IN THE UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF MAINE
PORTLAND DIVISION

DANIEL FITZGERALD, **MARGUERITE FITZGERALD**, in their own right and as next of kin to minor children, **L.M.F.**, and **J.P.F.**, and **LESLIE SNEDDON**,	**Honorable Nancy Torresen**
Plaintiffs,	**Civil Action No. 2:14-cv-00053-NT**
v.	
CITY OF PORTLAND, MICHAEL F. BRENNAN, Mayor of the City of Portland, **KEVIN J. DONOGHUE**, Councilor of the City of Portland, **DAVID A. MARSHALL**, Councilor of the City of Portland, **EDWARD J. SUSLOVIC**, Councilor of the City of Portland, **CHERYL A. LEEMAN**, Councilor of the City of Portland, **JOHN R. COYNE**, Councilor of the City of Portland, **JON C. HINCK**, Councilor of the City of Portland, **NICHOLAS M. MAVODONES, JR.**, Councilor of the City of Portland, **JILL C. DUSON**, Councilor of the City of Portland	**ORAL ARGUMENT REQUESTED** **INJUNCTIVE RELIEF SOUGHT**
Defendants.	

PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

Plaintiffs Daniel and Marguerite Fitzgerald, their minor children L.M.F. and J.P.F., and Leslie Sneddon, by and through their undersigned counsel, hereby move this Court to enter a Preliminary Injunction pursuant to Fed. R. Civ. P. 65(a) in order to prevent immediate irreparable injury to Plaintiffs' fundamental rights and interests.

In support of their motion, Plaintiffs rely upon the pleadings and papers of record, as well as their brief filed with this motion, and the declarations and exhibits attached hereto. For the reasons set forth more fully below, Plaintiffs hereby request that this court enjoin the

enforcement of City of Portland Ordinance § 17-108-111, which violates Plaintiffs' rights guaranteed by the First and Fourteenth Amendments to the United States Constitution.

Plaintiffs attempted to meet and confer prior to filing this motion. However, at the time of filing, Plaintiffs had not received concurrence. The Plaintiffs request oral argument on the motion pursuant to Local Rule 7(f).

Respectfully submitted this 10th day of March, 2014.

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CERTIFICATE OF SERVICE

I hereby certify that on March 10, 2014 a copy of the foregoing was filed electronically. Notice of this filing will be sent to all parties for whom counsel has entered an appearance by operation of the Court's electronic filing system. Parties may access this filing through the Court's system. I certify that a copy of the foregoing has been served by ordinary U.S. Mail and electronic mail upon all parties for whom counsel has not yet entered an appearance electronically:

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PLAINTIFFS' BRIEF IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

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PLAINTIFFS' BRIEF IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

INTRODUCTION

The City of Portland, Maine, has made it unlawful to exercise First Amendment rights on public sidewalks within 39-feet of an abortion clinic. This unjustified attack on First Amendment freedoms is egregious and cannot be permitted to stand. The City of Portland's Ordinance § 17-108-111, (hereinafter "Ordinance") creates a fixed 39-foot prohibited speech zone around the entrances, exits, and driveways of abortion clinics, prohibiting all forms of protected First Amendment expression on significant stretches of public sidewalks. The United States Supreme Court is currently considering a similar case, *McCullen v. Coakley*, 708 F.3d 1 (1st Cir. 2013), *cert granted* 133 S. Ct. 2857 (2013), involving a constitutional challenge to a Massachusetts buffer zone.

The Supreme Court will likely reverse the First Circuit's decision allowing a 35-foot buffer zone to stand in *McCullen* as this decision expands the restriction of First Amendment rights beyond the floating 8-foot buffer zone the Court permitted in *Hill v. Colorado,* 530 U.S. 703 (2000), over the vigorous dissent of three of the Justices. If the Supreme Court decides the Act at issue in *McCullen* is unconstitutional, the City of Portland's Ordinance will necessarily be invalidated. The Ordinance at issue in this case is even more restrictive and violative of First Amendment rights than the law being reviewed in *McCullen*. The City of Portland's Ordinance restricts greater physical space, does not allow adequate alternative channels of communication, and was not instituted to respond to prior cases of violence or to solve an ongoing problem of people blocking clinic doors or lack of police control. Rather, the Ordinance was enacted to restrict the pro-life message that law-abiding citizens were attempting to convey outside of

abortion clinics because Planned Parenthood supporters thought that the pro-life *message* was disagreeable, not the *conduct* of the mostly mothers and children who frequently stand outside of the clinic distributing literature, holding signs, and attempting to vocally advocate for life. Any impermissible conduct could be adequately prosecuted or otherwise dealt with under existing law. The City of Portland's Ordinance targets pro-life speech, and is an impermissible time, place, and manner regulation that is not narrowly-tailored, does not leave open ample alternative avenues of communication, and is unconstitutionally vague and overbroad. Plaintiffs wish to speak on a matter of public concern and to persuade women seeking abortions that they can and should choose life for their babies, and to help post-abortive women obtain counseling. Plaintiffs are irreparably harmed by the denial of their First Amendment rights and seek injunctive relief preventing enforcement of this unconstitutional ordinance.

