UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

JUDITH MINAHAN and
JOANN O'CONNELL,
Plaintiffs,

v. **Case No**. 2:14-cv-629-JES-DNF

CITY OF FORT MYERS, FLORIDA, and **DAVID CONTICELLI**, Fort Myers Police Officer, in his personal and official capacities,
Defendants.
_____/

PLAINTIFFS' MOTION FOR TEMPORARY RESTRAINING ORDER OR, IN THE ALTERNATIVE, MOTION FOR PRELIMINARY INJUNCTION AND INCORPORATED MEMORANDUM OF LAW

Plaintiffs Judith Minahan and JoAnn O'Connell respectfully request that this Court enjoin Defendants from enforcing against Plaintiffs, and those similarly situated, the City's "loitering ordinance" and the City's policy, practice, or custom that restricts peaceful First Amendment activity in traditional public forums, in particular, on the public sidewalk in front of the Fort Myers Women's Health Center, an abortion clinic. Plaintiffs want to continue to engage in First Amendment activity on that sidewalk as soon as possible without being subjected to unconstitutional restrictions and threats of arrest, citation, and/or fine from Defendants. Doc. 1, Verified Compl. at ¶¶ 32, 57, 58. That is why Plaintiffs are seeking a temporary restraining order (TRO), in addition to a preliminary injunction: so that their rights, which have been irreparably injured *since October 2, 2014*, can be restored immediately while this case proceeds to a resolution of Plaintiffs' motion for a preliminary injunction and then to a resolution of the merits of this action.

Although a TRO may be entered without notice to the opposing party in situations, as here, where Plaintiffs have set forth specific facts in their verified complaint clearly showing that immediate injury will result (and continue) absent the entry of a TRO, *see* Fed. R. Civ. P. 65(b); M.D. Fla. L.R.4.05(a), Plaintiffs have supplied Defendants with notice of this motion, by the means stated in the attached certificate of service. *See* Fed. R. Civ. P. 65(b); M.D. Fla. L.R. 4.05(b)(5). Defendants will be formally served with the verified complaint and summons as soon as possible; the undersigned is waiting to first receive the executed summonses from the Clerk of Court. But, to expedite matters, since Plaintiffs' First Amendment rights are being irreparably injured, and to provide Defendants with notice of all documents filed by Plaintiffs, Defendants have been sent copies of the complaint and other initial filings, Docs. 1, 1-1, 2, 3, by the means listed in the attached certificate of service.

This motion is supported by the incorporated legal memorandum and the verified complaint filed in this action along with the documents on file with this Court in *Minahan v. City of Fort Myers*, Case No. 2:04-cv-551-JES-DNF (*Minahan I*), as part of the conduct this Court ordered Defendants to stop in that action is continuing, as demonstrated herein. Plaintiffs request that no bond be required if an injunction issues. A proposed order granting a TRO has been submitted with this motion. Plaintiffs request oral argument on their motion for a preliminary injunction, if this Court so desires, and estimate that each side will need no more than thirty minutes to present their arguments. *See* M.D. Fla. L.R. 3.01(j).

I. STATEMENT OF FACTS

Plaintiffs have deeply held religious beliefs that abortion takes the life of an innocent child. As motivated by their faith, they pray in traditional public forums for the unborn child,

the child's parents, the end of abortion, and the religious conversion of those involved with the abortion industry. Doc. 1 at ¶¶ 1, 29, 30. Plaintiffs are further motivated by their faith to engage in sidewalk counseling to counsel women, in a non-confrontational manner, about such things as alternatives to abortion and post-abortion healing. Plaintiffs' sidewalk counseling efforts include speaking with women about their concerns and distributing literature that includes abortion-related topics. Doc. 1 at ¶ 31.

The Fort Myers Women's Health Center is an abortion clinic located in a medical office complex at 3900 Broadway Avenue, Fort Myers, Florida (hereafter referred to as the "abortion clinic" and the "medical office complex" respectively). Doc. 1 at ¶ 22. Broadway Avenue is a public street. Between Broadway Avenue and the medical office complex is a public sidewalk. Two separate driveways lead into and out of the medical office complex from Broadway Avenue. The two driveways cut across the public sidewalk in front of the medical office complex, and each driveway can accommodate two lanes of vehicle traffic. To get from one side of the public sidewalk to the other side, people generally walk across the driveways. Doc. 1 at ¶ 23.

Over the past several years, Plaintiffs have engaged in such activities as peaceful prayer, sidewalk counseling, and literature distribution on the public sidewalk in front of the medical office complex and abortion clinic. Doc. 1 at ¶¶ 32, 57, 58. That public sidewalk is the only location where Plaintiffs' First Amendment can have any communicative impact on people going into or leaving the abortion clinic. Doc. 1 at ¶ 33.

When Plaintiffs are on the public sidewalk outside the medical office complex, they do not block pedestrians using the sidewalk. Doc. 1 at ¶ 34. When Plaintiffs stand on the public

sidewalk next to one of the driveways, they get the attention of those driving into or out of the medical office complex by holding out pieces of literature. Doc. 1 at ¶ 35.

