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

PLAINTIFFS' MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

Plaintiffs Madison Vigil for Life, Inc., Gwen Finnegan, Jennifer Dunnett, Mary Markielewski, Theresa Klinkhammer, Constance Nielsen, Students for Life of Madison, Badger Catholic, Fr. Richard Heilman, Sarah Quinones, and Ryan Woodhouse, hereby move this Court for a temporary restraining order and preliminary injunction.

INTRODUCTION

On February 25, 2014, the City of Madison Common Council passed ordinance #32827, the City of Madison Buffer Zone Ordinance (hereinafter "Buffer Zone ordinance," "Buffer Zone" or "ordinance"). Madison Gen. Ord. 23.01(1) (attached to the Verified Complaint as Exhibit 1). The Buffer Zone creates 320-foot diameter and larger "bubbles" all around the City—

including on State Street, Capital Square, sidewalks and streets on the UW-Madison campus, outside polling places, at the Dane County Farmers Markets, outside hospitals where unions picket, and even outside the City-County Building itself. Within these bubbles the Buffer Zone prohibits approaching within eight feet of someone on the public way or sidewalk to "[p]ass a leaflet or handbill," "[d]isplay a sign," or "[e]ngage in oral protest, education or counseling" without that person's consent. *Id.*

The Buffer Zone creates these anti-speech bubbles on each entrance of any "hospital, clinic or office that is used by a licensed physician," and of any multi-office building containing such entities. *Id*. Physician offices exist on almost every populated street in the City. Each of those offices now bears a 320-foot diameter (160-foot radius) anti-speech bubble extending from every entrance of the building, with buildings themselves sometimes spanning entire city blocks. The Buffer Zone therefore creates anti-speech bubbles spanning 320 feet in diameter at minimum beyond these buildings—and often extending in much larger diameters where the building has multiple entrances. And because new physician offices open in a variety of office buildings and zones, the Buffer Zone ordinance continually gurgles out new anti-speech bubbles on public sidewalks, streets and other public ways throughout the City.

The Buffer Zone therefore converts miles of City sidewalks and public ways into no-leafleting corridors, including portions of State Street, campus and other areas. The City-County Building's own external sidewalks and public ways fall into bubble zones from nearby physicians' offices, effectively banning education and person-to-person free speech activities on issues related to the City Council and its business in those traditional public fora.

The City has cited no sufficient justification for creating even *one* anti-speech bubble in traditional public fora, much less creating hundreds throughout Madison. The First Amendment contemplates no possible justification for such a measure. For decades Madison has been the

scene of robust free speech and exchanges of ideas, including nationally significant demonstrations to the present day. The freedom of speech is at its apex on public streets and sidewalks when citizens wish to persuade other citizens by means of leafleting and personal education. And the City was not able to cite even one arrest or one incident of access-prevention at the Planned Parenthood abortion center where pro-life free speech occurs so as to attempt to justify the bubble zone there.

The government cannot arrogate to itself the power to categorically wall off speaker-initiated free speech from large swaths of public ways and sidewalks just because they happen to be near "health facilities"—meaning any building that happens to have an office used by a physician. No city can convert acres of public ways and sidewalks into anti-leafleting zones. No city can insulate from public education the controversial health research activities by physicians at a major university that is regularly the subject of leafleting about animal experimentation, genetic food modification, human embryonic research and other issues. And no city can target speech based on its content or viewpoint, such as because it consists of "protest" or "education" as opposed to asking for directions or the time of day, or because it is politically motivated against speakers who disagree with the city's views.

Plaintiffs use leafleting, education, counseling and sign displays on public ways throughout Madison in a wide variety of contexts. They distribute handbills on State Street, engage in personal education on sidewalks near Capital Square, display signs and hand out leaflets on sidewalks and public ways running through campus and near buildings with "health" and other offices, offer advocacy and counseling related to abortion, and engage in free speech on public areas outside newsworthy events. The Buffer Zone directly and imminently deprives them and many other citizens of their freedom of speech.

Unless this Court issues a temporary restraining order and preliminary injunctive relief, the Plaintiffs' leafleting and personal education activities on Madison's sidewalks and streets will be squelched, causing irreparable harm to their freedom of speech as protected by the First Amendment of the United States Constitution. The City, however, will suffer no injury from injunctive relief issued against its poorly conceived and unjustified attack on free speech. A temporary restraining order and preliminary injunction will preserve the status quo of robust freedom of speech in Madison, which has caused no cognizable public or personal harm and has instead yielded great public benefit.

STATEMENT OF FACTS

The facts are asserted in the Verified Complaint ("VC"), which constitutes a sworn affidavit executed by Plaintiffs, and is reiterated in the corresponding Statement of Record Facts. Those facts are summarized here.

Plaintiffs engage in various forms of free speech around Madison. Ms. Klinkhammer and Ms. Nielsen supervise and participate with students from St. Ambrose Academy to engage in such speech as distributing leaflets and "pro-life cupcakes" on State Street. VC ¶¶ 96–106. Students for Life of Madison and Badger Catholic are UW-Madison student organizations that engage in many expressions of free speech on public ways on and around campus. VC ¶¶ 107–21. Fr. Richard Heilman leads a regular rally on public areas at Capital Square and State Street. VC ¶¶ 122–34. Ms. Quinones engages in leafleting and education on various causes, distributes handbills in favor of legalizing raw milk, and engages in campaign speech outside polling places and in other locations. VC ¶¶ 144–48, 164–79. Ms. Dunnett likewise engages in leafleting throughout Madison in various locations, and leafleted outside the City-County Building in opposition to the Buffer Zone ordinance itself. VC ¶¶ 72–95, 135–148, 155–58. Mr. Woodhouse engages in leafleting, education and sign-display in various pedestrian locations in

Madison, such as on State Street, campus public areas, and sidewalks in the vicinity of public events like Badger football games. VC ¶¶ 159–67. And Madison Vigil for Life, Inc., Ms. Finnegan, Ms. Dunnett, and Ms. Markielewski collectively engage in almost daily free speech activities to promote the pro-life message to women going to the Planned Parenthood abortion facility on 3706 Orin Road on the East Side. VC ¶¶ 70–95.