FACTUAL BACKGROUND

Plaintiffs have been counseling, advocating, and demonstrating outside of the Portland Health Center, a Planned Parenthood facility that performs abortions, for over a year. (Ex. 2, ¶ 6; Ex. 4, ¶ 3). They have never been arrested or cited and have never seen anyone else be arrested or cited outside of the clinic. (Ex. 2, ¶¶ 2, 8, 9; Ex. 3, ¶¶ 2, 8, 9; Ex. 4, ¶¶ 2, 5, 6). They have also never attempted to block an entrance or prohibit women from entering the Planned Parenthood abortion facility and have never witnessed anyone else do so. (Ex.2, ¶¶ 10, 11; Ex. 3 ¶¶ 10, 11; Ex. 4 ¶¶ 7, 8). Plaintiffs engage in pro-life ministry by holding signs, speaking, and handing literature to people entering the abortion clinic and people passing by on the street. (Ex. 2, ¶¶ 13, 15, 16; Ex. 3,¶ ¶ 13, 15, 16; Ex. 4, ¶¶ 12, 13, 32). Plaintiffs are motivated by their sincere moral and religious belief that abortion is the destruction of an innocent human life. (Ex. 2, ¶ 12; Ex. 3, ¶ 12; Ex. 4, ¶¶ 9, 10). Plaintiff Sneddon has counseled women seeking abortion

by sharing her personal stories with them regarding her past decisions to have four abortions. (Ex. 4, ¶¶ 10, 11, 12). She wishes to communicate to women the gravity of the decision they are about to make, to share that each life is precious and a gift from God, and to persuade them that other, better options are available for them that will not burden them with the life-long regret that having an abortion will. *Id.* She also wishes to provide women exiting the Planned Parenthood facility with information regarding post-abortive counseling. *Id.* at 13. She cannot have these conversations from a distance of 39-feet or while having to speak around or over Planned Parenthood escorts. *Id.* at ¶¶ 11, 22, 31, 33. Prior to imposition of the Ordinance, Plaintiffs stood near the path of pedestrians to engage in conversation and to distribute their pro-life literature, which provides information regarding adoption and counseling services along with the message that human beings are made in the image and likeness of God. *Id.* at ¶¶ 12, 13, 15; Ex. 2 ¶ 15; Ex. 3, ¶ 15; Ex. 6. Plaintiffs would also hold signs and engage in conversation with people entering the Planned Parenthood facility and with people passing by who would stop and speak with them. (Ex. 4, ¶ 32). A local pro-abortion business owner staged a counter-protest to support Planned Parenthood and this event gained public attention and caused far more people than usual to arrive near the Planned Parenthood facility in January 2013. (Ex. 2, ¶¶ 35, 36; Ex. 3, ¶¶ 14, 35; Ex. 4, ¶ 17).

Police distributed a letter to protestors on January 18, 2013, stating that the police had received complaints regarding noise created by protestors and attached to the letter a synopsis of laws and regulations related to disorderly behaviors and sidewalk obstruction. (Ex. 2, ¶ 37; Ex. 3, ¶ 37; Ex. 4, ¶ 18; Ex. 5). Prior to imposition of the ordinance, no one, including Plaintiffs, was ever prosecuted for violating any of these existing laws at the Portland Maine Planned Parenthood facility. (Ex. 2, ¶ 38; Ex. 3, ¶ 38; Ex. 4, ¶ 19). After the “counter-protest” ceased in

January 2013, Plaintiffs continued praying, counseling, demonstrating, and distributing literature outside of the Planned Parenthood facility. Plaintiffs estimate that the average number of people present outside of the Planned Parenthood facility on Fridays and Saturdays was less than twenty, was usually comprised of four to five adults and their children, and was often less than that. (Ex. 2, ¶ ¶ 14, 36; Ex. 3, ¶¶ 14, 36; Ex. 4, ¶ 16). At the urging of Planned Parenthood employees and supporters, Defendants adopted City of Portland Ordinance § 17-108-111, "Access to Reproductive Health Care Facilities" on a purported emergency basis, which became effective on November 18, 2013. City of Portland Ordinance § 17-108-111, available at www.portlandmaine.gov/citycode.htm (last visited March 7, 2014) (Ex. 1). The Ordinance prohibits a person from "knowingly enter[ing] or remain[ing] on a public way or sidewalk adjacent to a reproductive health care facility within a radius of 39 feet of any portion of an entrance, exit or driveway of a reproductive health care facility" during the facility's business hours. *Id.* at § 17-110. It defines "reproductive health care facility" as a place other than a hospital, "where health care services related to the human reproductive system, including abortions, are offered or performed." *Id.* at § 17-109. The restriction does not apply to all citizens; it exempts the following:

> (a) Persons entering or leaving such facility;
> (b) Employees or agents of such facility acting within the scope of their employment for the purpose of providing patient escort services only;
> (c) Law enforcement, ambulance, firefighting, construction, utilities, public works and other municipal agents acting within the scope of their employment;
> (d) Persons using the public sidewalk or street right-of-way adjacent to such facility solely for the purpose of reaching a destination other than such facility; and
> (e) Persons using the public sidewalk or street right-of-way adjacent to such facility solely for the purpose of de-boarding or waiting to board public transit.