If a driver voluntarily stops, Plaintiffs will hand the driver and/or passenger(s) the literature and will speak with them briefly. Doc. 1 at ¶ 36. When individuals who are driving into the medical office complex stop to speak with them, Plaintiffs will generally hand them literature and speak with them about such topics as the possible emotional and physical effects of abortion, fetal development, and nearby maternity homes. Doc. 1 at ¶ 37. When individuals stop to speak with them after leaving the abortion clinic, Plaintiffs will generally hand them literature that provides post-abortion counseling information and a prayer card and will speak with them about their concerns and about God's forgiveness. Doc. 1 at ¶ 38.

In the rare event that another vehicle pulls up behind the vehicle containing the people who are speaking with Plaintiffs, Plaintiffs will wave that other vehicle around them, as there is sufficient room to pass on the two-lane driveways, or they will end their conversation so the vehicles may enter or leave the medical office complex. Doc. 1 at ¶ 39.

On or about October 2, 2014, Defendant Officer David Conticelli approached Plaintiffs and two other pro-life advocates who were on the public sidewalk in front of the medical office complex. Plaintiffs were sidewalk counseling at the time, with one standing on the public sidewalk next to each driveway. Doc. 1 at ¶ 40. Defendant Conticelli had been speaking with the owner of the medical office complex before approaching Plaintiffs and the other pro-life advocates. Doc. 1 at ¶ 41.

Defendant Officer Conticelli gathered the four pro-life advocates together on the public sidewalk and handed each a copy of the City's loitering ordinance (Section 86-2). Doc. 1 at ¶

42. Defendant Conticelli stated that he would enforce the loitering ordinance against them if they (1) stood in one spot on the public sidewalk in front of the medical office complex and did not keep walking on that public sidewalk, (2) approached any vehicles entering or leaving the medical office complex to hand out literature or speak with the occupants of the vehicle, or (3) blocked vehicular traffic entering or leaving the medical office complex by handing out literature or talking to the people in vehicles. Doc. 1 at ¶ 43. Defendant Conticelli commented to Plaintiff Minahan that the City's police department generally enforces the loitering ordinance against prostitutes and the like. Doc. 1 at ¶ 44.

Section 86-2, Subpart A, states in relevant part as it relates to loitering:[1]/

> (a) *Definitions.* The following words, terms and phrases, when used in this section, shall have the meanings ascribed to them in this subsection, except where the context clearly indicates a different meaning:
> . . . .
> *Loitering* means remaining idle in essentially one location and shall include the concept of spending time idly, to be dilatory, to linger, to stay, to saunter, to delay, or to stand around, and shall also include the colloquial expression "hanging around."
> . . . .
> *Public place* means any place to which the general public has access and a right to resort for business, entertainment, or other lawful purpose, but does not necessarily mean a place devoted solely to the uses of the public. It shall also include the front or immediate area of any store, shop, restaurant, tavern or other place of business and also public grounds, areas or parks.
>
> (b) *Loitering acts prohibited.*
>
> (1) It shall be unlawful for any person to loiter, loaf, wander, cruise in a motor vehicle, stand or remain idle, either alone and/or in consort with others, in a public place in such manner so as to:

[1]/ Section 86-2, Subpart A, of the Fort Myers Code of Ordinances also deals with "cruising," which is not the subject of this action.

> a. Obstruct or hinder the movement of traffic on any public street, public highway, public sidewalk, or any other public place or building by hindering or impeding, or tending to hinder or impede, the free and uninterrupted passage of vehicles, traffic or pedestrians.
>
> b. Commit, in or upon any public street, public highway, public sidewalk or any other public place or building, any act or thing which is an obstruction or interference to the free and uninterrupted use of property or with any business lawfully conducted by anyone in or upon or facing or fronting on any such public street, public highway, public sidewalk or any other public place or building, all of which prevents the free and uninterrupted ingress, egress and regress therein, thereon, and thereto.
>
> . . . .
>
> (c) *Duty of police.* When any person causes or commits any of the conditions enumerated in this section, any law enforcement officer shall order that person to stop causing or committing such conditions, and to move on or disperse. Any person who fails or refuses to obey such orders shall be guilty of a violation of this section.
>
> . . . .
>
> (e) *Violations; penalties.* Any person who violates any of the provisions of this section shall be subject to a fine of not less than $25.00, and not exceeding $250.00. Any such violation shall constitute a separate offense.

The October 2, 2014, incident is not the first time Defendants have restricted the First Amendment activities of Plaintiffs and similarly-situated persons in the traditional public forums outside the medical office complex. For example, in 2004, Plaintiff Minahan and other pro-life advocates sued Defendant Fort Myers in this Court in *Minahan I*. In that case, plaintiffs challenged the City's parades and processions ordinance and the City's February 2004 policy, which applied to Plaintiff Minahan and other pro-life advocates who engaged in First Amendment activities in the traditional public forums outside the same medical office complex that is the subject of the instant complaint. Case No. 2:04-cv-551-JES-DNF, Doc. 1, Compl.; Doc. 33, Consent Judgment, Ex. 2, February 2004 policy.

