UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Case No. 18-2884

COLLEEN REILLY; BECKY BITER; and ROSALIE GROSS,

Plaintiffs-Appellants

v.

THE CITY OF HARRISBURG, *et al*.

Defendants-Appellees.

BRIEF OF AMICUS LIFE LEGAL DEFENSE FOUNDATION

On Appeal from the United States District Court for the
Middle District of Pennsylvania
Civil Case No. 1:16-CV-0510 (Judge Sylvia H. Rambo)

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CORPORATE DISCLOSURE STATEMENT

Pursuant to 3d Cir. R. 26.1.1, Amicus Life Legal Defense Foundation states that it has no parent corporation and that no publicly held corporation owns more than 10% of it.

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INTEREST OF AMICI[1]

Life Legal Defense Foundation is a California non-profit 501(c)(3) public interest legal and educational organization that works to assist and support those who advocate in defense of life. Many of Life Legal Defense Foundation's clients are individuals who, like the Plaintiffs here, seek to communicate a life-affirming message of hope to women considering abortion.

Life Legal Defense Foundation was founded in 1989, when arrests of large numbers of pro-life advocates engaging in non-violent civil disobedience created the need for attorneys and attorney services to assist those facing criminal prosecution. Most of these prosecutions resulted in convictions for trespass and obstruction; sentences consisting of fines, jail time, or community service; and stern lectures from judges about the necessity of protesting within the boundaries of the law.

By the early 1990's, most of these pro-life advocates were seeking other channels to express their opposition to abortion. Unfortunately, the response of many legislatures and local officials was not to applaud this conversion to lawful means of advocacy, but instead, like the City of Harrisburg, to look for ways to criminalize peaceful expressive activity. This history informs Life Legal Defense

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[1] This brief was wholly authored by counsel for amicus Life Legal Defense Foundation. No party or person other than amicus contributed money intended to fund the preparation or submission of this brief.

Foundation's vigilance to protect the First Amendment rights of ordinary citizens who peacefully and lawfully express a politically unpopular message.

Life Legal Defense Foundation is particularly concerned that the District Court decision here, if affirmed, will signal this Circuit's approval of cities evading compliance with the United States Supreme Court's unanimous decision in *McCullen v. Coakley*. While the Supreme Court directed governments to seriously consider alternatives before restricting the speech of pro-life activists outside abortion facilities, the District Court's decision manifestly allowed Harrisburg to dispose of this requirement with a wink and nod.

SUMMARY OF ARGUMENT

Sidewalk counseling in front of abortion clinics is a unique and time-honored practice. It provides not just the last but often the only chance for reaching a woman considering abortion with the message that she has other options. The leaflet showing fetal development, the business card with the number of a pregnancy resource center, and the verbal offer of help reach the woman passing on the sidewalk either then and there, or not at all. As will be shown in the sections that follow, sidewalk counselors depend on a gentle, conversational approach in disseminating their message. This quiet-style delivery is an essential part of the message they seek to communicate, and the communication of this message is seriously hampered if not entirely destroyed by the City of Harrisburg's ordinance.

Arguably, fixed buffer zones on public sidewalks, particularly those created only for certain locations, make the City's job easier and cheaper, but that is not enough to satisfy the First Amendment. "A painted line on the sidewalk is easy to enforce, but the prime objective of the First Amendment is not efficiency." *McCullen v. Coakley*, 134 S. Ct. 2518, 2540 (2014).

Both the nature of the buffer zone[2] at issue in this case, and its impact on Appellants' speech demonstrate that the zone does not pass constitutional scrutiny. While purporting to follow the principles laid out in *McCullen*, the District Court's application of those principles was off the mark. The lower court made factual findings that minimized the physical impact of the zone, and thus minimized the burden on Plaintiffs' speech. More importantly, the District Court effectively excused the City from any real demonstration of the narrow tailoring of the ordinance or consideration of alternatives to restricting speech.

