argue that the resulting fear of prosecution has chilled, and continues to chill, their speech.[6] (Doc. 154 at 10–12, 18–20.)

Even assuming that Plaintiffs' free speech was restricted, however, the City is nevertheless entitled to summary judgment because the record does not support a finding that the City was the moving force of the violation. Under § 1983, a municipality is not liable under a theory of *respondeat superior* for constitutional deprivations caused by its employees. *Monell*, 436 U.S. at 691. Rather, the plaintiffs must identify a municipal policy or custom to establish that, "through its deliberate conduct, the municipality was the 'moving force' behind the injury alleged." *Berg v. Cty. of Allegheny*, 219 F.3d 261, 276 (3d Cir. 2000) (quoting *Bd. of Cty. Comm'rs v.*

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

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

Brown, 520 U.S. 397, 404 (1997)). Municipal custom is created when officials' practices are "so permanent and well settled" that they have the "force of law." *Monell*, 436 U.S. at 691. Municipal policy exists when a "'decisionmaker possess[ing] final authority to establish municipal policy with respect to the action' issues an official proclamation, policy, or edict." *Kneipp v. Tedder*, 95 F.3d 1199, 1212 (3d Cir. 1996) (quoting *Beck v. City of Pittsburgh*, 89 F.3d 966, 971 (3d Cir. 1996). The identified policy need not be in writing, but it must be "intended to, and [in fact], establish fixed plans of action to be followed under similar circumstances consistently and over time." *Pembaur v. City of Cincinnati*, 475 U.S. 469, 480–81 (1986). "Proof of a single incident of unconstitutional activity is not sufficient to impose liability under *Monell*, unless proof of the incident includes proof that it was caused by an existing, unconstitutional municipal policy, which policy can be attributed to a municipal policymaker." *City of Oklahoma City v. Tuttle*, 471 U.S. 808, 823–24 (1985) (plurality opinion). In essence, for a municipality to be liable, "a direct causal link between the municipal action and the deprivation of federal rights" must exist. *Bd. of Cty. Comm'rs*, 520 U.S. at 404.

Here, there is no evidence in the record of any relevant written or unwritten policy, other than the Ordinance itself, which is insufficient to impose liability given its facial constitutionality. *See Brown*, 586 F.3d at 292. The same is true with respect to custom, because even when viewing the facts in a light most favorable to

Plaintiffs, the evidence shows nothing more than a single ad-hoc enforcement action undertaken by an individual municipal employee who lacked policymaking authority. *See Porter v. City of Philadelphia*, 975 F.3d 374, 384–85 (3d Cir. 2020) (finding that a municipal attorney's "unendorsed actions, without more, did not become municipal policy or give rise to municipal liability under *Monell*").

Nothing in the record suggests that the City or any of its policymakers directed or encouraged officers to enforce the Ordinance as prohibiting sidewalk counseling. Not a single person was arrested or cited for violating the Ordinance in connection with sidewalk counseling, and there is no reason to believe any City policymaker knew or should have known that less formal enforcement against sidewalk counseling occurred. (*See e.g.*, Docs. 135-28, 135-29 (police incident reports showing that officers enforced the buffer zone against protestors, recognized their rights to protest outside the zone, and advised protestors not to trespass or harass clients and staff).)[7] Police Captain Moody's unrebutted testimony demonstrates that the City lacked a coordinated response to complaints about sidewalk counseling, and that the onus of interpreting and enforcing the Ordinance fell to individual officers and their immediate supervisors. (*See* Doc. 59-1 at 39:21–40:23, 89:2–91:12 (testifying that responding officers need to absorb all of the details necessary to

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

determine whether the Ordinance is violated, and depending on the situation's complexity and the degree of discretion required, will consult a supervisor if available).) Any misapplication of the statute was therefore the product of discrete enforcement decisions by individual municipal employees rather than a "fixed plan[] of action" or a customary practice for which the City can be held liable. *See Pembaur*, 475 U.S. at 480–81.

Plaintiffs' arguments to the contrary lack merit, as they rely on the testimony of City representatives interpreting the Ordinance during litigation and alleged ratification by the City Solicitor.[8] The City officials' after-the-fact interpretations of the Ordinance, which were formulated in response to hypothetical enforcement scenarios and pursuant to the City's litigation strategy of defending the Ordinance's constitutionality, do not meaningfully support that a municipal policy prospectively

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

caused an unlawful restriction of speech.[9] Nor could the City Solicitor, without knowledge of improper enforcement of the Ordinance against sidewalk counseling, have ratified the practice. *See Wallace v. Powell*, No. 3:09-CV-0291, 2009 WL 6850318 (M.D. Pa. Nov. 20, 2009) (citing *City of St. Louis v. Praprotnik*, 485 U.S. 112, 127 (1988)) (ratification under *Monell* requires knowledge and approval of the subordinate's decision and the basis for it).

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

[9] Plaintiffs cite to *Porter v. City of Philadelphia*, 975 F.3d 374 (3d Cir. 2020) to support the contrary. However, unlike in *Porter*, where the city representatives testified that a policy existed and therefore could have prospectively caused the free speech violation, Police Chief Moody and City Solicitor Grover were asked to interpret and apply the Ordinance to the hypotheticals posed by counsel during litigation. *Porter*, 975 F.3d at 383–84. As a matter of logic, their after-the-fact testimony concerning the City's interpretation does not support a finding that the City had a pre-existing policy that caused the violation.

the City had a policy that caused the alleged violation. Therefore, the City's motion for summary judgment will be granted.[10]

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

IV. CONCLUSION

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

s/ Sylvia H. Rambo
SYLVIA H. RAMBO
United States District Judge

Dated: March 28, 2022

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

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was filed electronically using the Court's Electronic Case Filing (ECF) system which will effect service by sending a Notice of Docket Activity (NDA) to all registered attorneys in the case.

DATED this September 1, 2022.

s/ Roger K. Gannam
Roger K. Gannam
Attorney for Plaintiffs–Appellants