The February 2004 policy prohibited Plaintiff Minahan and similarly-situated persons from approaching or blocking pedestrians and vehicles and handing out literature, among

other things, while on the public sidewalk in front of the medical office complex. *Id.* at Doc. 33, Ex. 2. The February 2004 policy also prohibited Plaintiff Minahan and similarly-situated persons from standing in one spot, and required them to keep walking, when on the public sidewalk in front of the medical office complex. *See id.*

In *Minahan I*, Plaintiff Minahan asserted that in 2004, Fort Myers police officers threatened her and other pro-life advocates a number of times with arrest for various First Amendment-protected activities on the public sidewalk in front of the medical office complex. *Id.* at Doc. 1 at ¶¶ 88-91; Doc. 2-2, Ex. A, Minahan Decl. at ¶¶ 17-19. For example, in 2004 Fort Myers police officers told Plaintiff Minahan that any pro-life advocate who walked off the public sidewalk onto the driveway leading into the medical complex to hand out literature to a vehicle would be considered blocking access to the abortion clinic and would be subjected to punishment. *Id.* at Doc. 1 ¶ 89; Doc. 2-2, Ex. A at ¶ 17. Another Fort Myers police officer told Plaintiff Minahan in 2004 that any pro-life advocate who walked off the public sidewalk onto the driveways leading into and out of the medical office complex to walk to the other side of the public sidewalk or to hand out literature would be considered trespassing. *Id.* at Doc. 1 at ¶ 91; Doc. 2-2, Ex. A, at ¶ 18. Moreover, Fort Myers police officers informed Plaintiff Minahan that if any pro-life advocate violated the February 2004 policy, they would be arrested. *Id.* at Doc. 1 at ¶ 88; Doc. 2-2, Ex. A at ¶ 17.

Through a consent judgment, Defendant Fort Myers was required to repeal certain sections of its parades and processions ordinance and repeal the February 2004 policy. *Id.* at Doc. 33, p. 2. Defendant Fort Myers (its officers, employees, agents, and successors in office,

which would include Defendant Conticelli) was also required not to enforce either the ordinance or the policy against Plaintiff Minahan and similarly-situated persons.[2]/ *Id.*

In or about February through April of 2006, after the consent judgment had been entered in *Minahan I* and before the City received a cease and desist letter from Plaintiff Minahan's counsel, Fort Myers police officers continued to interfere with the rights of Plaintiff Minahan and other pro-life advocates in the traditional public forum outside the medical office complex by wrongfully accusing them of impeding traffic, by telling them they needed a permit to be on the public sidewalk, and by threatening them with citations if they spoke with anyone while on the public sidewalk. Doc. 1 at ¶ 54.

On or about October 2, 2014, after Defendant Officer Conticelli handed Plaintiffs and the others the loitering ordinance and instructed them not to approach vehicles to distribute literature or stand on the sidewalk, Plaintiff Minahan handed Defendant Conticelli a copy of the consent judgment and order from *Minahan I* to inform him that he was instructing them to do things the City had agreed, and was ordered, to no longer require of pro-life advocates on the same public sidewalk in front of the medical office complex. Doc. 1 at ¶ 55.

Based on the threatened enforcement of the loitering ordinance and the instructions from Defendant Conticelli, Plaintiffs now—against their wishes—refrain from approaching vehicles, speaking with people in vehicles or handing them literature, and standing in one spot while on the public sidewalk in front of the medical office complex, which includes

[2]/ As this Court explained in *Occupy Fort Myers v. City of Fort Myers*, 882 F. Supp. 2d 1320, 1333-34 (M.D. Fla. 2011) (Steele, J.), the City did not comply with the consent judgment and order regarding the repeal of certain sections of the parades and processions ordinance until 2011, about seven years after the City had been ordered to do so.

refraining from standing together while praying, out of fear of arrest, citation, prosecution, and/or fine. Doc. 1 at ¶ 57. Plaintiffs seek relief from this Court to resume engaging in such constitutionally protected activities on the public sidewalk in front of the medical office complex and abortion clinic as soon as possible. Doc. 1 at ¶ 58.

II. ARGUMENT

A. Plaintiffs Have Standing to Bring This Action.

Plaintiffs have standing to bring their as-applied challenge. The injury-in-fact requirement is applied "most loosely where First Amendment rights are involved, lest free speech be chilled even before the law or regulation is enforced." *Wollschlaeger v. Governor of Fla.*, 760 F.3d 1195, 1209 (11th Cir. 2014) (citation omitted). A sufficient injury-in-fact exists when a plaintiff was actually threatened with application of the law, there is a credible threat of application, or application against the plaintiff is likely; actual arrest or prosecution is not required. *E.g., Georgia Latino Alliance for Human Rights v. Governor*, 691 F.3d 1250, 1257-58 (11th Cir. 2012). Here, Defendants have directly threatened Plaintiffs and other pro-life advocates with the enforcement of the City's loitering ordinance if they continue their free speech activities in violation of the City's policy, practice, or custom of restricting constitutional rights in a traditional public forum. *E.g.*, Doc. 1 at ¶¶ 40-44.

Moreover, Plaintiffs have standing to bring their facial challenge. "It has long been recognized that the First Amendment needs breathing space and that statutes attempting to restrict or burden the exercise of First Amendment rights must be narrowly drawn and represent a considered legislative judgment that a particular mode of expression has to give way to other compelling needs of society." *Broadrick v. Oklahoma*, 413 U.S. 601, 611-12

(1973). Thus, the traditional standing rules are relaxed to allow, in the First Amendment context, "attacks on overly broad statutes with no requirement that the person making the attack demonstrate that his own conduct could not be regulated by a statute drawn with the requisite narrow specificity." *Id.* at 612 (quoting *Dombrowski v. Pfister*, 380 U.S. 479 (1965)). "Litigants, therefore, are permitted to challenge a statute not because their own rights of free expression are violated, but because of a judicial prediction or assumption that the statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression." *Id.* On its face, the loitering ordinance impermissibly restricts a broad range of protected speech activities on public property.