On February 25, 2014, the City of Madison Common Council passed the Buffer Zone ordinance, Madison Gen. Ord. 23.01, by unanimous voice vote. VC ¶ 24. The ordinance goes into effect imminently. VC ¶ 25. The Buffer Zone ordinance creates an untold number of "bubble" areas throughout Madison where person-to-person free speech is restricted. VC ¶ 26. The Buffer Zone creates a bubble spanning 320 feet in diameter from any "entrance to a health care facility." VC ¶¶ 27–28. (Mathematically [πr^2] this means each bubble can reach 80,000 sq. ft. in area.) The Buffer Zone defines "health care facility" as including any "hospital, clinic, or office that is used by a licensed physician." VC ¶ 29. "Where an office used by a facility is located in a multi-office building, the common areas of the entire building shall also be deemed a health care facility." VC ¶ 30. Thus when a building housing a "health care facility" has multiple entrances, the Buffer Zone creates multiple bubbles, one for each entrance. VC ¶ 32.

The Bubble Zone ordinance creates scores or even hundreds of speech-restrictive bubbles throughout the City, including in the heart of downtown Madison. VC ¶ 33. Licensed physicians use offices in buildings with entrances on State Street, Capital Square, University Avenue, the UW-Madison campus, near farmers' markets, next to the City-County Building itself, and on countless streets throughout Madison. VC ¶ 34. For example, according to internet listings of offices used by physicians or health entities, the Buffer Zone creates speech-restricted bubbles around:

- 341 State Street (a multi-office stretching around State and Gorham);
- 14 West Mifflin Street (near State and Capital Square);
- 1 West Wilson Street and 315 Martin Luther King Junior Blvd. (adjacent to the City-County Building);
- The entire block between University Avenue, N. Lake Street, W. Johnson Street, and E. Campus Mall, which houses UW Student Government and student organizations;
- Large portions of public sidewalks and public ways through the UW-Madison campus such as the Medical Sciences Center and research buildings filling the block at University Avenue, N. Charter Street and Linden Drive;
- The Wisconsin National Primate Research Center at 1220 Capital Court;
- Numerous polling places, such as St. Mary's Care Center, 3401 Maple Grove Drive, and Meriter McKee Clinic, 3102 Meriter Way; and
- The UW Hospital and Clinics.

VC ¶ 35.

Within each one of the Buffer Zone's 320-foot wide bubbles, the ordinance makes it "unlawful for any person" to "[i]ntentionally approach another person to within eight (8) feet without consent for the purpose of" "doing any of the following on a public way or sidewalk area," namely, to "[p]ass a leaflet or handbill to the person," "[d]isplay a sign to the person," or "[e]ngage in oral protest, education or counseling with the person." VC ¶ 36. Thus the Buffer Zone prohibits speaker-initiated leafleting and person-to-person education (both of which occur without advance consent and closer than eight feet from the recipient). VC ¶ 37. Violators of the Buffer Zone's prohibitions "shall be subject to a forfeiture of not less than fifty dollars ($50) nor more than one thousand dollars ($1000)." VC ¶ 46. The Buffer Zone ordinance authorizes incarceration of violators and imposes a schedule of bail deposits amounting to $300 for the first offense, $500 for the second, and $750 for the third. VC ¶ 47.

The City Council enacted the Buffer Zone out of disagreement with "anti-choice" persons engaging in free speech outside the Orin Road Planned Parenthood, and specifically Plaintiff Madison Vigil for Life. VC ¶¶ 48–52 (quoting the ordinance's primary sponsor Rep. Lisa Subeck). But the City had no evidence of any arrests or disruptions of access to that facility, and that facility's entrance is already set back approximately 50 feet from the public sidewalk by the facility's property line. VC ¶¶ 53–54. Despite lacking any evidence of the need for the buffer zone at the abortion facility on Orin, the City was well aware of the extensive demonstrations occurring in Madison in the past three years that have involved tens of thousands of people, arrests, medical emergencies, harassment and even death threats, and large disruptions of traffic and access through public areas. VC ¶¶ 59–67. Yet the City, not caring to restrict speech due to actual disruption, chose not to create Buffer Zone bubbles triggered specifically by large demonstrations, or in the Capital Square vicinity.

The Buffer Zone ordinance therefore creates imminent and irreparable harm to the free speech activities of Plaintiffs. Unless this Court issues temporary and preliminary injunctive relief, the Buffer Zone ordinance will chill and punish Plaintiffs' speech in the most active zones of free speech activity that have existed in Madison for decades. VC ¶¶ 7, 93, 104, 120, 133, 147, 157, 166, 178, 184, 185. For the same reasons it will chill the speech of other speakers not before the Court, who are swept into this overbroad ordinance. The City, however, will suffer no injury from injunctive relief, which will merely preserve the status quo of robust freedom of speech in Madison. VC ¶ 7.

ARGUMENT

In seeking a temporary restraining order or a preliminary injunction, a movant is required to show (1) no adequate remedy of law and that he will suffer irreparable harm if the preliminary injunction is not granted, and (2) some likelihood of success on the merits. *ACLU of Illinois v.*

Alvarez, 679 F.3d 583, 589 (7th Cir. 2012) (internal citation and quotations omitted). The interests of the public are also to be considered, as well as any harm that could come to the non-movant if the injunction is granted. *Id*. If the claim derives from the First Amendment, as here, a showing of likelihood of success will often be the determining factor. *Id*. (internal citation and quotations omitted). "Consistent with the Seventh Circuit's approach, this court applies a sliding scale in weighing whether preliminary relief is warranted." *Van Hollen*, 2013 WL 3992907, at *5 (citing *Hoosier Energy Rural Elec. Coop., Inc v. John Hancock Life. Ins. Co*., 582 F.3d 721, 725 (7th Cir. 2009); *Girl Scouts of Manitou Council, Inc. v. Girl Scouts of USA, Inc.*, 549 F.3d 1079, 1100 (7th Cir. 2008)). [1]

Plaintiffs satisfy each of the factors of the injunction standard. They face imminent and irreparable harm to their constitutional right to the freedom of speech. First Amendment freedoms are always in the best interest of the public and the loss of which invariably constitutes irreparable harm to the movant. *Alvarez*, 679 F.3d at 589. It is undisputed 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, 373–74 (1976). The City faces no harm from injunctive relief since Madison has been home to extensive free speech for decades without this ordinance, and the City has zero evidence of harm occurring outside the abortion facility on the East Side. On the contrary, the City is aware of extensive public harm from free speech downtown, including hundreds of arrests, crowds numbering in the tens of thousands, medical emergencies, harassment and congestion in those crowds. And the City faces no harm from injunctive relief

[1] "When an opposing party receives notice of an application for a TRO," as the undersigned certifies he has delivered to the Madison City Attorney, "the court treats the motion as a request for a preliminary injunction." *Planned Parenthood of Wisconsin, Inc. v. Van Hollen*, No. 13-cv-465, 2013 WL 3992907, at *6 (W.D. Wis. July 8, 2013) (citing *Levas & Levas v. Antioch*, 684 F.2d 446, 448 (7th Cir. 1982)). The same showing is required to obtain either a TRO or a preliminary injunction. *Id*. (internal citations omitted).

awarded to protect persons not before the Court who are swept into the law's overbreadth. Accordingly, this memorandum focuses on the merits of Plaintiffs' claims.