This reviewing Court has "a constitutional duty to conduct an independent examination of the record as a whole" and "cannot defer to the District Court's factual findings unless they concern witnesses' credibility." *Tenafly Eruv Ass'n v. Borough of Tenafly*, 309 F.3d 144, 156-157 (3d Cir. 2002); see also *Child Evangelism Fellowship of N.J., Inc. v. Stafford Twp. Sch. Dist.*, 386 F.3d 514, 524

[2] Amicus agrees with Plaintiffs that the Ordinance is content and viewpoint-based, both in its justification as well as in its enforcement. However, for purposes of this brief, Amicus will assume that the Ordinance is content-neutral.

(3d Cir. 2004) ("we have a constitutional duty to conduct an independent examination of the record as a whole when a case presents a First Amendment claim"). Simply put, if this record suffices to show that the City adequately considered alternatives to restricting speech, then there is not a city in the country that could not successfully claim the same justification for enacting a buffer zone or other restriction on disfavored expression.

ARGUMENT

I. SIDEWALKS AND SIDEWALK COUNSELING

A. The Nature of Sidewalks

Streets and sidewalks are not just for transportation. They have historically been one of the most important venues for the dissemination and exchange of ideas. They are "traditional public fora … immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 152 (1969) (internal citations omitted).

Nor can the government decide that some sidewalks, such as those adjacent to private driveways, are not suitable places for such expressive activity. "No particularized inquiry into the precise nature of a specific street is necessary; all public streets are held in the public trust, and are properly considered traditional public fora." *Frisby v. Schultz*, 487 U.S. 474, 481 (1988).

"Even today, [sidewalks] remain one of the few places where a speaker can be confident that he is not simply preaching to the choir." *McCullen*, 134 S.Ct. at 2529. In *McCullen*, the Supreme Court recognized, in the precise context of speech activity such as Appellants', that sidewalks afford an opportunity to reach beyond those who already have an opinion about the message:

> With respect to other means of communication, an individual confronted with an uncomfortable message can always turn the page, change the channel, or leave the Web site. Not so on public streets and sidewalks. There, a listener often encounters speech he might otherwise tune out. In light of the First Amendment's purpose "to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail," *FCC v. League of Women Voters of Cal.*, 468 U.S. 364, 377, 104 S. Ct. 3106, 82 L. Ed. 2d 278 (1984) (internal quotation marks omitted), this aspect of traditional public fora is a virtue, not a vice.

McCullen, 134 S.Ct. at 2529.

B. Motivation and Methods of Pro-Life Sidewalk Counselors

What motivates an ordinary citizen to voluntarily set out, day after day, week after week, rain or shine, to quietly talk with passers-by entering an abortion clinic? She receives no pay for this work. She acts out of an earnest desire to do good, a desire deeply rooted in moral conviction and sometimes personal experience. As Justice Scalia succinctly put it:

> For those who share an abiding moral or religious conviction (or, for that matter, simply a biological appreciation) that abortion is the taking of a human life, there is no option but to persuade women, one by one, not to make that choice. And as a general matter, the most effective place, if not the only place, where that persuasion can occur, is outside the entrances to abortion facilities.

Hill v. Colorado, 530 U.S. 703, 763 (2000) (Scalia J., dissenting). Whatever the motivation, the Appellants share the same underlying goal with thousands of other ordinary citizens across the nation: to save women from the pain, regret and remorse that come with abortion, and to save nascent, innocent human life from destruction.

The methods used by pro-life sidewalk counselors such as Plaintiffs are identical to those used by the Petitioners in *McCullen*: they "approach and talk to women outside facilities, attempting to dissuade them from having abortions." *McCullen*, 134 S.Ct. at 2525. Rather than protesting, displaying signs, confronting, or shouting, Appellants "attempt to engage women approaching the clinics in what they call 'sidewalk counseling,' which involves offering information about alternatives to abortion and help pursuing those options." *McCullen*, 134 S.Ct. at 2527. They initiate conversations through such phrases as "Good morning, may I give you this leaflet? Is there anything I can do for you? I'm available if you have any questions." Justice Scalia understood the methodology:

> The counselor may wish to walk alongside and to say, sympathetically and as softly as the circumstances allow, something like: "My dear, I know what you are going through. I've been through it myself. You're not alone and you do not have to do this. There are other alternatives. Will you let me help you? May I show you a picture of what your child looks like at this stage of her human development?"