B. Plaintiffs Satisfy The Standard For Obtaining Injunctive Relief.

As demonstrated herein, Plaintiffs satisfy the four elements needed to obtain a TRO or preliminary injunction: (1) they are likely to prevail on the merits of their claims; (2) they will experience irreparable injury unless the injunction issues; (3) the threatened injury to them outweighs whatever damage (if any) the proposed injunction may cause Defendants; and (4) if issued, the injunction would not be adverse to the public interest. M.D. Fla. L.R. 4.05(b)(4), 4.06(b)(1); *see, e.g., Parker v. State Bd. of Pardons & Paroles,* 275 F.3d 1032, 1034 (11th Cir. 2001) (applying same standard for TRO and preliminary injunction).

C. Plaintiffs Are Likely To Succeed on the Merits.

1. Plaintiffs Are Engaging In Protected First Amendment Activities In A Traditional Public Forum.

Commenting on matters of public concern, such as abortion, through the spoken word, prayer, and the distribution of literature, is speech that lies at the heart of the First Amendment's protections. This speech—whether others consider it to be agreeable or

disagreeable—is at its most protected from government infringement on public sidewalks and public streets, prototypical examples of traditional public forums. *See, e.g., McCullen v. Coakley*, 134 S. Ct. 2518, 2529 (2014) (recognizing First Amendment right of pro-life leafleting and sidewalk counseling). Thus, the prayer, speech, and assembly engaged in by Plaintiffs and similarly-situated persons on the public sidewalk in front of the medical office complex are classic examples of First Amendment activity in a traditional public forum that receives heightened protection from government infringement.[3]/

2. The Loitering Ordinance Is Unconstitutionally Vague.

A law is void for vagueness when it 1) fails to provide the kind of notice that will allow an ordinary citizen to understand what conduct it prohibits, 2) allows arbitrary and discriminatory enforcement by giving governmental officials too much discretion, or 3) has a chilling effect on the exercise of First Amendment freedoms. *E.g., Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972); *see also United States v. Williams*, 553 U.S. 285, 302 (2008). The Supreme Court has stated that "[a] government regulation that allows arbitrary application is 'inherently inconsistent with a valid time, place, and manner regulation because such discretion has the potential for becoming a means of suppressing a particular point of view.'" *Forsyth Cnty. v. Nationalist Movement*, 505 U.S. 123, 130-31 (1992) (quoting *Heffron v. Int'l Soc'y for Krishna Consciousness*, 452 U.S. 640, 649 (1981)).

[3]/ In First Amendment cases, the government carries the burden of establishing the constitutionality of its actions once a plaintiff shows that a law burdens the plaintiff's constitutional rights. *See United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 816 (2000). As demonstrated below, Defendants cannot satisfy their burden with regard to either the loitering ordinance or the policy, practice, or custom that restricts the exercise of First Amendment rights in traditional public forums.

The standard of review for vague laws is especially stringent when "the uncertainty induced by the statute threatens to inhibit the exercise of constitutionally protected rights." *See Colautti v. Franklin*, 439 U.S. 379, 390–91 (1979). Laws that "make unlawful a substantial amount of constitutionally protected conduct may be held facially invalid even if they also have legitimate application." *City of Houston v. Hill*, 482 U.S. 451, 459 (1987) (citing *Kolender v. Lawson*, 461 U.S. 352, 358 n.8 (1983)).

The initial constitutional problem with the ordinance is its definition of loitering, which is defined as "remaining idle in essentially one location and shall include the concept of spending time idly, to be dilatory, to linger, to stay, to saunter, to delay, or to stand around, and shall also include the colloquial expression 'hanging around.'" Section 86-2(a). This definition does not provide an ordinary citizen or a law enforcement officer with sufficient clarity to know what will, and will not, be considered loitering. The vagueness of the ordinance raises many reasonable questions: Does the definition apply to a person who is "remaining idle in essentially one location" on a public sidewalk if that person lingers, stays, loafs, or stands there for five seconds, one minute, thirty minutes, one hour? Does the definition apply to a person who is standing idly on a public sidewalk for ten minutes because there is a beautiful view and she wants to admire it? In short, by its lack of a clear definition of loitering, especially its lack of a time limit that one has to surpass to be considered a loiterer, the ordinance is vague on its face.

The ordinance is also vague on its face with regard to the acts that it prohibits. Section 86-2(b). The vague terms used to describe the prohibited acts, especially in combination with the vague definition of loitering in the first place, do not provide sufficient notice to ordinary

citizens of what is prohibited, and do not curtail arbitrary enforcement by police officers. The ordinance states, with emphasis added to certain vague terms, that it is

> unlawful for any person to *loiter*, *loaf*, *wander*, . . . *stand or remain idle*, either alone and/or in consort with others, in a public place in such manner so as to:
> a. *Obstruct or hinder* the *movement* of traffic on any public street, public highway, public sidewalk, or any other public place or building *by hindering or impeding, or tending to hinder or impede*, the *free* and *uninterrupted passage* of vehicles, traffic or pedestrians.
>
> b. Commit, in or upon any public street, public highway, public sidewalk or any other public place or building, *any act or thing which is an obstruction or interference to the free and uninterrupted use* of property or with any business lawfully conducted by anyone in or upon or facing or fronting on any such public street, public highway, public sidewalk or any other public place or building, all of which *prevents the free and uninterrupted* ingress, egress and regress therein, thereon, and thereto.