I. THE BUFFER ZONE ORDINANCE VIOLATES THE FREEDOM OF SPEECH.

Plaintiffs have established a likelihood of success on the merits because the Buffer Zone ordinance violates the right to freedom of speech, both on its face and as applied to Plaintiffs. The Buffer Zone ordinance prevents Plaintiffs from engaging in a panoply of leafleting and educational activities on miles of public sidewalks throughout Madison, including some of the most central areas for free speech activity such as State Street, the sidewalks around East Campus Mall and the Student Government offices, Capital Square, the City-County Building, polling places, and outside of abortion facilities where personal, peaceful education and leafleting has occurred without incident for years.

A. Plaintiffs' expression is entitled to protection.

Plaintiffs' desired expression of leafleting and education on the public sidewalk, from religious and other perspectives, is protected by the First Amendment to the United States Constitution. "Leafleting and commenting on matters of public concern are classic forms of speech that lie at the heart of the First Amendment, and speech in public areas is at is most protected on sidewalks, a prototypical example of a traditional public forum." *Schenck v. Pro-Choice Network of W. N.Y.*, 519 U.S. 357, 377 (1997). The right to advocate, persuade, or share a religious viewpoint implicates the very reason the First Amendment was adopted. *Thomas v. Collins,* 323 U.S. 516, 537 (1945). The speech of Plaintiffs is clearly entitled to constitutional protection.

B. The public ways and sidewalk areas are traditional public fora.

Constitutionally permissible regulation of protected speech depends in significant part on the location of the speech. *Frisby v. Schultz*, 487 U.S. 474, 479 (1988). The Buffer Zone

ordinance bans certain speech in a "public way or sidewalk area" outside of any "health care facility," and therefore Defendants are prohibiting speech within a "traditional public forum," where the government's ability to restrict expression is at its lowest.

Traditional public fora are places such as streets, parks, and sidewalks, which "have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." *Shuttlesworth v. City of Birmingham*, 394 U.S. 147. 152 (1969) (quoting *Hague v. C.I.O*, 307 U.S. 496, 515-16 (1939)); *see also Ill. Dunesland Preservation v. Ill. Dept. of Natural Resources*, 584 F.3d 719, 723 (7th Cir. 2009). "Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens." *Id*. Therefore, this right "must not, in the guise of regulation, be abridged or denied." *Id*. Such traditional public fora "are open for expressive activity regardless of the government's intent." *Ark. Educ. Television Comm'n v. Fobes*, 523 U.S. 666, 678 (1998).

The public way and sidewalk areas implicated in this case are innumerable. They include sidewalks and public areas through campus, State Street, Capital Square, outside the City-County Building itself, polling places, and where people speak on the issue of abortion outside the one abortion facility in Madison, Planned Parenthood on Olin Road. These areas are so numerous because the ordinance applies massive anti-speech zones outside each entrance of every building housing a "hospital, clinic, or office that is used by a licensed physician." The ordinance therefore creates hundreds of these bubbles throughout the city.

C. The Buffer Zone ordinance violates the First Amendment by imposing massive and unjustified restrictions on quintessential speech in traditional public fora.

The Buffer Zone ordinance violates all three requirements on a speech restriction on public ways and sidewalks. A restriction on speech in a traditional public forum must, at

minimum, (1) be narrowly tailored to serve a significant governmental interest, (2) allow for ample alternative channels for the expression, and (3) be content neutral. *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989).

1. The Buffer Zone ordinance is the opposite of a narrowly tailored rule.

The Buffer Zone's creation of hundreds of no-leafleting bubbles throughout Madison is the opposite of a narrowly tailored restriction.

Because traditional public fora occupy a "special position in terms of First Amendment protection," the City's ability to restrict leafleting, education, and other speech on public sidewalks and ways "is very limited." *Boos v. Barry*, 485 U.S. 312, 318 (1988). When a law impinges on First Amendment rights, "government may regulate only with narrow specificity." *NAACP v. Button*, 371 U.S. 415, 433 (1963). Action taken to remedy an alleged "evil" will be considered narrowly tailored "if it targets and eliminates no more than the exact source of the evil it seeks to remedy." *Frisby v. Schultz,* 487 U.S. 474, 485 (1988). The government must not "regulate expression in such a manner that a substantial portion of the burden on speech does not serve to advance its goals." *Ward*, 491 U.S. at 799. A complete ban is not narrowly tailored unless "each activity within the prescription's scope is an appropriately targeted evil." *Frisby*, 487 U.S. at 485. "If a less restrictive alternative would serve the Government's purpose, the legislature *must use that alternative*." *Playboy Entm't Grp., Inc.,* 529 U.S. at 813 (2000) (emphasis added).

When an ordinance violates narrow tailoring on its face, it is considered substantively overbroad. An ordinance is facially overbroad if "a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep." *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 449 n.6 (2008). The overbreadth doctrine prohibits laws that "sweep unnecessarily broadly and thereby invade the area of

protected freedoms." *NAACP v. Alabama*, 377 U.S. 288, 307 (1964). Accordingly, a law is void for overbreadth where it "does not aim specifically at evils within the allowable area of [government] control but . . . sweeps within its ambit other activities that in ordinary circumstances constitute an exercise" of protected rights. *Alabama v. Thornhill*, 310 U.S. 88, 97 (1940).