Id. at § 17-110. Although the Ordinance states that "patient escort services" does not include counseling or protesting while physically escorting patients through the buffer zone, the

Ordinance does not define what counseling or protesting would include. After the Ordinance was passed, Planned Parenthood escorts have used their favored position inside of the buffer zone to stand in front of pro-life advocates, blocking their signs, preventing them from offering literature, and making it even more difficult for pro-life advocates to be seen and heard from their already distant location. (Ex. 7; Ex. 2, ¶¶ 26, 32; Ex. 3, ¶¶ 26, 32; Ex. 4, ¶ 34).

Prior to the Ordinance taking effect, Plaintiffs could speak to people entering the clinic in a normal conversational tone. (Ex. 2, ¶¶ 19 28, 41; Ex. 3, ¶¶ 19, 28, 41; Ex. 4, ¶¶ 14, 21, 29). They could engage in conversation and attempt to persuade women seeking abortions that there are better alternatives to abortion and that there are resources available to help them choose life for their babies. Since the Ordinance has taken effect, Plaintiffs are forced to stand 39-feet away from all clinic entrances, exits, and driveways and as a consequence they must either stand across the street, separated from clinic clients by a busy street and obstructed from view by traffic, or stand in a small area on the same side of the street as the clinic that is out of hearing range of clinic clients unless pro-life advocates raise their voices or yell. (Ex. 2, ¶¶ 30, 26, 43; Ex. 3, ¶¶ 26, 30, 43; Ex. 4, ¶¶ 42, 43, 48; Ex. 8; Ex. 10).

Additionally, there have been times when clinic clients enter the prohibited zone and Plaintiffs have been unable to navigate around the prohibited "buffer zone" to reach the clinic clients. (Ex. 4, ¶ 46). The size and location of the prohibited zones eliminates Plaintiffs' ability to engage in sidewalk counseling, by orally communicating without yelling, and to distribute literature to people entering the clinic and their intended audience, women considering abortion. (Ex. 2, ¶¶ 30, 44, 45; Ex. 3,¶¶ 30, 43, 44, 45; Ex. 4, ¶¶ 20, 27, 33, 34, 42, 43, 44). Realizing the detrimental effect the Ordinance is having on their pro-life ministry and counseling efforts, Plaintiffs decided to file suit and now seek an injunction preventing enforcement of the

Ordinance so that they may convey a peaceful pro-life message on public sidewalks within 39-feet of clinic entrances, exits, and driveways, without risking citation, fines, and police action.

ARGUMENT

I. *McCullen v. Coakley* Does Not Bar Injunctive Relief in this Case

In *McCullen v. Coakley,* the First Circuit reviewed a facial and as applied challenge to a Massachusetts buffer zone in a bifurcated manner. In *McCullen I,* 571 F.3d 167 (1st Cir. 2009), the Court addressed plaintiffs' facial challenges to the Act starting with a review of content neutrality. The Court stated that its "principal inquiry in this regard, both in speech cases generally and in time-place-manner cases specifically, 'is whether the government has adopted a regulation of speech because of disagreement with the message it conveys.'" *McCullen* 571 F.3d at 176. The Court then addressed the plaintiffs' arguments that although "the statute has a content-neutral patina," the reality was that "the legislature's abiding motive was to curb anti-abortion speech." *Id.* The Court addressed the argument by stating that its "independent review of the record confirms that the legislative factfinding adequately underpins what the legislature wrought" and noted its "wholehearted agreement with the district court that the record is 'replete with factual references to specific incidents and patterns of problematic behavior around [reproductive health center facilities].'" *Id.* at 176-177 (quoting *McCullen v. Coakley,* 573 F. Supp.2d 382, 405 (D. Mass. 2008)). Finding "nothing in either the text or the legislative history of the [challenged] Act" that would deprive the Act of content-neutral status, the Court applied intermediate scrutiny "recognizing that the constitutionality of the [challenged] Act turns on whether it is narrowly tailored and allows sufficient alternative means of communication." *Id.* at 178. Plaintiffs submit that the text and legislative history of the City of Portland's Ordinance deserves a different conclusion from this Court and further that the Ordinance is not narrowly

tailored and does not allow sufficient alternative means of communication. Although the First Circuit ultimately found that the Massachusetts Act survived a facial challenge based on the heavy burden involved in mounting a facial challenge, it concluded its decision with the caveat that "[n]othing we have said forecloses the possibility that, on a better-developed record, this legislative solution may prove problematic in particular applications." *Id.* at 184.