The italicized words lack clear definition, especially when combined with the vague definition of "loitering," which is devoid of a time element. For example, does *obstructing the movement* of traffic on any public street, public highway, or public sidewalk mean to permanently block that movement, or would a ten or twenty second obstruction suffice? Does *hindering or impeding the movement* of traffic on any public street, public highway, or public sidewalk mean to make such movement impossible, difficult, or just a temporary inconvenience? Does *tending to hinder or impede* the free and uninterrupted passage of pedestrians mean that even if a person is *not actually* hindering or impeding because no one else is on the sidewalk, he could still be cited because his conduct might *tend* to hinder or impede if someone else were present?[4]/

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[4]/ With regard to another Fort Myers ordinance that dealt with "loitering and boisterousness" in a public park and prohibited "behavior *tending* to a breach of the public peace," this Court enjoined the relevant parts of that ordinance, in part, because "conduct

(The text of this footnote is continued on the following page.)

The constitutional infirmities of the loitering ordinance are not cured by the provision in the ordinance that requires a warning by a police officer. Section 86-2(c). That provision states as follows: "When any person causes or commits any of the conditions enumerated in this section, any law enforcement officer shall order that person to stop causing or committing such conditions, and to move on or disperse. Any person who fails or refuses to obey such orders shall be guilty of a violation of this section."

The Supreme Court addressed a similar provision in *City of Chicago v. Morales*, 527 U.S. 41 (1999) (plurality), when it determined that Chicago's loitering ordinance was invalid on its face because it gave too much discretion to the police and too little notice to citizens. There, the City argued that any concern about inadequate notice to citizens was alleviated since a citizen was not subject to sanction until after he failed to comply with a police officer's order to disperse. *Id.* at 58. The City's arguments were rejected for two reasons.

First, the plurality explained that the purpose of fair notice is to allow the ordinary citizen to conform his conduct to the law. *Id.* That fair notice has to come from the clarity of the law itself and not after-the-fact based on the warning of a police officer:

> Because an officer may issue an order only after prohibited conduct has already occurred, it cannot provide the kind of advance notice that will protect the putative loiterer from being ordered to disperse. Such an order cannot retroactively give adequate warning of the boundary between the permissible and the impermissible applications of the law.

Id. at 59.

'*tending*' towards breach of the public peace" has no established meaning and is not comprehensible to ordinary people. *Occupy Fort Myers*, 882 F. Supp. 2d at 1337-38 (emphasis added).

Second, the plurality explained that the terms of the dispersal order compounded the inadequacy of the notice afforded by the ordinance because the police were supposed to "order all such persons to disperse and remove themselves from the area." *Id.* at 59. The plurality noted that the vague phrasing of the dispersal order raised too many questions, thus further demonstrating the unconstitutionality of the ordinance, which did not properly define the term "loitering" in the first place: "After such an order issues, how long must the loiterers remain apart? How far must they move?" *Id.*

The Fort Myers loitering ordinance is similarly vague. For example, if a Fort Myers police officer gave instructions to "move on or disperse" to four men who were standing on the public sidewalk outside of their church discussing a sermon they had just heard, or to an elderly woman who was standing on a public sidewalk catching her breath after a long walk, how far would they have to "move on" and how long would they have to "disperse" to avoid violating the ordinance? Can they walk across the street to another sidewalk and stand there? Who knows? Hence, one of the vagueness problems with the ordinance.

Ordinances similar to the Fort Myers loitering ordinance have been found unconstitutionally vague. For instance, in *Derby v. Town of Hartford*, 599 F. Supp. 130 (D. Vt. 1984), the plaintiff brought a facial and an as-applied challenge against the Town of Hartford's loitering ordinance, which was *almost identical* to Fort Myers' loitering ordinance. The district court determined that the Hartford ordinance was unconstitutionally vague on its face, stating that the

> loitering ordinance possesses an uncertain time element. The court finds inherent vagueness in that there is no indication as to how long one can remain "idle in essentially one location" before that conduct constitutes loitering. Mere standing

> in one place for a matter of seconds would fall within the ordinance's broad terms.

Id. at 135. The district court also determined that the ordinance provided law enforcement with unguided discretion to decide whether a person violated the ordinance and noted that "[s]uch discretion necessarily invites arbitrary and discriminatory treatment that cuts across established due process precepts." *Id.* at 136. The same conclusions should be reached with regard to Fort Myers' almost identical loitering ordinance.