The Buffer Zone ordinance is substantively overbroad on its face for two reasons. First, it converts Madison into an archipelago of no-leafleting, no-approach bubble islands, including in the heart of Madison's downtown area where free speech has been central to the public life of Wisconsin for decades. This is the very definition of a law in which "a substantial number of its applications are unconstitutional, judged in relation to" the scope of the law that the City considers legitimate. The City Council did not even attempt to justify the ordinance except with respect to the one abortion facility in Madison that is located on a remote street all the way on the East Side of town, the Planned Parenthood on Olin Road. Even with regard to that location, the City proffered absolutely no evidence of "an appropriately targeted evil" because no disruption, arrests or blockage of access has ever occurred there (due to the facility's existing large buffer of private property). But the Bubble Zone ordinance is especially facially overbroad for drowning Madison in anti-speech bubbles not even theoretically related to a City interest.

The City Council utterly failed—and did not even try—to justify the creation of anti-speech bubbles on State Street, Capital Square, public ways through campus including outside Student Government, outside the City-County Building itself, at polling places beyond the 100-foot electioneering limit, at farmers markets, outside Badger football games and other public events, outside medical science campus buildings and primate research facilities, at labor disputes against hospitals, and on and on and on. The Buffer Zone creates speech restrictions in all these vicinities because according to its terms, any building housing any office used by a

physician, or a clinic or hospital, generates a 320 foot anti-speech bubble around each of the buildings entrances. Licensed physicians have offices on practically every non-residential street in Madison (and many residential streets, too).

The City's flood of anti-speech bubbles submerge Madison in "geographic overbreadth." This is demonstrated by *Comite de Jornaleros de Redondo Beach v. City of Redondo Beach*, where a city passed a citywide anti-solicitation ordinance to promote traffic flow and safety. 657 F.3d 936, 947–48 (9th Cir. 2011). But the Ninth Circuit invalidated this ordinance because it was "geographically overinclusive. The Buffer Zone ordinance applies citywide to all streets and sidewalks in the City, yet the City has introduced evidence of traffic problems only with respect to a small number of major streets and medians.… [W]e cannot simply assume that the City's other streets, alleys, and sidewalks allegedly suffer from similar solicitation-related traffic problems." *Id*. at 949. *See, e.g., Ohio Citizen Action v. City of Englewood*, 671 F.3d 564, 572 (6th Cir. 2012) (invalidating ban on door-to-door canvassing between 6 P.M. and 9 A.M. because there was no evidence "that residents are particularly protective of their privacy after 6 P.M.").

As demonstrated in the complaint, Plaintiffs engage in speech in this vast array of locations where the City has now hobbled their efforts. Badger Catholic and Students for Life of Madison engage in a wide berth of free speech activities in such locations as State Street, outside the building where Student Government resides and students organizations frequently leaflet, outside the medical sciences campus and similar locations, all of which have 320 foot diameter bubbles and larger. Ms. Dunnett engages in free speech in various parts of town, even outside the City-County Building the night its Bubble Zone was passed, but that area (which includes farmers market pedestrians) is now surrounded by anti-speech bubbles. Ms. Nielsen and Ms. Klinkhammer supervise and participate with students handing out "pro-life cupcakes" and

leaflets on State Street. Fr. Heilman engages in speech at Capital Square and State Street, which also draws disagreeing speech at the same event, but both kinds of speech are now impacted by a bubble on W. Mifflin. Mr. Woodhouse engages in free speech in many such high-traffic locations, such as State Street, campus public ways, and in the neighborhoods outside Camp Randall. All these areas—like all areas of the City—are bloated with anti-speech bubbles created by buildings having an office used by a licensed physician.

The City's bubbles effectively scrub Madison clean of leafleting and personal education. From eight feet away it is impossible to hand a leaflet to someone, discuss with them the details of an important public issue, or even seek "consent" in a conversational tone. In crowded locations—as most of these free speech bubble-hubs are—it is not even possible to stay eight feet away from passersby, and therefore all speech is prohibited because the speaker cannot back up far enough away to be free of the accusation that she "approached" her proximate listeners when she opened her mouth, offered her leaflet or displayed her sign.

The City has no evidence whatsoever that pro-life cupcakes and leaflets distributed on State Street present an "evil" that rises to some kind of "significant interest" to justify the Buffer Zone as a narrowly tailored restriction. It has no evidence of any harm caused by religious, pro-life, or any-viewpoint speech on campus ways, outside the Student Government building, or outside the Medical Sciences Center or primate research facilities. It has no evidence that Mr. Woodhouse, Ms. Quinones and Ms. Dunnett harm the public by their speech in various locations around Madison such as State Street, beyond polling places or outside the City-County Building. It has no evidence that Fr. Heilman's Rosary Rally at Capital Square and State Street present a public harm that requires they be banned from approaching passersby with leaflets.

Not only did the City fail to justify inundating the City with anti-speech bubbles, the City could not possibly justify such a rule. City parks, city streets, the public square, and numerous

other places deluged with these bubbles "have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." *Shuttlesworth,* 394 U.S. at 152 (quoting *Hague*, 307 U.S. at 515-16). And preserving freedom of speech on public areas around campus is integral to maintaining a marketplace of ideas. *See, e.g., Keyishian v. Bd. of Regents of Univ. of State of N.Y.*, 385 U.S. 589, 603 (1967); *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957).

2. The Buffer Zone ordinance is not narrowly tailored outside the Planned Parenthood on Olin Road.

Even outside the City's one abortion facility, narrow tailoring fails due to the City's complete dearth of evidence of a problem. The City "must demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way." *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 664 (1994). But the City has no evidence of any problem at all, except that some people dislike pro-life speech.

The Buffer Zone ordinance's restriction on speech outside the Planned Parenthood on Olin Road fails to "target[] and eliminate[] no more than the exact source of the evil it seeks to remedy," *Frisby,* 487 U.S. at 485, for several apparent reasons. First, this Planned Parenthood facility already has a large buffer zone of private property, approximately 50 feet, between it and the public ways and sidewalks where people engage in leafleting, because the entrance is set back that far (apparently by deliberate design of the owners). The Buffer Zone ordinance can only be justified if the City shows that an even larger buffer is needed to shield women from speech that they are already 40 or feet away from when they walk into the door.