In *McCullen II,* the First Circuit addressed the as applied challenge to the Massachusetts buffer zone. The Court found that the challenged Act allowed abortion clinic employees to be present in the buffer zone under the clinic employee exemption but found that "to the extent [clinic employees] have tried to use their exempt status either to advocate a particular point of view or to drown out the plaintiffs' message, there is no allegation that such behavior had been sanctioned by the state." 708 F.3d at 23. Conversely, Plaintiffs in the instant case allege that the City of Portland's Ordinance allows Planned Parenthood escorts to use their physical presence in the prohibited speech zone to obstruct the view of Plaintiffs and their signs from their intended audience. The *McCullen* Court also found that "[t]he record makes plain that communicative activities flourish" at each of the clinics at issue, that "plaintiffs and their placards are visible to their intended audience," that plaintiffs could use "sound amplification equipment," and that plaintiffs' voices were audible. *Id.* at 31. Accordingly, the Court found that "[a]s long as adequate alternative means of communication exist, the First Amendment is not infringed. *Id.* at 32. In making its determination, the Court recognized "[o]ur inquiry into the adequacy of alternative means of communication is, of course, site-specific." *Id.* Addressing one of the clinics at issue, the Court noted "all prospective patients must traverse a public sidewalk to gain entry. Given this reality, many channels of communication remain available to the plaintiffs. Those alternative channels are adequate to offset the restrictions inherent in the buffer zones." *Id.* The

same cannot be said of Plaintiffs in the instant case, who are often blocked from view by busy traffic when standing across the street from the Portland Health Center Planned Parenthood, who have been blocked from view by Planned Parenthood escorts when standing on the same side of the street as the abortion facility, and who cannot traverse on the sidewalk surrounding the clinic to distribute literature since the 39-foot restricted zone extends from all three entrances to the building housing Planned Parenthood, even those entrances not used by clinic clients. *See* Exs. 7, 8, 9, 10. The *McCullen II* Court summarized its decision by stating "[o]n this record, it is readily apparent that, notwithstanding the buffer zones authorized by the Act, adequate communicative channels remain available to the plaintiffs, including oral speech of varying degrees of volume and amplification, distribution of literature, displays of signage and symbols, wearing of evocative garments and costumes, prayer alone and in groups. The Act is, therefore, a valid-time-place-manner regulation as applied [to the clinics at issue]." *Id.* at 36. The Plaintiffs here are not able to avail themselves of the same adequate channels of communication.

The Supreme Court has heard oral argument in the case and will likely reverse *McCullen* as a misapplication and inappropriate expansion of permissible restrictions on First Amendment activity beyond those the Court allowed in *Hill v. Colorado,* 530 U.S. 703 (2000), over the vigorous dissent of three current Justices. Previous cases where the Court allowed silencing speech within a fixed zone of 35-feet involved injunctions that were issued *only after* other methods failed to ameliorate the problems experienced at specific clinics. *See Madsen v. Women's Health Center, Inc*., 519 U.S. 753 (1994), *Schenk v. Pro-Choice Network of Western New York, Inc.,* 519 U.S. 357 (1997). The City of Portland's Ordinance effects similar restrictions but without an adequate factual record of violence or history of uncontrollable or impermissible behavior outside the Portland Planned Parenthood clinic. And unlike *McCullen*,

Plaintiffs do not have adequate alternative channels of communication available to convey their message, making the City of Portland's Ordinance invalid even if *McCullen* is upheld by the Supreme Court. Accordingly, for the reasons discussed herein, Plaintiffs seek a preliminary injunction preventing the Ordinance from being enforced against them.

In determining whether preliminary injunctive relief should be granted, a district court must consider the following four factors:

> (1) The likelihood of success on the merits; (2) the potential for irreparable harm if the injunction is denied; (3) the balance of relevant impositions, i.e., the hardship to the nonmovant if enjoined as contrasted with the hardship to the movant if no injunction issues; and (4) the effect (if any) of the court's ruling on the public interest.

Ross-Simmons of Warwick, Inc. v. Baccarat, Inc., 102 F.3d 12, 15 (1st Cir. 1996) (citing *Weaver v. Henderson*, 984 F.2d 11, 12 & n.3 (1st Cir. 1993)).

II. Plaintiffs' Have a Substantial Likelihood of Success on the Merits

Plaintiffs' speech and expressive activities are unquestionably protected by the First Amendment. *Hill,* 530 U.S. at 715 ("leafleting, sign displays, and oral communications are protected by the First Amendment."). Further, Plaintiffs seek an injunction that will allow them to exercise their First Amendment rights to assemble and to speak on an issue of public concern on a public sidewalk. Streets and sidewalks are "quintessential" public forums. *Frisby v. Schultz*, 487 U.S. 474, 481 (1988). Public forums "occupy a 'special position in terms of First Amendment protection'" and "the government's ability to restrict expressive activities [in such forums] 'is very limited.'" *Boos,* 485 U.S. at 318 (*quoting United States v. Grace*, 461 U.S. 171, 180, 177 (1983)). "Streets, sidewalks, parks, and other similar public places are so historically associated with the exercise of First Amendment rights that access to them for the purpose of exercising such rights cannot constitutionally be denied broadly and absolutely." *Carey v.*

Brown, 447 U.S. 455, 460 (1980) (internal quotations and citations omitted). The Ordinance at issue here ignores this fundamental constitutional principle.