Hill, 530 U.S. at 757 (Scalia J., dissenting).

Sidewalk counselors "consider it essential to maintain a caring demeanor, a calm tone of voice, and direct eye contact during these exchanges." *McCullen*, 134 S.Ct. at 2527. In order for these methods of communication to be successful, Plaintiffs must meet their audience where it is—on the public sidewalks at the entrance to abortion clinics, in close enough proximity for women to be able to hear a mild voice and easily take a proffered leaflet: "It is easier to ignore a strained voice or a waving hand than a direct greeting or an outstretched arm." *Id.* at 2536.

II. THE IMPACT OF THE ORDINANCE ON PLAINTIFFS' EXPRESSION

In order to downplay the effect of the Ordinance on Plaintiffs' ability to reach their desired audience with a leaflet or a personal expression of concern, the District Court propounded two fictions. First, the Court found that much of the area covered by the Ordinance was unavailable for Plaintiffs' speech activity with or without the Ordinance. Second, the Court found that the Ordinance doesn't mean what the City says it means.

A. The Ordinance Created a 70-Foot, Not a 15-Foot, Speech-Free Zone

Employing a mathematical approach to quantifying the impairment of Plaintiffs' speech, the district court found that "the sum total of the area restricted by is between 15 to 20 feet." The court arrived at this figure by declaring that the

public sidewalks adjacent to private driveways were not "previously available to Plaintiffs" for speech activity.

But those sidewalks *were* available. The Ordinance alone is what prevents the Plaintiffs from walking on those portions of the sidewalks, singly or in groups; from standing on those sidewalks (as long as they are not blocking the ingress or egress of any cars); and from handing our leaflets and speaking to passersby when they are in these locations.[3]

The Supreme Court in *McCullen* rejected a virtually identical attempt to minimize the impact of the Massachusetts statute by blaming the layout of the clinic and environs:

> It is true that the layout of the two clinics would prevent petitioners from approaching the clinics' *doorways*, even without the buffer zones. But petitioners do not claim a right to trespass on the clinics' property. They instead claim a right to stand on the public sidewalks by the driveway as cars turn into the parking lot. Before the buffer zones, they could do so. Now they must stand a substantial distance away. The Act alone is responsible for that restriction on their ability to convey their message.

McCullen, 134 S.Ct. at 2537 (emphasis added).

Plaintiffs wish to engage in free speech activity on these public sidewalks adjacent to driveways, by, for example, handing leaflets to people in cars entering

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[3] Also, only the Ordinance prevents other citizens from holding signs or engaging in other forms of expression on those portions of the sidewalk, although Plaintiffs themselves do not do so.

the clinic parking lot. That activity was not unlawful prior to the enactment of the Ordinance. Now it is, and it "deprives [Plaintiffs] of [one of their] primary methods of communicating with patients." *Id*. at 2536.

Plaintiffs' statement that the Ordinance creates a 70-foot zone, inhibiting their ability to approach and interact with women approaching the clinic, is accurate. The district court erred in claiming the zone only restricts "between 15 to 20 feet" of public sidewalk.

B. The Ordinance Prohibits Peaceful Sidewalk Counseling by Individuals

In evaluating the actual burden of the Ordinance on Plaintiffs' speech, the Court created from whole cloth a singular interpretation that contradicts both the City's own statements about the application of the Ordinance and its officers' own enforcement of the Ordinance.

The District Court stated, "A single individual handing out fliers does not appear to fit within the actions prohibited by the Ordinance. Individuals run afoul of the Ordinance only when they gather together in groups [] and hold up banners, pickets, or similar signage [] or chant, shout, or use voice amplification to vociferously express their message [] within the buffer zone."