Second, the City failed to put forward any concrete justification at all for the need for a larger buffer than the existing property line. The City did not produce evidence of even one person arrested trying to block the door or the driveway, one incident where a woman had

trouble accessing the facility, or one example where a crowd prevented access to the facility. In fact none of those instances exist, much less are caused by a handful of leafleters, in the decade since this facility opened. Thus the City failed to show that alleged problems outside Planned Parenthood are "real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way." There is no "evil" here for the City to remedy. Every woman going into that facility is already shielded by a large private property buffer zone between her and the public sidewalk, and no evidence of harm outside that property line exists at all. "[M]erely invoking interests … is insufficient," they must be demonstrated. *Kuba v. 1-A Agr. Ass'n*, 387 F.3d 850, 859 (9th Cir. 2004).

Third, the City made its bubble almost three times as large than the bubble zone created in *Hill v. Colorado*, 530 U.S. 703 (2000). That bubble was only 100 feet in radius, this one is 160. *Id.* at 707. By size, that means Madison created a bubble over 80,000 square feet in size, compared to *Hill*'s 31,415 square foot bubble. In contrast, the City has no evidence to justify even a *Hill*-sized bubble, because it has no evidence of arrests or impeded access or large confrontational demonstrations at all, whereas in *Hill* the Court relied significantly on "hearings that preceded the enactment of the statute," from "the testimony of both supporters and opponents of the statute," and tailored to the specific abortion facilities in question, "that demonstrations in front of abortion clinics impeded access to *those clinics* and were often confrontational." *Id.* at 709 (emphasis added).

The City has not borne its "extraordinarily heavy burden to regulate speech in" this traditional public fora. *Long Beach Area Peace Network v. City of Long Beach*, 574 F.3d 1011, 1022 (9th Cir. 2009). The City Council considered City "no empirical studies, no police records, no reported injuries, nor evidence of any lawsuits filed [and] fails to explain why there were no disturbances or problems … during the period prior to enforcement of the ordinance. Using a

speech restrictive blanket with little or no factual justification flies in the face of preserving one of our most cherished rights." *Weinberg v. City of Chicago*, 310 F.3d 1029, 1039 (7th Cir. 2002). "Where, as here, the governmental entity has no basis in the record for expecting more than a handful of protestors to show up, the significance of the state interest in the congestion and safety issues is questionable." *Kuba*, 387 F.3d at 856.

Because this evidence is lacking here while it existed in *Hill*, 530 U.S. at 709, and because the 80,000+ sq. ft. bubbles are almost three times as big as the 31,000 sq. ft. bubbles in *Hill*, the City cannot use *Hill* to justify its ordinance. Instead this Court should look to applicable cases. The Supreme Court found a statute similarly constitutionally flawed in *United States v. Grace*, which struck down a ban on the display of any "flag, banner, or device" on the Supreme Court grounds and surrounding public sidewalks because it did not substantially serve the purposes asserted by the government. 461 U.S. 171, 183-84 (1983). The purpose of the Act was to "provide for the protection of the building and grounds and the persons and property therein, as well as the maintenance of proper order and decorum." *Id*. at 182. The *Grace* Court noted that there was no suggestion that "appellees' activities in any way obstructed the sidewalks or access to the Building, threatened injury to any person or property, or in any way interfered with the orderly administration of the building or other parts of the grounds." *Id*. The Court concluded that the statute had an "insufficient nexus with any of the public interests that may be thought to undergird [the statute]." *Id*. at 181. Similarly, in this case, the Buffer Zone ordinance has an "insufficient nexus with any of the public interests" asserted by Defendants. *Id*. Quite frankly, there is *no* nexus. The City's allegations about prevention of access and the need for a buffer are empty. They are supported by no incidents that have occurred at this facility, and the physical plant contradicts the City's suggestion by showing that the property line already has a large buffer area between the entrance and the public sidewalk.

Following *Grace*, the Supreme Court struck down overbroad restrictions on speech in public fora outside abortion facilities. *See Madsen v. Women's Health Ctr., Inc*., 512 U.S. 753 (1994); *Schenck*, 519 U.S. at 357. In *Madsen*, the Supreme Court struck down a provision against "uninvited approaches" in an injunction[4] entered by a Florida state court against pro-life speakers concerning a particular abortion facility. 512 U.S. at 757–58. According to the *Madsen* Court, "[I]t is difficult, indeed, to justify a prohibition on *all* uninvited approaches of persons seeking the services of the clinic, regardless of how peaceful the contact may be, without burdening more speech than necessary to prevent intimidation and to ensure access to the clinic." *Id*. at 774. "Absent evidence that the protesters' speech is independently proscribable (*i.e*., "fighting words" or threats), or is so infused with violence as to be indistinguishable from a threat of physical harm, this provision cannot stand." *Id*. (citation omitted). The Court concluded, "[t]he 'consent' requirement alone invalidates this provision; it burdens more speech than is necessary to prevent intimidation and to ensure access to the clinic." *Id*.

The constitutional defect that the *Madsen* Court found in the prohibition against "uninvited approaches" is repeated in the Buffer Zone ordinance, because it prohibits Plaintiffs from approaching others without obtaining their consent. The consent requirement is especially egregious in this case where Plaintiffs cannot obtain consent to approach a woman contemplating abortion – even where she is a willing listener – because a boyfriend, family member, friend, or facility escort that is walking side by side with the woman may deny consent. Like the *Madsen* Court recognized, Defendants cannot justify their "prohibition on *all* uninvited approaches of persons seeking the services of the clinic, regardless of how peaceful the contact may be, without burdening more speech than necessary to prevent intimidation and to ensure access to the clinic." *Id*. at 774.

In *Schenck*, the Supreme Court struck down floating buffer zones around individuals and vehicles outside abortion facilities because they "burden[ed] more speech than necessary to serve the relevant governmental interests." 519 U.S. at 379. In the Court's view, the "floating buffer zones prevent defendants—except for two sidewalk counselors, while they are tolerated by the targeted individual—from communicating a message from a normal conversational distance or handing leaflets to people entering or leaving the clinics who are walking on the public sidewalks." *Id*. at 377. Here, the Buffer Zone ordinance does not even contain an exception for even one sidewalk counselor to enter the restricted area and engage in speech.

The Buffer Zone ordinance ignores the fundamental principle that Plaintiffs does not lose their First Amendment rights at the edge of the public way and sidewalk areas outside abortion facilities. *See, e.g*., *Grace*, 461 U.S. at 184 ("[v]isitors to this Court do not lose their First Amendment rights at the edge of the sidewalks any more than 'students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate'" (Marshall, J., concurring in part and dissenting in part) (citation omitted)).

