UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

MADISON VIGIL FOR LIFE, INC.; a Wisconsin corporation; GWEN FINNEGAN; JENNIFER DUNNETT; MARY MARKIELEWSKI; THERESA KLINKHAMMER; CONSTANCE NIELSEN; STUDENTS FOR LIFE OF MADISON, an unincorporated expressive student organization at the University of Wisconsin-Madison; BADGER CATHOLIC, a Wisconsin corporation and an expressive student organization of the University of Wisconsin-Madison; FR. RICHARD HEILMAN; SARAH QUINONES; and RYAN WOODHOUSE;

Plaintiffs,

v.

CITY OF MADISON, WISCONSIN;

Defendant.

Case No. 14-cv-157-WMC

NOTICE OF SUPPLEMENTAL AUTHORITY IN SUPPORT OF MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

In support of their Motion for Temporary Restraining Order and Preliminary Injunction [Doc. # 26] Plaintiffs hereby file this Notice of Supplemental Authority to alert the Court of the Supreme Court's decision yesterday striking down restrictions on free speech outside abortion facilities in *McCullen v. Coakley*, No. 12-1168, slip op. (S. Ct. June 26, 2014). *McCullen* strongly supports Plaintiffs' requested injunctions against Madison General Ordinance 23.01.

McCullen sets forth several principles that undermine the Ordinance being challenged here. First, *McCullen* clarifies that a law is content based—and therefore subject to strict scrutiny—"if it [is] concerned with undesirable effects that arise from" speech, namely, because "speech outside [] abortion clinics cause[] offense or ma[ke] listeners uncomfortable." *Id.* slip op. at 13. Here Madison's Ordinance is consciously designed to prevent the alleged discomfort

that patients experience if they are subjected to uninvited speech as they enter abortion or health facilities. Such a "concern[]" is a content-based and subjects the Ordinance here to strict scrutiny, which it cannot satisfy for the reasons discussed in our briefing. Moreover, the unanimous court in *McCullen* agreed that a law is content based "if it require[s] 'enforcement authorities' to 'examine the content of the message that is conveyed to determine whether' a violation has occurred.'" *Id.* slip op. at 12 (quoting *FCC v. League of Women Voters of Cal.*, 468 U.S. 364, 338 (1984)). This is precisely the test that the Court rejected in *Hill v. Colorado*, 530 U.S. 703, 720–21 (2000). Because this Ordinance requires examining speech to see if it is "oral protest, education, or counseling," it is content-based. See MGO 23.01(2)(b)(3).

Second, *McCullen* makes it clear that the government may not cite alleged problems that occur "mainly" in one specific place, and then use that as a predicate to restrict free speech at other places throughout the jurisdiction. "For a problem shown to arise only once a week in one city at one clinic, creating 35-foot buffer zones at every clinic across the Commonwealth is hardly a narrowly tailored solution." *McCullen*, slip op. at 26. Here, as in *McCullen*, the Ordinance's legislative record alleging (anecdotal and non-specific) problems, even if credited, "pertain mainly to one place at one time: the [Orin Road] Planned Parenthood clinic." *Id.* Yet Madison's Ordinance creates countless bubble areas restricting speech throughout Madison, in too many places to identify but notably including the U.W. Student Government offices (the Lucky Building). Where *McCullen* said speech couldn't be restricted at other *abortion clinics* just because of alleged problems at one clinic in Boston, Madison has bizarrely restricted free speech on campus and in countless locations in the city just because of alleged problems at one abortion facility on Orin Road. It less narrowly tailored than even the law in *McCullen*.

The amendments made to the Ordinance actually increased its impact in three ways. (1) It expands the locations where it applies, now to any "place" where a doctor or nurse routinely

provides medical services (making this Ordinance massively broader than *Hill*, which applied only to licensed *facilities*). Such a gargantuan prophylactic measure is impermissible under *McCullen*. (2) The new Ordinance increases the number of bubble zones around multi-entrance buildings, such as the Lucky Building, by removing the "common area" limit on doors to which bubble zones are attached. As a result, the entire city block encompassing the Lucky Building and East Campus Mall is engulfed in speech restrictive bubbles, and similar effects exist in other multi-office buildings around Madison. (3) The Ordinance added driveway bubble zones. This extends its anti-speech zones possibly hundreds of feet away from a building entrance. *McCullen* frowns upon speech restrictions that prevent leafleters from approaching close enough to leaflet or have personal conversations with a stopped driver entering a driveway. *Id*. slip op. at 19–20.