A. The Ordinance is not content or viewpoint neutral

"The government may not regulate [speech] based on hostility- or favoritism- towards the underlying message expressed." *R.A.V. v. City of St. Paul*, 505 U.S. 377, 386 (1992); *Cutting v. City of Portland*, 2014 U.S. Dist. LEXIS 17481, Case No. 13-cv-359 (D. Me. Feb. 12, 2014) at *28 ("A law may no more favor one type of message because of agreement with it than it may disfavor a message because of disapproval."). And "[c]ontent-based regulations are presumptively invalid." *R.A.V.*, 505 at 382. A regulation that burdens speech based on content or viewpoint must endure strict scrutiny review. *Id.* The City of Portland's Ordinance only applies to "reproductive health care facilities" where abortions are performed during the business hours of that facility. City of Portland Ordinance § 17-109-110; *see Hill*, 530 U.S. 767 (Kennedy, J., dissenting) ("We would close our eyes to reality were we to deny that 'oral protest, education, or counseling' outside the entrances to medical facilities concern a narrow range of topics – indeed, one topic in particular. By confining the law's application to the specific locations where the prohibited discourse occurs, the State has made a content-based determination."). The inevitable effect of the Ordinance is that virtually all of the speech burdened is speech about abortion. *See Church of Lukumi Babalu Aye, Inc. v. City of Hialeah,* 508 U.S. 520, 535 (1993) ("Apart from the text, the effect of a law in its real operation is strong evidence of its object."). Unlike other buffer zone cases, this 39-foot barrier was not implemented in response to acts or threats of violence or to solve an actual problem with protestors blocking clinic doors. *See Madsen, 519 U.S. 753; Schenk , 519 U.S. 357*; *McCullen v. Coakley*, 573 F. Supp.2d. 382, 387, 412-413 (D. Mass. 2008). And it does not prohibit only conduct toward unwilling listeners. *See Hill,* 530

U.S. 703; *McGuire v. Reilly*, 260 F.3d 36 (1st Cir. 2001); *McGuire v. Reilly,* 386 F.3d 45 (1st Cir. 2004). The City of Portland's Ordinance was enacted because Planned Parenthood employees and supporters were uncomfortable with the pro-life message Plaintiffs convey and with their mere presence outside the Planned Parenthood abortion clinic. This is a wholly unjustified and unconstitutional reason for restricting peaceful First Amendment expression on public sidewalks. "If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." *Texas v. Johnson*, 491 U.S. 397, 414 (1989).

In *McCullen v. Coakley*, 708 F.3d at 18, the court noted that the "'inevitable effect' of the [Massachusetts] Act is to limit the communicative activities of all demonstrators (whether pro-choice or pro-life) to exactly the same extent." But the language of the Portland Ordinance recognizes the interest at stake, one which is ultimately sacrificed, is the "right to protest or counsel *against* certain medical procedures." City of Portland Ordinance § 17-108(a)(emphasis added). There is no question that the Portland City Council recognized exactly the viewpoint this Ordinance was targeting. *See McGuire,* 386 F.3d at 48 (noting that the buffer zone "statute was held facially constitutional based on the fact that the legislative motivations in passing it were content-neutral motivations."). Further, employees and agents of the abortion clinic acting within the scope of their employment are exempt from the Ordinance's prohibitions and although the Ordinance states that abortion clinic escorts are exempt only to physically escort patients through the buffer zones and not to engage in counseling or protesting, the Ordinance fails to define counseling or protesting. Planned Parenthood escorts, wearing the company's t-shirts or insignia, are able to use their favored position inside of the buffer zone to physically obstruct the view of pro-life advocates and to prevent the pro-life message from reaching women entering the

abortion clinic. *See* Ex. 7. They are certainly advocating a pro-abortion viewpoint and using their physical position inside of the prohibited speech zone to do so.

The Ordinance also leaves unfettered discretion to police to determine what constitutes counseling and protest and to determine whether or not a violation has occurred and whether or not speech may continue. Police are left to decide whether an individual is using the prohibited zone of the public sidewalk "solely" to reach a destination. Unless a pedestrian remains silent on the walk through the prohibited zone, the police must analyze anything said to determine if, in their discretion, the comment is "protest" or "counseling." *See Hill,* 530 U.S. at 766 (Kennedy, J., dissenting) ("When a citizen approaches another on the sidewalk in a disfavored-speech zone, an officer of the State must listen to what the speaker says. If, in the officer's judgment, the speaker's words stray too far toward 'protest, education, or counseling' – the boundaries of which are far from clear – the officer may decide the speech has moved from the permissible to the criminal. The First Amendment does not give the government such power."). Planned Parenthood escorts are allowed inside of the prohibited zone wearing Planned Parenthood shirts, buttons, or signs, but someone wearing a pro-life t-shirt or who has expressed agreement with Plaintiffs' message may be kept out of the prohibited zone. *See* Ex. 4, ¶ 35.