That is what the Buffer Zone ordinance represents: a restriction speech *merely* because it happens near an abortion facility, without of evidence of an "evil" that the ordinance is necessary to curb. "When a citizen is 'in a place where [he] has every right to be,' he cannot be denied the opportunity to express his views simply because the government has not chosen to designate the area as a forum for public discussion." *Id*.

3. The Buffer Zone ordinance is also massively underinclusive.

A law is not narrowly tailored if it ignores actual "harm" and targets other harm of the same kind that has less evidence for its existence. "Underinclusiveness raises serious doubts about whether the government is in fact pursuing the interest it invokes, rather than disfavoring a

particular speaker or viewpoint." *Wisconsin Educ. Ass'n Council v. Walker*, 705 F.3d 640, 651 (7th Cir. 2013).

In the last three years the City of Madison has been the site of protests featuring tens and sometimes more than a hundred thousand people, hundreds of arrests, anger and harassment of political opponents (even death threats), medical emergencies, and disruption of access to streets, sidewalks and business entrances. Yet the City of Madison chose in the Bubble Zone ordinance *not* to attach an anti-speech bubble to, for example, any public protest featuring 1,000 or more people, or any protest near a location where 10 or more protest arrests have occurred in the last year, so as to protect people coming and going from local establishments. The City of Madison likewise chose *not* to attach a bubble 160 feet around Capital Square as such, to protect the constitutional right of citizens to go to the Capital unmolested and unharassed, either to lobby their representatives or to serve as a representative or staff. Instead the City, ostensibly because of concern due to disruptive free speech, chose only to attach bubbles to physicians' offices, because it wanted to drive a political agenda against pro-life people outside the Planned Parenthood where no disruption actually occurs.

In ignoring actual disruption that has occurred under the very nose of the City-County Building, and instead reaching out to Olin Road where no such disruption occurs due to Plaintiffs' speech, the City demonstrated that its Bubble Zone ordinance does not "target[] and eliminate[] no more than the exact source of the evil it seeks to remedy," or "regulate only with narrow specificity," as required by the First Amendment.

D. The Buffer Zone fails to leave ample alternative channels of speech open.

The Buffer Zone's hundreds of anti-speech bubbles fail to leave ample alternative channels of speech open to Plaintiffs and others. Leafleting and personal education on the public sidewalk are irreplaceable methods of persuading fellow citizens on issues of public concern.

"The First Amendment protects the right of every citizen to 'reach the minds of wiling listeners and to do so there must be opportunity to win their attention.'" *Heffron v. Int'l Soc'y for Krishna Conciousness, Inc*., 452 U.S. 640, 655 (1981) (quoting *Kovacs v. Cooper*, 336 U.S. 77, 87 (1949)). "The simple fact that [a speaker] is permitted to communicate his message elsewhere does not end [the] analysis if the intended message is rendered useless or is seriously burdened." *Weinberg v. City of Chicago*, 310 F.3d 1029, 1041 (7th Cir. 2002) (citing *City of Ladue v. Gilleo,* 512 U.S. 43, 56-57 (1994); *Bay Area Peace Navy v. United States*, 914 F.2d 1224, 1229 (9th Cir. 1990)).

"Whether an alternative is ample should be considered from the speaker's point of view," and not from the government's. *Weinberg*, 310 F.3d at 1041. An alternative is not adequate if it "foreclose[s] a speaker's ability to reach one audience even if it allows the speaker to reach other groups." *Gresham v. Peterson,* 225 F.3d 899, 907 (7th Cir. 2000). Therefore, evidence demonstrating that speakers are able to disseminate their message to the *public at large* is unequivocally insufficient to prove alternative avenues of communication are adequate to disseminate message to *specific audiences*.

The Buffer Zone ordinance bans speaker-initiated leafleting and person-to-person education in new 80,000 sq. ft. bubbles created on campus, State Street, the City-County Building, Capital Square, outside university buildings, and in many other locations where the public walks through Madison. The "alternatives" to leafleting and education in these places are wholly inadequate. Yelling at someone on State Street from eight feet away is not an alternative to quietly approaching to leaflet or speak with them at a conversational distance. Screaming for permission to leaflet someone from eight feet away outside the Student Government building is not an alternative politely approaching passersby to offer them leaflets and converse with those who stop. On a crowded public sidewalk like farmers market sidewalks, campus areas between

classes, or on streets around public events, the Buffer Zone ordinance gives speakers no alternative channel of speech at all because there is *never* a time when the speaker is eight or more feet away from all nearby persons, so all of their leaflet offering, education, and sign display will be potentially an "approach" to someone who is already too close to them.

The Buffer Zone ordinance falsely assumes that leafleting occurs towards persons who have either given consent or refused consent. In fact nearly all leafleting occurs with an audience that has not yet done either. They might not even know the leafleting is occurring until the leaflet is offered to them within a space where they can take it. Distributing handbills on the public sidewalk is effectively banned when it cannot be done within eight feet of persons unless the speaker gets that person's advance consent from eight feet away—which is likewise virtually impossible. *See, e.g., Mainstream Marketing Services, Inc. v. F.T.C.*, 358 F.3d 1228, 1242-43 (10th Cir. 2004) (distinguishing between "opt-in" and "opt-out" regulations and explaining that First Amendment ensures the latter). Handbilling has been arguably the most core form of free speech since the invention of the printing press. The City cannot casually create a flood of anti-leafleting bubbles all over Madison and claim that it somehow leaves alternative channels of communication open.

It is noteworthy that in *Hill*, the statute allowed speakers to walk right up to the door of the facility, such that "demonstrators with leaflets might easily stand on the sidewalk at entrances (without blocking the entrance) and without physically approaching those who are entering the clinic." 530 U.S. at 703. But the entrance to the Planned Parenthood on Olin Road is set back from the public sidewalk approximately 50 feet. The Buffer Zone ordinance, as applied to this address, therefore does not leave open the alternative left open in *Hill*, to stand right "at entrances." Put another way, the Buffer Zone ordinance is unnecessary when there is already a large natural buffer. This is why the City could not demonstrate a single arrest or incident where

access was prevented or women had no buffer between the public way and the entrance. The Buffer Zone ordinance as applied here restricts the only remaining channel of speech available to the VFL Plaintiffs: person-to-person approach for leafleting and education as persons pass by them 50 or more feet away from the building's entrance.