In *Miami for Peace v. Miami-Dade Cnty.*, 2008 U.S. Dist. LEXIS 61912 (S.D. Fla. 2008), the plaintiffs challenged Miami-Dade County's loitering ordinance, which stated in relevant part that "'loitering' means the act of standing, remaining . . . on, in or about any public street [or] public sidewalk . . . [and a] person commits the offense of loitering when he knowingly . . . [l]oiters on any public street [or] public sidewalk . . . so as to hinder or impede the passage of pedestrians or vehicles.'" *Id.* at *2. The district court determined that the ordinance, specifically its use of the phrase "hinder or impede," was vague and criminalized a broad range of activities on a public right of way, including the simple act of standing on a public sidewalk. *Id.* at *29. Because of the broad language in the ordinance, the public could not discern exactly what conduct was prohibited and law enforcement could too easily apply the ordinance in an arbitrary or discriminatory fashion. *Id.* at *29-30. Fort Myers' loitering ordinance, with its vague "hindering or impeding" language, is similarly unconstitutional.

Lastly, in *Bell v. City of Winter Park*, 745 F.3d 1318 (11th Cir. 2014), the Eleventh Circuit recently invalidated Winter Park's loitering ordinance. *Id.* at 1324-25. That ordinance authorized police enforcement when people were "remaining" within a buffer area that extended to public property, including public sidewalks and public rights of way. *Id.* at 1324.

The Eleventh Circuit explained that the ordinance improperly allowed the police to prohibit First Amendment activities on traditional public forums and also failed to define the term "remaining," thus causing a citizen to wonder whether he would violate the loitering ordinance if he were in a public forum for one minute or five minutes. *Id.* at 1325.

As with the ordinances discussed in these cases, the Fort Myers loitering ordinance is also unconstitutionally vague. It does not provide ordinary citizens, including Plaintiffs, with sufficient clarity about what is prohibited and thereby infringes on their constitutional rights, and it allows too much discretion to police officers to enforce it arbitrarily, including against speakers whose viewpoint the officers want to silence. *See, e.g.*, *Grayned*, 408 U.S. at 108-09. As the Eleventh Circuit has explained, "[a] grant of unrestrained discretion to an official responsible for monitoring and regulating First Amendment activities is facially unconstitutional." *Atlanta Journal & Constitution v. City of Atlanta Dep't of Aviation*, 322 F.3d 1298, 1310 (11th Cir. 2003).

3. The Loitering Ordinance Is Facially Overbroad.

When an ordinance applies to a substantial amount of constitutionally protected activity and accords the police broad discretion in its enforcement, the ordinance is unconstitutionally overbroad under the First Amendment. *E.g., Hill*, 482 U.S. at 466-67; *see also Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789, 801 (1984) (explaining that when a realistic danger exists that a statute "will significantly compromise recognized First Amendment protections of parties not before the court," it must be declared unconstitutionally overbroad).

According to the loitering ordinance itself, as well as Defendant Conticelli's understanding and application of it, a multitude of fully protected free speech activities must be prohibited in Fort Myers. For example, two women standing and speaking on a public sidewalk about the best candidate in this year's gubernatorial election could not continue to do so if a police officer told them to "move on or disperse." Individuals cannot hold a religious or political sign while standing in one spot on a public sidewalk or in a public park. A religious leader cannot pray with a parishioner on a public sidewalk near their house of worship. On its face, the loitering ordinance is vastly overbroad and thereby unconstitutional.

In sum, because the loitering ordinance fails to survive constitutional scrutiny, it should be declared unconstitutional and enjoined in whole or in part, with the unconstitutional parts being severed from the remainder of the ordinance, especially where, as here, the Fort Myers Code of Ordinances contains a severability clause. *See, e.g., Occupy Fort Myers*, 882 F. Supp. 2d at 1335-36 (discussing severability); Fort Myers Code of Ordinances, Section 1-10, Subpart A, Severability.

4. The Loitering Ordinance Is Unconstitutional As Applied To Plaintiffs.

In quintessential traditional public forums, such as public sidewalks, the government may not prohibit all communicative activity, or enforce content-based exclusions absent a compelling justification.

> For the State to enforce a content-based exclusion it must show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end. The State may also enforce regulations of the time, place, and manner of expression which are content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication.

Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983) (citations omitted).

The loitering ordinance is content-based in that it gives officers unbridled discretion to apply it to individuals expressing disfavored messages while not applying it to other speakers. Even if the ordinance were content-neutral, however, it is not narrowly tailored to serve any compelling or significant governmental interest. It applies to a broad range of protected expression and can be enforced arbitrarily. Offering literature to people as they pass by, and discussing important issues, are quintessential uses of public sidewalks that the loitering ordinance bans. No valid governmental interest is served by such a sweeping restriction on expressive activity. *See, e.g., Forsyth Cnty*, 505 U.S. at 130-31 (explaining that "[a] government regulation that allows arbitrary application is 'inherently inconsistent with a valid time, place, and manner regulation because such discretion has the potential for becoming a means of suppressing a particular point of view.'") (citation omitted).

Moreover, there are no "ample alternative channels of communication" for Plaintiffs and those similarly situated. The loitering ordinance applies throughout Fort Myers, forbidding many free speech activities on all public property, especially when coupled with the City's policy, practice, or custom of restricting speech. Additionally, the public sidewalk in front of the medical office complex is the only location where the First Amendment activities of Plaintiffs and those similarly-situated can have any communicative impact on those going in and out of the abortion clinic. Doc. 1 at ¶ 33; *see Hoye v. City of Oakland*, 653 F.3d 835, 858 (9th Cir. 2011) ("[A]n alternative is not ample if the speaker is not permitted to reach the intended audience.").