As a practical matter, abortion clinic escorts are free to direct clinic clients away from pro-life speakers, to speak over or make noise to drown out pro-life speech, to intercept or prevent pro-life advocates from distributing literature by placing themselves in between pro-life advocates outside the buffer zone and abortion seeking people inside the buffer zone, or to engage in other forms of pro-abortion advocacy that might not clearly be recognized by police as "counseling" or "protesting." *See* Ex. 2 ¶¶ 26, 32: Ex. 4, ¶ 3. Consequently, the Ordinance operates to give a favored position to pro-abortion advocates over pro-life advocates. The

"government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views." *Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 96 (1972); *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 828 (1995) ("In the realm of private speech or expression, government regulation may not favor one speaker over another.").

The City of Portland Ordinance at issue here is a more extreme violation of the First Amendment than the buffer zone the Supreme Court reviewed in *Hill v. Colorado*, 530 U.S. 703. In *Hill,* the Supreme Court justified an 8-foot floating buffer zone preventing people within 100 feet of any health care facility, not just abortion clinics, from approaching an *unwilling* listener within an 8-foot distance. *Hill* did not prevent people from standing their ground at any distance within the buffer zone. Although the law in *Hill* may have been motivated by concerns related to abortion-centered speech, it was more generally drawn to restrict only un-consented approaches outside of all healthcare facilities. *Hill,* 530 U.S. at 709-10, 723-25; *see Frisby*, 487 U.S. at 476-77, 481-82 (finding a statutory prohibition on residential picketing content-neutral when it was motivated by abortion protests but was generally drawn to prohibit picketing at all residences). Conversely, here even stationary speakers engaged in consensual conversation are prohibited from entering the restricted zone surrounding the abortion clinic to continue their conversation. *See Hill*, 530 U.S. at 738 (Souter, J., concurring) ("The fact that speech by a stationary speaker is untouched by this statute shows that the reason for its restriction on approaches goes to the approaches, not to the content of the speech of those approaching.")

It is clear from the language, history, and application of the Ordinance that it is directed at restricting speech about abortion and particularly at silencing pro-life advocates who attempt to counsel women against abortion at the time and place where it matters most. *See Hill*, 530

U.S. at 788 (Kennedy, J., dissenting) ("Nowhere is the speech more important than at the time and place where the [abortion] is about to occur.").

B. The Ordinance is Not a Permissible Time Place and Manner Regulation

Even if the Court determines that the Ordinance does not discriminate on the basis of content or viewpoint, the Ordinance still fails as a time, place and manner regulation under intermediate scrutiny as it is not "narrowly tailored to serve a significant governmental interest" and does not "leave open ample alternative channels for communication." *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989). It is the government's burden to prove the constitutionality of speech restrictions. *See United States v. Playboy Entm't Grp*., 529 U.S. 803, 816 (2000). The City of Portland cannot carry its burden even under intermediate scrutiny.

1. The Ordinance is Not Narrowly-Tailored to Serve a Significant Governmental Interest

The Ordinance is overly broad and bans far more speech and expressive activities than necessary to further its stated interest. *Ward*, 491 U.S. at 799-800 (finding that the narrow-tailoring standard "does not mean that a time, place, or manner regulation may burden substantially more speech than is necessary to further the government's legitimate interests"); *see also Cutting*, 2014 U.S. Dist. LEXIS 17481 at *33-34. The Ordinance provides that it is regulating the public sidewalks outside of abortion clinics "to promote the free flow of traffic on streets and sidewalks, reduce disputes and potentially violent confrontations requiring significant law enforcement services, protect property rights, protect First Amendment freedoms of speech and expression and secure a citizen's right to seek reproductive health care services." City of Portland Ordinance § 17-108(b). The Ordinance further provides that the size of the buffer zones that the Ordinance establishes around abortion clinics "is necessary to ensure that patients and employees of reproductive health care facilities have unimpeded access to reproductive health

care services[.]" City of Portland Ordinance § 17-108(c). The City must prove that the challenged restrictions "do not burden substantially more speech than necessary to achieve its interest[s]" and why less restrictive alternatives are inadequate. *Casey v. City of Newport*, 308 F.3d 106, 115 (1st Cir. 2002).

The interests the City of Portland seeks to further are already adequately protected by existing laws. *See* Ex. 5 (listing possible laws protestors could be charged with violating). If an individual blocks access to an abortion clinic or engages in some other harassing conduct, the City may proceed against that individual without banning non-obstructive and peaceful speakers from entering large segments of the public sidewalk to exercise their First Amendment rights. It is also not clear how forcing Plaintiffs to stand across the street from the abortion clinic or in a small patch of sidewalk 39-feet away from any entrances or exit to the facility, the City is protecting property or helping ease traffic. (Ex. 2, ¶ 48; Ex. 3, ¶ 48; Ex. 4,¶ 28). As to "reducing disputes and potentially violent confrontations," the City of Portland Chief of Police stated at the city council meeting prior to this Ordinance passing that the police had not found a single criminal incident in the entire time they have been involved, despite police presence at the facility and investigation of complaints.[1] Any actual physical disputes or violent confrontations could be adequately prosecuted under existing laws prohibiting assault, battery, or disturbing the peace. "Predictions about imminent disruption from picketing involve judgments appropriately made on an individualized basis, not by means of broad classifications, especially those based on subject matter." *Mosely*, 408 U.S. at 100-101; *see Boos,* 485 U.S. at 335 (Brennan, J., concurring) ("Our traditional analysis rejects such a priori categorical judgments based on the content of speech, requiring governments to regulate based on actual congestion, visual clutter,