Finally, the U.S. Supreme Court is has granted certiorari and heard oral argument in a case that not only reviews an abortion facility buffer zone, but that raises the specific question presented whether to overturn *Hill*. *McCullen v. Coakley*, No. 12-1168 (S. Ct. oral argument Jan. 15, 2014). Therefore the Court will issue its ruling by the end of June, and most likely much sooner. The Buffer Zone ordinance here should be enjoined at least pending the outcome in *McCullen* (if not for the duration of the case), to preserve efficient use of judicial resources until direct and up-to-date guidance is offered by the Court. The City will suffer no harm by waiting a few more months to enforce a law that has never existed in Madison and is supported by no evidence of actual harms to abortion access.

E. The Buffer Zone ordinance is content based and fails strict scrutiny.

"Any content-based exclusion of speech" in a traditional public forum "is subject to strict scrutiny, meaning that the government must show the exclusion is necessary to serve a compelling state interest that is narrowly drawn to achieve that interest." *Surita v. Hyde*, 665 F.3d 860, 870 (7th Cir. 2011) (citing *Perry Educ. Ass'n*, 460 U.S. at 45).

1. The Buffer Zone ordinance is targeted at the pro-life content and viewpoint of the VFL Plaintiffs' speech.

In enacting the Buffer Zone ordinance against Plaintiffs, the City impermissibly engaged in discrimination based on the content, as well as the viewpoint, of the speech of Plaintiffs. The Buffer Zone o is therefore subject to strict scrutiny.

As a general rule, regulations that permit the government to discriminate on the basis of content cannot be tolerated under the First Amendment. *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 118 (1991). "The First Amendment means that the government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Police Dept. of City of Chicago v. Mosley*, 408 U.S. 92, 95 (1972); *see also R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992) ("Content-based regulations or presumptively invalid.")

Viewpoint discrimination is "an egregious form of content discrimination" and is a "blatant" First Amendment violation. *Rosenberger v. Rectors and Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995). Viewpoint-based restrictions, such as those "based on hostility—or favoritism—towards the underlying message expressed are impermissible under the First Amendment. *R.A.V.*, 505 U.S. at 386. The "First Amendment does not permit [the government] to impose special prohibitions on those speakers who express views on disfavored subjects." *Id.* at 391; *see also Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 46 (1983) (holding that the government cannot "suppress expression merely because public officials oppose the speaker's view."). "[T]he government *must abstain* from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction." *Rosenberger*, 515 U.S. at 829 (emphasis added). The "principal inquiry . . . is whether the government has adopted a regulation of speech because of disagreement with the message it conveys." *Rock Against Racism*, 491 U.S. at 791.

The record in this case demonstrates that the Buffer Zone ordinance was adopted due to a disagreement with the pro-life message of speakers such as Plaintiffs. The City brazenly admitted in offering its rationales that the Buffer Zone ordinance is a target against the pro-life people, specifying Plaintiff Madison Vigil for Life, because they engage in free speech against

abortion outside the Planned Parenthood. *See, e.g.*, VC ¶¶ 50–52. Lacking any evidence of public disruptions or prevention of access due to these speakers, the City's rationale is supported by nothing more than disapproval of the VFL Plaintiffs' viewpoint. This violates the First Amendment, which "prevents government from proscribing speech or even expressive conduct because of disapproval of the ideas expressed." *R.A.V.*, 505 U.S. at 382.

2. No compelling government interest exists or is narrowly advanced.

The City has no compelling government interest to target pro-life speakers outside Planned Parenthood. The compelling interest inquiry can only be satisfied where the law at issue serves interests "of the highest order." *Lukumi*, 508 U.S. at 546. The government can survive strict scrutiny only if it can "identify an 'actual problem' in need of solving" and prove that the restriction on free speech is "actually necessary to the solution." *Brown v Entm't Merchs. Ass'n*, 131 S. Ct. at 2738. The government "bears the risk of uncertainty", and therefore "ambiguous proof will not suffice." *Id*. at 2738-39. "Only the gravest abuses, endangering paramount interests, give occasion for permissible limitation" of the fundamental right to free speech." *Thomas v. Collins*, 323 U.S. 516, 530 (1945).

As discussed above, the City has no evidence at all, much less compelling evidence, that the pro-life speech outside Planned Parenthood on Olin Road impedes access to women. The property line already creates a large buffer between the sidewalk and the entrance. There is no history or arrests or the blocking of doors or any inability of women to access the facility. There is no evidence of any need at all for the ordinance.

The government "may not unduly suppress free communication of views, religious or other, under the guise of conserving desirable conditions." *Cantwell v. Connecticut*, 310 U.S. 296, 308 (1940). The government may only "prevent or punish" speech due to a "clear and present danger of riot, disorder, interference with traffic upon the public streets, or other

immediate threat to public safety, peace, or order." *Id*. Merely disliking pro-life speech does not constitute an actual public reason to restrict it.

F. The Buffer Zone ordinance should be enjoined against application to speakers not before the Court.

Overbreadth has two different meanings. Substantively it refers to a law that is not narrowly tailored, as discussed above. *Cmty. For Creative Non-Violence v. Turner*, 893 F.2d 1387, 1400 (D.C. Cir. 1990) (Williams, J., concurring) (calling substantive overbreadth and non-narrow tailoring "the same thing in different words"). Overbreadth is also, distinctly, a term applied to the standing doctrine so that even if the Court deems Plaintiffs' rights not violated by the ordinance, they may obtain injunctive relief for speakers who are not before the Court but who are nevertheless unconstitutionally chilled in their speech. *Hodgkins v. Peterson*, 355 F.3d 1048, 1056 (7th Cir. 2004).

Plaintiffs hereby ask that if injunctive relief is not granted to them, in the alternative the Court issue a temporary restraining order and preliminary injunction against the ordinance on behalf of other speakers. Free speech, leafleting, sign display, education and protest occur every day in Madison on areas where the Buffer Zone creates its hundreds of speech-scrubbing bubbles: campus, State Street, Capital Square, and many other locations. The City has no justification whatsoever to suppress speaker-initiated leafleting and person-to-person education in all these areas throughout Madison just because there happens to be an office used by a physician or clinic in the recesses of a nearby building—buildings that the City did not even consider in evidence. The Buffer Zone ordinance presents an urgent threat to core First Amendment rights and should be enjoined as technically overbroad for other speakers.