If that were indeed the only conduct prohibited by the Ordinance, these two plaintiffs would almost certainly not have brought this action to challenge it. Unfortunately for Plaintiffs, however, the District Court is not the party responsible

for patrolling the streets of Harrisburg and deciding whether to arrest and whether to prosecute individuals who venture into the zone to counsel women. Those roles are performed by Harrisburg police and attorneys, both of whom have made unmistakably clear that they recognize no "quiet individual leafleter" exception to the Ordinance. (Appellants' Opening Brief ["AOB"] at 10-13)

The District Court made a glaring factual error in finding that the Ordinance does not prohibit Plaintiffs or others from approaching women in the buffer zone to engage in the very type of activity that the Supreme Court has repeatedly described as "the essence of First Amendment expression." *McCullen*, 134 S. Ct. at 2536.

III. THE CITY FAILED TO ESTABLISH THE LACK OF MORE NARROWLY TAILORED MEANS OF SERVING ITS INTERESTS

When a preliminary injunction is sought, the plaintiff normally has the burden of demonstrating a sufficient likelihood of prevailing on the merits. However, in First Amendment cases where "the [g]overnment bears the burden of proof on the ultimate question of [a statute's] constitutionality, [plaintiffs] must be deemed likely to prevail [for the purpose of considering a preliminary injunction] unless the [g]overnment has shown that [plaintiffs'] proposed less restrictive alternatives are less effective than [the statute]." *Ashcroft v. ACLU*, 542 U.S. 656, 666 (2004). This is because "the burdens at the preliminary injunction stage track the burdens at trial," and for First Amendment purposes they rest with the [g]overnment. *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, et al.*,

546 U.S. 418, 429 (2006). That was not done here, as the District Court applied the usual standard of placing the burden on Plaintiffs. *Reilly v. City of Harrisburg*, 858 F.3d 173, 180 (3d Cir. 2017).

Unfortunately, on remand, the District Court again failed to hold the City to its burden of proof. Instead, the court only perfunctorily examined whether the City had considered and attempted less burdensome measures available to address the alleged problems.[4]

Regarding the effectiveness of other measures, the court misconstrued the burden on a governmental agency prior to passing a buffer zone ordinance, claiming that neither *Bruni v. City of Pittsburgh*, 824 F.3d, 353, 370 (3d Cir. 2016), nor *McCullen* "require[s] a local government produce all available evidence and consider all available alternatives at a single, recorded hearing before taking action." Opinion at p. 26. While a governmental agency may not be required to produce such evidence in a **single** hearing, it must exhaust the reasonable, less restrictive alternatives before significantly infringing on a fundamental right such as freedom of speech. Indeed, the fact that the City held only a single substantive

[4] Amicus does not agree with the District Court that the City established the existence of an "actual problem" that needed solving. The existence of a problem in Harrisburg rests on the shaky foundation of two uncorroborated, unsworn statements from indisputably biased sources.

hearing concerning the Ordinance is itself evidence of a lack of seriousness in the City's efforts to consider alternative measures before enacting the Ordinance.[5]

This lack of seriousness can also be detected by the number of alternative measures the City never even considered or tried. The City brought no prosecutions under existing laws. It did not consider asking federal or state authorities to help with enforcement of existing laws. It did not consider seeking injunctions against individual protesters. It apparently did not consider advising the abortion clinic itself to seek an injunction against individual protesters, an alternative that seems particularly appropriate in light of the fact that the "problem," to the extent there actually was one, was more in the nature of a private than a public nuisance.

Of the alternatives the City considered, some were rejected based on entirely conclusory statements that they had "shortcomings" (JA 133) or were "not an immediate fix." (JA443). The simplest expedient of enforcing existing laws was

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[5] In defending the City's blatantly inadequate record of efforts to consider alternatives, the district court erected a straw man, stating that city councils could not be expected to create a record equivalent to a trial court record, as "[s]uch an onerous burden on a city's legislature would likely stymie any action on local ordinances." (JA028-29) However, a law restricting the exercise of constitutional rights is not like most legislative actions taken by municipal governments. Implicit in the unanimous holding of *McCullen* is that a municipality's decision to infringe on the free speech of its citizens necessitates greater care, consideration, and effort on the part of its governing body than deciding whether to raise fees at the local recycling facility.

dismissed as being too expensive to implement because it would require having a police officer stationed at the clinic during the relevant times during the week. This reasoning is flawed, on multiple counts.