[1] A video of the town hall meeting wherein the Ordinance was passed is available at http://townhallstreams.com/locations/portland-me/events/17266/portland_council_chambers (last visited March 10, 2014). Chief of Police Sauschuck speaks from 1:45:45 to 1:50:04.

or violence rather than based on predictions that speech with a certain content will induce those effects."(internal citation omitted)). This prior restraint on speech to "reduc[e] disputes" is aimed at reducing only those disputes that occur outside of abortion clinics, which would obviously primarily, if not solely, center around the topic of abortion. Protected speech "cannot be restricted simply because it is upsetting or arouses contempt." *Snyder v. Phelps*, 131 S. Ct. 1207, 1219 (2011). Again, the City is attempting to silence speech it finds unpleasant or inflammatory, and it may not constitutionally do so.

Finally, the city council found that the Ordinance was needed to protect the "right to seek reproductive health care services" and to ensure "unimpeded access to reproductive health care services." But federal and state laws already exist to protect access to reproductive health care facilities. *See* Freedom of Access to Clinic Entrances Act, 18 U.S.C. § 248; Maine Civil Rights Act, 5 M.R.S. § 4684-B. If protestors were impeding access to the Portland Planned Parenthood facility or harassing its employees or clients, the government already has means to prosecute these individuals and to prevent that conduct from occurring. The government may not "burden substantially more speech than is necessary to further [its] legitimate interests." *Ward,* 491 U.S. at 799; *Frisby,* 487 U.S. at 485 ("A statute is narrowly tailored if it targets and eliminates no more than the exact source of the 'evil' it seeks to remedy." (citation omitted)). The Ordinance cannot be considered narrowly-tailored when the City has other available tools that it has not utilized that are designed to serve its stated goals. Supreme Court cases that have upheld abortion-related buffer zones dealt with injunctions or statutes that were either tailored to apply to proven wrongdoers or to prevent close physical approaches to unwilling listeners. *See* *Madsen*, 512 U.S. at 768-69; *Schenck* , 519 U.S. at 383; *Hill*, 530 U.S. at 715-18. Conversely, here Plaintiffs are not even permitted to stand within the prohibited zones to engage in

consensual conversation or to distribute literature and offer assistance to willing listeners from a stationary position. *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[,]" and "no form of speech is entitled to greater constitutional protection[.]"). Defendants cannot show that consensual conversations between pro-life advocates (or any advocate for that matter) and women entering an abortion clinic will impede the woman's access to the clinic or otherwise harm her. In *McCullen I*, the First Circuit found that there was no constitutional protection "to any particular conversational distance" or to "handbilling," but that "[t]he correct inquiry is whether, in light of the totality of the circumstances, a time-place-manner regulation burdens substantially more speech than necessary and, concomitantly, whether such a regulation leaves open adequate alternative channels of communication." *McCullen I,* 571 F.3d at 180. The Ordinance is not designed to prohibit only activity that might create the problems the City asserts justify the law, such as congestion or disruption, rather it outlaws all communication within the prohibited zone, except as to certain classes of individuals including abortion clinic escorts. The Ordinance burdens substantially more speech than necessary, warranted, or defensible to promote the City's stated interests.

2. The Ordinance Does Not Leave Pro-Life Advocates With Adequate Alternative Channels of Communication

The prohibited speech zone the City of Portland has instituted, effectively eliminates Plaintiffs ability to engage in peaceful sidewalk counseling and prevents them from distributing literature to people passing within the prohibited zone. (Ex. 2, ¶¶ 43-45; Ex. 3, ¶¶ 43-45; Ex. 4. ¶¶ 20, 33, 44). Under the Ordinance, Planned Parenthood escorts are allowed inside of the buffer zone and have used their favored position to stand in front of Plaintiffs and block people entering the clinic from seeing Plaintiffs' signs. (Ex. 7). From their favored position within the

prohibited zone, Planned Parenthood escorts can block Plaintiffs from being seen and from making eye contact with people entering the clinic. *Id.* To be heard, Plaintiffs must either raise their voices over two lanes of busy traffic or, if they stand on the same side of the street as the Planned Parenthood facility, they must raise their voices to be heard over 39 feet and past the physical presence of Planned Parenthood escorts. [2] This is not an ample alternative means of communication. In *Hill*, the Court emphasized that Colorado's speech restrictions only applied to un-consented approaches and that this still allowed speakers outside of the same healthcare facilities with many remaining speech options including the ability to engage in speech with willing listeners, to distribute leaflets without physically approaching closer than a distance of eight feet, to hold signs, and to proffer speech from a "normal conversational distance." *Hill,* 530 U.S. 726-730. The Ordinance deprives Plaintiffs of these alternatives and accordingly cannot be sustained under *Hill.*