Third, *McCullen* enhances the application of narrow tailoring analysis exacted upon even "content neutral" laws that restrict free speech in traditional public fora. *McCullen* insists that if a government claims to be serving the interests of "public safety, patient access to healthcare, and the unobstructed use of public sidewalks and roadways," the government must "look to less intrusive means of addressing its concerns" without curtailing speech. *Id.* slip op. at 23–25. So where the government is concerned about "obstruction," it can rely on laws that specifically curtail obstruction (like the portion of this Ordinance that does so and, as in *McCullen*, is not being challenged). *Id.* slip op. at 23–24. If a government is concerned about "harassment" (as distinct from mere speech, even when unwelcome), it could pursue a not-vague, not-overbroad law focusing on harassment. *Id.* slip op. at 24 & n.8. If a government is concerned about "public safety risk created when protestors obstruct driveways," it must simply use laws that prohibit blocking driveways. *Id.* slip op. at 24–25. The government's "interest in preventing congestion in front of abortion clinics" can be served by "more targeted means" such as ordinances that require crowd dispersal. *Id.* slip op. at 26. The government also fails narrow tailoring due to the

availability of "generic criminal statutes forbidding assault, breach of the peace, trespass, vandalism, and the like." *Id.* slip op. at 25. And narrow tailoring is undermined by the availability of "targeted injunctions as alternatives to broad, prophylactic measures." *Id.* If the City of Madison had an actual history of people causing real problems (the legislative record cites none), it could pursue tailored and targeted injunctions against those persons.

Here the City relies on exactly the same inadequate interests shot down in *McCullen*, which does not allow addressing those alleged problems by restricting speech on the sidewalk.

Fourth, *McCullen* rejects, as too dismissive of First Amendment interests, the government's response that other methods of regulation just won't work. *Id.* slip op. at 27–28. A government does not pass narrow tailoring if it "has not shown that it seriously undertook to address the problem with less intrusive tools readily available to it." *Id.* slip op. at 27. The City of Madison has not tried *any* tools to address the alleged problems outside the Planned Parenthood. This appears to be because those problems do not actually exist, with the legislative record and the City's response brief citing no evidence showing they exist, much less that they require restrictions on leafleting. "To meet the requirement of narrow tailoring, the government must demonstrate that alternative measures that burden substantially less speech would fail to achieve the government's interests, not simply that the chosen route is easier." *Id.* slip op. at 28.

Fifth, quiet leafleting as Plaintiffs seek to do in this case constitutes the most cherished form of speech under the Constitution. "'[O]ne-on-one communication' is 'the most effective, fundamental, and perhaps economical avenue of political discourse.'" *Id.* slip op. at 21 (quoting *Meyer v. Grant*, 486 U. S. 414, 424 (1988)). "When the government makes it more difficult to engage in these modes of communication, it imposes an especially significant First Amendment burden." *Id.* slip op. at 21–22. The "floating" buffer zones imposed by this Ordinance indisputably "make it more difficult" to leaflet and converse, and therefore cannot be

distinguished from *McCullen* to show that the City can satisfy the First Amendment. "It is thus no answer to say that petitioners can still be 'seen and heard' by women within the buffer zones," when under the Ordinance they must not approach within the distance in which one can quietly converse or hand someone a leaflet (neither of which can be done from eight feet away). *Id.* slip op. at 22. In fact, Madison's law impacts one-on-one leafleting worse than in *McCullen*, since in *McCullen*, at 36 feet and farther from the entrance, the sidewalk counselors could fully approach women with no limitation and "begin a discussion outside the zone," *id.* slip op. at 20, but in Madison, Plaintiffs cannot do so unless they are 101 or more feet away from the clinic entrance. Making a leafleter "rais[e] her voice at patients from outside the zone" permitted for conversation causes her to suffer under "a mode of communication sharply at odds with the compassionate message she wishes to convey." *Id.* "[H]anding out leaflets in the advocacy of a politically controversial viewpoint . . . is the essence of First Amendment expression"; "[n]o form of speech is entitled to greater constitutional protection." *Id.* slip op. at 21 (quoting *McIntyre v. Ohio Elections Comm'n*, 514 U. S. 334, 347 (1995)).

The Ordinance must be enjoined to preserve the status quo of free speech in Madison, unless and until the City can meet its burden to satisfy *McCullen*'s narrow tailoring and content-based standards. The legislative record's lack of evidence of actual problems outside the Planned Parenthood on Orin Road, and lack of even the allegation of actual problems on campus or anywhere else in Madison, demonstrate that the City is unlikely to satisfy *McCullen* and therefore that Plaintiffs have demonstrated a clear likelihood of success on the merits. Plaintiffs therefore respectfully urge the Court to issue a temporary restraining order, and require the City to show cause forthwith why a preliminary injunction should not follow under *McCullen*.

Respectfully submitted this 27th Day of June, 2014.

s/Matthew S. Bowman

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CERTIFICATE OF SERVICE

I hereby certify that on June 27, 2014, I promptly caused a copy of the foregoing motion for temporary restraining order and preliminary injunction memorandum of law to be delivered upon counsel for Defendant by means of the Court's electronic filing system.

This the 27th Day of June, 2014.

s/Matthew S. Bowman
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