5. The City's Policy Is Unconstitutional On Its Face And As Applied.

In 2004, this Court enjoined the City's enforcement of its previous policy (known as the February 2004 policy) that prohibited, among other things, Plaintiff Minahan and similarly situated persons from standing or blocking the sidewalk and driveways in front of the medical office complex, from blocking or approaching pedestrians to hand out literature, and from blocking or approaching vehicles to hand out literature. *Minahan I*, Case No. 2:04-cv-551-JES-DNF, Doc. 33, Consent Judgment, & Ex. 2, February 2004 policy. Despite this Court's injunction, Defendants are continuing to impose these prohibitions on Plaintiffs and similarly situated persons through the threatened enforcement of the unconstitutionally vague and overbroad loitering ordinance. The previously enjoined policy is now being imposed, in substance, through a different vehicle, that is, the threatened enforcement of the loitering ordinance. The policy that Defendants are now imposing is just as unconstitutional as was the original February 2004 policy, both on its face and as applied to Plaintiffs.

First, Defendants' policy, practice, or custom prevents Plaintiffs and those similarly situated from approaching people and distributing literature. As the Supreme Court held long ago, a law that prevents the distribution of literature in public forums is facially unconstitutional since it violates the freedom of speech. *Lovell v. City of Griffin*, 303 U.S. 444 (1938); *accord Schneider v. Town of Irvington*, 308 U.S. 147, 161-65 (1939).

The constitutional problems with Defendants' policy, practice, or custom is further illustrated by the holdings in *Watkins v. City of Arlington*, 2014 U.S. Dist. LEXIS 95082 (N.D. Tex. July 14, 2014). There, the plaintiffs brought a facial and an as-applied challenge against the City of Arlington's ordinance, which stated that "[a] person commits an offense if

he or she stands on or in any manner occupies a shoulder, improved shoulder, sidewalk, median or public right-of-way in the areas [of specific intersections] . . . [and] distributes or attempts to distribute any object directly to the occupants of a vehicle, other than a lawfully parked vehicle." *Id.* at *3.

The district court granted the plaintiffs a preliminary injunction because the ordinance burdened substantially more speech than was necessary to achieve any governmental interest in pedestrian and traffic safety. *Id.* at *30-31. The court explained that the ordinance prohibited pedestrians from interacting with occupants of vehicles even while the pedestrian was standing on the public sidewalk and the vehicle was stopped. *Id.* at *31. This restriction infringed on the plaintiffs' First Amendment rights because it prevented them from having conversations and handing out literature to occupants of vehicles at the various intersections to which the ordinance applied. *Id.* at *37. The same is true in Fort Myers where Defendants have greatly restricted First Amendment activities on the public sidewalk in front of the medical office complex. Based on the City's policy, practice, or custom as applied by Defendant Conticelli's threatened enforcement of the loitering ordinance, Plaintiffs and similarly-situated persons cannot hand out literature or speak with people who are in vehicles that want to receive their information in a traditional public forum. *See generally Stanley v. Georgia*, 394 U.S. 557, 564 (1969) ("The Constitution protects the right to receive information and ideas.").

Second, Defendants' policy, practice, or custom requires Plaintiffs and those similarly situated to keep walking on the public sidewalk in front of the medical complex, which prevents Plaintiffs from standing on the public sidewalk to engage in such First Amendment

activities as speaking, praying, or distributing literature. Such a restriction is not narrowly tailored to achieving any valid governmental interest and is unconstitutional. For example, in *Foti v. City of Menlo Park,* 146 F.3d 629 (9th Cir. 1998), the Ninth Circuit determined that a provision in an ordinance that required picketers to actually move while on a public sidewalk was unconstitutional because it was not narrowly tailored to the city's interests. *Id.* at 642-43. The city claimed that the "actually moving" requirement furthered its interest in preserving the free flow of pedestrian traffic on public sidewalks. *Id.* at 642. The Ninth Circuit rejected that claim by noting that "[r]equiring picketers to shuffle back and forth does not contribute to safe and convenient circulation on sidewalks; presumably, pedestrians could better negotiate around a stationary picketer than one who is walking back and forth." *Id.*

Moreover, in *Abdullah v. County of St. Louis*, 2014 U.S. Dist. LEXIS 141744 (E.D. Mo. Oct. 6, 2014), the plaintiff challenged an unwritten policy that law enforcement officers imposed during the recent riots in Ferguson, Missouri, that required protestors to keep moving and not stand still on public sidewalks. *Id.* at *5-12. The court granted the plaintiff a preliminary injunction and determined that the keep-moving policy violated the First Amendment, including the right to peacefully assemble on a public sidewalk and engage in conversations. *Id.* at *21-23. The same applies here. Defendants' policy, practice, or custom prohibits Plaintiffs and similarly situated persons from standing on a public sidewalk to hold a conversation, pray, or distribute literature since they are required to keep walking.

6. Defendants Have Violated Plaintiffs' Freedoms of Association and Assembly.

"Among the rights protected by the First Amendment is the right of individuals to associate to further their personal beliefs." *Healy v. James*, 408 U.S. 169, 181 (1972).

Freedom to associate or assemble for the advancement of beliefs and ideas is an integral aspect of the ability to speak effectively. *See NAACP v. Alabama*, 357 U.S. 449, 460 (1958).