Because the Ordinance substantially burdens speech in a public forum and cannot be sustained as a permissible time, place, and manner regulation, the City must show that it has chosen the least restrictive means available to achieve a compelling government interest. *See Playboy*, 529 U.S. at 813. Under this strict scrutiny, the City must prove the existence of an "actual problem" in need of solving, and demonstrate that its restriction of free speech is "actually necessary to the solution." *Brown v. Entertainment Merchants Ass'n*, 131 S. Ct. 2729, 2738 (2011) (internal quotation omitted). For the reasons discussed above, the City of Portland's ordinance cannot pass intermediate scrutiny and certainly cannot survive strict scrutiny, "the

[2] While attempting to speak loud enough to be heard across traffic or across a 39-foot distance, Plaintiffs must also be careful not to violate any of the offenses cited in Police Chief Sauschuck's January letter including Portland City Code § 17-17, which prohibits people in public places from using a loudspeaker or amplifier to attract the public to a specific location, yelling, or singing, and Maine Civil Rights Act 5 M.R.S. § 4684-B, which prohibits people after being warned by law enforcement from making any noise that can be heard within a building where health services are provided. *See* Ex. 5.

most demanding test known to constitutional law." *City of Boerne v. Flores,* 521 U.S. 507, 534 (1997). The City's stated interest, even if compelling, could be amply protected by existing laws for prohibiting improper conduct and it cannot show that the overly restrictive 39-foot prohibited zones it has created around every entrance, every exit, and every driveway to the building, regardless of whether those entrances are actually used by Planned Parenthood clients, are necessary to solve any actual problem.

III. Plaintiffs Will Suffer Irreparable Harm Without Injunctive Relief

Plaintiffs will be irreparably harmed absent the issuance of an injunction by this Court. The Ordinance deprives Plaintiffs of their fundamental First Amendment rights. And it is well established that "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976); *Bl(a)ck Tea Soc'y v. City of Boston,* 378 F.3d 8, 15 (1st Cir. 2004). Plaintiffs seek to counsel people considering abortion and to attempt to convince these individuals not to end the lives of their unborn children. Plaintiffs' ability to effectively communicate with their intended audience is severely restricted if not completely nullified by the Ordinance. The Ordinance severely and unjustifiably restricts Plaintiffs' ability to win the attention of their intended audience, denying the right to communicate on matters of significant, life-changing, and life-ending importance at a critical time and place. "Nowhere is the speech more important than at the time and place where the [abortion] is about to occur." *Hill*, 530 U.S. at 788 (Kennedy, J., dissenting).

IV. The Harm to Plaintiffs is Greater than Any Potential Harm to Defendants if the Injunction Issues

In this case, the likelihood of harm to Plaintiffs is substantial because Plaintiffs' First Amendment freedoms are at issue, and the deprivation of these rights, even for minimal periods, constitutes irreparable injury. *Elrod*, 427 U.S. at 373. Conversely, there are other laws in place

that protect access to abortion clinics and that further the City's stated interests. See e.g. Ex. 5 (listing possible offenses); Freedom of Access to Clinic Entrances Act, 18 U.S.C. § 248. Defendants have ample alternative ways to pursue their interests simply by enforcing criminal and civil laws that already exist. Preventing Defendants from enforcing an overbroad Ordinance that unjustifiably restricts all forms of First Amendment expression on a public sidewalk, will not prevent them from using other narrowly tailored laws that restrict or prohibit harassing or obstructive conduct in front of abortion clinics.

V. Granting the Injunction is in the Public Interest

It is in the public interest to protect the First Amendment rights at issue in this case. "[F]reedom of expression, especially freedom of political expression, is vital to the health of our democracy." *Bl(a)ck Tea Soc'y*, 378 F.3d at 15. And because there is significant public interest in upholding our First Amendment principles, "[p]rotecting rights to free speech is *ipso facto* in the interest of the general public." *Cutting*, 2014 U.S. Dist. LEXIS 17481 at *36 (quoting *Westfield High Sch. L.I.F.E. v. City of Westfield*, 249 F. Supp. 98, 128 (D. Mass. 2003)).

CONCLUSION

Freedom of speech is "the matrix, the indispensable condition, of nearly every other form of freedom." *Palko v. Conn.,* 302 U.S. 319, 327 (1937). The Ordinance is an intolerable threat to this fundamental freedom and cannot be sustained under existing case law including *Hill* and *McCullen*. Accordingly, for the reasons stated herein, Plaintiffs hereby request that this court issue the requested preliminary injunction.

Respectfully submitted this 10th day of March, 2014.

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CERTIFICATE OF SERVICE

I hereby certify that on March 10, 2014, a copy of the foregoing was filed electronically. Notice of this filing will be sent to all parties for whom counsel has entered an appearance by operation of the Court's electronic filing system. Parties may access this filing through the Court's system. I certify that a copy of the foregoing has been served by ordinary U.S. Mail and electronic mail upon all parties for whom counsel has not yet entered an appearance electronically:

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