II. THE ORDINANCE VIOLATES THE RIGHT TO DUE PROCESS.

A. The Buffer Zone ordinance is vague.

"It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined." *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972). The vagueness doctrine is premised on due process principles requiring fair notice (*i.e.*, pre-violation warning). *Id*. A law or policy is void for vagueness if it "either forbids or requires the doing of an act in terms so vague that [people] of common intelligence must necessarily guess at its meaning and differ as to its application." *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391 (1926). The vagueness doctrine applies with special force in the First Amendment context. *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 499 (1982). Vague laws offend basic constitutional principles because they act to chill the exercise of First Amendment rights. *Grayned*, 408 U.S. at 109. "[U]ncertain meanings inevitably lead citizens to 'steer far wider of the unlawful zone' . . . than if the boundaries of the forbidden areas were clearly marked." *Id*.(citation omitted).

In this case, the Buffer Zone ordinance prohibits an "approach" within eight feet of persons in the hundreds of bubbles it creates. But the ordinance fails to adequately advise, notify, or inform persons subject to prosecution what behavior constitutes an "approach." How much motion or direction towards such a person constitutes an "approach" that the City will prosecute? Two steps? A half-step? What if the speaker keeps one foot planted but the other moves? What if the speaker's feet are both planted but they lunge their upper body? Is it an "approach" with a sign, or a leaflet, if the speaker pushes the sign or leaflet towards the listener with her arms? On a crowded sidewalk on campus, State Street or Capital Square, where there are always people within eight feet of the speaker, how will the speaker know which people she is "approaching" with her message and which she is not?

Furthermore, which offices are "used" by physicians so as to generate a bubble? Do home offices count? What does the physician have to do at an office? Do the teachers' offices of UW-Madison professors who are licensed physicians count as generating a bubble outside the academic building? Most of the individuals within the restricted 320-foot bubbles feet from the entrance to a health care facility are going to neighboring businesses and establishments, or other offices in the building, not to the physician's office, or they are going to no business at all and are simply passing through. Under the Buffer Zone ordinance, does the "no approach" prohibition apply to all individuals? Or, does it just apply to those who intend to enter the health facility building? Does it apply at all during hours or on days when the health facility is closed but the crowds are still passing by? From a distance of 160 feet up to the entrance door, how is one to know where individual intends to go?

The Buffer Zone ordinance also fails to provide fair notice and warning to individuals as to what words or conduct constitute "consent" and whether the consent requirement applies only to those intending to enter abortion facilities or whether it applies to all individuals within the restricted area. Under the Buffer Zone ordinance, does the "consent" requirement mean that one must receive verbal affirmation such as, "You may approach." Or, is the "consent" requirement met if the speaker makes eye contact with an individual, and she appears to be listening or slows down to talk? The City's failure to define "consent" violates the due process requirement that officials give fair notice of what conduct is prohibited. *Grayned*, 408 U.S. at 108. The Buffer Zone ordinance leaves Plaintiffs to "guess at its meaning" and Madison officials to "differ as to its application." *Connally*, 269 U.S. at 391.

B. The Buffer Zone ordinance grants unbridled discretion.

Defendants' vague Buffer Zone ordinance vests Madison officials with unbridled discretion to restrict Plaintiffs' speech in public ways and sidewalk areas.

The Supreme Court has emphasized that the government cannot "restrict speech in whatever way it likes." *Arkansas Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 682 (1998). "[T]he Constitution requires that the [government] establish neutral criteria to insure that the licensing decision is not based on the content or viewpoint of the speech being considered." *City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 760 (1988). These neutral criteria should be "narrow, objective, and definite standards to guide the [governmental] authority," so that such regulations do not result in an "unconstitutional censorship or prior restraint." *Shuttlesworth*, 394 U.S. at 151. "The reasoning is simple: If the permit scheme 'involves appraisal of facts, the exercise of judgment, and the formation of an opinion,' by the licensing authority, 'the danger of censorship and of abridgment of our precious First Amendment freedoms is too great' to be permitted." *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 131 (1992) (citations omitted). "Without these guideposts, *post hoc* rationalizations by the licensing official and the use of shifting or illegitimate criteria are far too easy, making it difficult for courts to determine in any particular case whether the licensor is permitting favorable, and suppressing unfavorable, expression." *City of Lakewood*, 486 U.S. at 758.

In this case, the Buffer Zone ordinance does not contain "narrow, objective, and definite standards" to guide Madison officials in enforcing the Buffer Zone ordinance. The ordinance severely restricts speech outside of all "health care facilities" including any office used by a physician, which creates bubbles on State Street, campus, Capital Square, the City-County Building, and numerous other locations. But the City's justification for the ordinance was pro-life activity outside the Planned Parenthood on the East Side, and the City is well aware of the large amounts of free speech that go on in these other locations.

The problem with allowing the City to prosecute almost any speech, is that it will use that discretion to decide not to prosecute speech violations in the ordinance's hundreds of bubbles

unless the City disfavors or disagrees with the speaker. Overbroad laws that sweep in massive amounts of constitutionally protected activity empower government officials to harass disfavored free speakers. Nor is this risk speculative, since the City's record in support of this law demonstrates that it desires to target pro-life speech, and indeed it mentioned almost no other speech to justify the ordinance's passage.

CONCLUSION

For these reasons, Plaintiffs respectfully request that this Court grant this Motion for Temporary Restraining Order and Preliminary Injunction.[2]

Respectfully submitted this 26th day of February, 2014,

s/Matthew S. Bowman

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**Pro hac vice motions forthcoming.*

[2] Because the public interest in this case and the lack of the City's entitlement to any damages from an injunction, and all of the other factors that weigh in Plaintiffs' favor, Plaintiffs request that the Court impose a bond of zero dollars in this instance, or a nominal amount. *RoDa Drilling Co. v. Siegal*, 552 F.3d 1203, 1215 (10th Cir. 2009) (court has discretion to order no bond).

CERTIFICATE OF SERVICE

I hereby certify that on February 26, 2014, I promptly caused a copy of the foregoing motion for temporary restraining order and preliminary injunction memorandum of law, along with the accompanying motion, statement of record facts, Verified Complaint, and civil cover sheet, to be delivered by hand on the following:

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