Defendants have prevented free association and assembly in a traditional public forum by prohibiting Plaintiffs and similarly-situated persons from standing on a public sidewalk to pray, talk, or distribute literature as a result of Defendants' requirements that they keep moving and not hinder, impede, or tend to hinder or impede others. No governmental interest, whether compelling, significant, or substantial, is served by imposing such requirements on Plaintiffs and those similarly situated or by infringing their rights of assembly and association in a traditional public forum. *See Citizens Against Rent Control/Coalition for Fair Hous. v. Berkeley*, 454 U.S. 290, 295 (1981) ("The Court has acknowledged the importance of freedom of association in guaranteeing the right of people to make their voices heard on public issues."); *NAACP*, 357 U.S. at 460.

D. Plaintiffs Have Been Irreparably Harmed.

"The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976); *Cate v. Oldham*, 707 F.2d 1176, 1188-89 (11th Cir. 1983); *Occupy Fort Myers*, 882 F. Supp. 2d at 1339. Plaintiffs have been denied the right to exercise their clearly established constitutional rights in the traditional public forums of Fort Myers, and they will continue to be so denied absent an order from this Court enjoining the application and enforcement of the loitering ordinance and the policy, practice, or custom of restricting constitutional rights on the public sidewalk in front of the medical office complex.

E. The Balance of Harms Weighs in Plaintiffs' Favor.

Allowing Plaintiffs to peacefully and lawfully exercise their First Amendment rights in a traditional public forum cannot cause any legally cognizable harm to others. Any legitimate interest asserted by Defendants or others will remain fully protected by existing provisions of valid law. There is no legitimate governmental interest in violating the clearly established constitutional rights of Plaintiffs or of any other citizen. *See, e.g., Deerfield Med. Ctr. v. City of Deerfield Beach,* 661 F.2d 328, 338-39 (5th Cir. Unit B Nov. 1981); *Red-Eyed Jack, Inc. v. City of Daytona Beach*, 165 F. Supp. 2d 1322, 1330 (M.D. Fla. 2001), *aff'd*, 62 Fed. Appx. 921 (11th Cir. 2003) (unpublished).

F. The Public Interest Will Be Served By An Injunction Against Defendants.

The public interest would be served by the issuance of an injunction because the public interest is best served by upholding First Amendment principles. *See, e.g., Cate,* 707 F.2d at 1189-90; *Red-Eyed Jack, Inc.*, 165 F. Supp. 2d at 1330 ("[T]he public interest is championed by judicial protections of legal speech."); *Occupy Fort Myers*, 882 F. Supp. 2d at 1339 (explaining that the public has no interest in enforcing unconstitutional ordinances).

III. NO BOND SHOULD BE IMPOSED ON PLAINTIFFS.

No bond should be imposed should Plaintiffs obtain injunctive relief. Any bond requirement would further deprive Plaintiffs of their rights by requiring them to have to pay to assert and defend their constitutional rights. Plus, there are no foreseeable costs or damages that Defendants would incur or suffer should this Court issue an injunction. *See* Fed. R. Civ. P. 65(c); *City of Atlanta v. Metropolitan Rapid Transit Auth.,* 636 F.2d 1084,

1094 (5th Cir. Unit B Feb. 1981) (noting that a district court has discretion not to require a bond, especially in public interest litigation).

IV. CONCLUSION

Plaintiffs respectfully request that this Court grant this motion and enjoin Defendants, their officers, agents, servants, employees, successors in office, and attorneys, and all those in active concert or participation with them, from enforcing, while Plaintiffs and those similarly situated persons are in traditional public forums in Fort Myers, Florida, including on the public sidewalk in front of the Fort Myers Women's Health Clinic, located in a medical office complex at 3900 Broadway Avenue, Fort Myers, (1) the City's "loitering ordinance," Section 86-2, Subpart A of the Fort Myers Code of Ordinances, and (2) any policy, practice, and/or custom that restricts First Amendment activity in traditional public forums including requiring Plaintiffs and similarly situated persons (a) to not stand in one spot and to keep walking on the public sidewalk in front of the medical office complex located at 3900 Broadway Avenue, Fort Myers, (b) to not approach any vehicles entering or leaving that medical office complex to hand out literature or speak with the occupants of the vehicle, and (c) to not block vehicular traffic entering or leaving that medical office complex by handing out literature or talking to the people in vehicles.

Respectfully submitted on this 29th day of October, 2014,

AMERICAN CENTER FOR LAW & JUSTICE

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* Pro hac vice application forthcoming

CERTIFICATE OF SERVICE

I hereby certify that on October 29, 2014, a true and correct copy of the foregoing was electronically filed with the Court by using the CM/ECF system and a copy of the proposed order granting the TRO motion was emailed to the judge's chambers. I further certify that on that same date I sent true and correct copies of the foregoing motion and proposed order, along with copies of the verified complaint, civil cover sheet, notice of appearance, and notice of pendency of related case, to the following by email or facsimile transmission, where indicated, and by Federal Express, next-business morning delivery:

Defendant City of Fort Myers
c/o City Attorney Grant Alley
c/o Mayor Randy Henderson
[redacted]

Defendant David Conticelli
c/o Fort Myers Police Department
[redacted]

/s/ Edward L. White III
Edward L. White III
American Center for Law & Justice