First, the First Amendment right to engage free speech in an unregulated public forum should not be contingent on the government's budget and spending priorities. *Second*, the same amount of police patrol and presence is needed to enforce the current Ordinance as would be needed to enforce other city ordinances. *Third*, the District Court's reliance on City Councilman Koplinski's excuse that police would not be able to timely respond to complaints of law violations is incredible. Surely, the police are not capable of being eyewitnesses to every crime committed in the City. Law violations occur all over the City where a witness calls to report a suspected crime and later the perpetrators are captured, prosecuted, and the reporting party is called to testify.

In the case of the Planned Parenthood clinic, video cameras strategically placed outside the clinic would have captured evidence of any law violation and made the job of the police and prosecutors easier than many other locations in the City. Planned Parenthood's spokesman claimed that protestors would follow patients from the sidewalk to the clinic door, trespassing onto clinic property, and that once there they would bang on windows. She also claimed that protesters would wait at the clinic driveway and slowly pass across it in an attempt to impede

and deter cars from entering the lot. Even if the police were not on scene when these alleged incidents occurred, why could the police not take witness statements and then apprehend the perpetrators, and why could the City not prosecute and punish these alleged acts of trespass and blocking access? (JA033: "It does not appear that any prosecutions under these statutes were brought by the City or private citizens.") Did the perpetrators run off before the police arrived, never to return to the clinic? Were the police foiled in their attempts to locate the perpetrators? Did juries inexplicably acquit them? The City's claim that criminal acts were regularly occurring on a public sidewalk with impunity cries out for an explanation, not for a restriction on the speech of peaceful, law-abiding speakers such as Appellants.[6]

The City's explanation of how it "seriously considered and reasonably rejected" the alternative of enforcing existing laws is effectively identical to that provided by Massachusetts in defending its statute in *McCullen*: a clearly-defined line works better. The Supreme Court rejected this argument: "A painted line on the sidewalk is easy to enforce, but the prime objective of the First Amendment is not efficiency." *McCullen*, 134 S.Ct. at 2540. The District Court erred in finding

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[6] "If Commonwealth officials can compile an extensive record of obstruction and harassment to support their preferred legislation, we do not see why they cannot do the same to support injunctions and prosecutions against those who might deliberately flout the law." *McCullen*, 134 S.Ct. at 2540.

that the City had met the *McCullen* standard for considering and attempting alternatives to restricting speech in a traditional public forum.

CONCLUSION

For the foregoing reasons, Amicus Life Legal Defense Foundation respectfully asks this Court to reverse the District Court's order denying Plaintiff-Appellants' motion for preliminary injunction.

Respectfully submitted and dated December 19, 2018:

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CERTIFICATE OF COMPLIANCE

This brief complies with the applicable page and word count limits of the Federal Rules of Appellate Procedure. Appellant's full Certificate of Compliance, in the form of CR Form 8, is attached to the end of this brief.

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CERTIFICATE OF BAR MEMBERSHIP, ELECTRONIC FILING, VIRUS CHECK AND WORD COUNT

I hereby certify that I am a member in good standing of the Bar of the United States Court of Appeals for the Third Circuit.

I further certify that the text of the electronic Brief filed by ECF and the text of the hard copies filed or to be filed with the Court are identical. I further certify that the electronic PDF of the brief has been prepared on a computer that is automatically protected with a virus detection program, namely a continuously updated version of Avast Security, version 13.11, and no virus was detected.

I hereby certify that that this brief complies with the requirements of Fed. R. A. P. 32(a)(5) and (6) because it has been prepared in 14-point Times New Roman, a proportionally spaced font. I further certify that this brief complies with the type-volume limitation of Fed. R. A. P. 32(a)(7)(B) because it contains 3432 words, excluding the parts of the brief exempted under Rule 32(a)(7)(B)(iii), according to the count of Microsoft Word.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I further certify that on December 19, 2018, I electronically filed the foregoing brief with the Clerk of this Court by using the appellate CM/ECF system. Opposing counsel are registered CM/ECF users and service will be accomplished by the appellate CM/ECF system.

Respectfully submitted,

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