

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JOSEPH A. ARIETTA, et al., : CIVIL ACTION
 Plaintiffs, :
 :
 v. :
 :
CITY OF ALLENTOWN, et al., :
 Defendants. :
 : No. 04-226

MEMORANDUM AND ORDER

J. M. KELLY, J.

AUGUST 9, 2004

Presently before the Court is the Motion for Temporary Restraining Order filed by Plaintiffs Joseph A. Arietta, Donald Earl Cummings, Joseph F. O'Hara, Edward J. Kuchar, Kathleen R. Kuhns, Phillip T. Pongracz, Karen Pongracz and Mary Ann Yorina (collectively, "Plaintiffs") seeking relief from the enforcement of certain provisions of the Codified Ordinances of the City of Allentown, Pennsylvania, specifically, those provisions relating to a permit requirement for special events. See Codified Ordinances of the City of Allentown, Sections 311.01-311.99 (the "Ordinance"). Plaintiffs allege that these provisions are facially unconstitutional and unconstitutional as applied to them in each of their individual abortion protest activities at the Keats Street entrance to the Allentown Women's Center (the "AWC"), a corporation organized under the laws of Pennsylvania that provides medical services to women, including abortions. Defendants City of Allentown, Police Chief Joseph Blackburn, Assistant Police Chief Ronald Manescu and Mayor Roy Afflerbach (collectively, "Defendants") filed their Opposition to

Plaintiffs' Motion, and a full evidentiary hearing was held. Following the evidentiary hearing, which took place on January 28, 2004 and February 10, 2004, the parties submitted Proposed Findings of Fact and Conclusions of Law.¹

Upon consideration of the papers and the matters addressed during an evidentiary hearing before the Court, we make the following Findings of Fact and Conclusions of Law.

I. FINDINGS OF FACT

The Parties

1. Plaintiffs are individuals motivated by their faith to protest against abortion in the public areas surrounding abortion clinics, and to counsel expectant mothers to seek alternatives to abortion. (Compl., ¶ 29.)
2. Plaintiffs are individual volunteers and are not affiliated with any group. (Compl., ¶ 5; Tr. Feb. 10 at 99, 114, 130-31.)
3. Plaintiffs volunteer their time to advocate their pro-life message through counseling, leafleting, praying and

¹ By agreement of the parties, Plaintiff's Motion for Temporary Restraining Order was converted to a Motion for Preliminary Injunction. Following the evidentiary hearing before this Court, Defendants moved for Judgment on Partial Findings Pursuant to Federal Rule of Civil Procedure 52(c), which motion Plaintiffs do not oppose. Accordingly, we construe the instant matter as one for permanent injunction, fully disposing of the matter on the merits.

- picketing. (Tr. Feb. 10 at 133.)
4. Plaintiffs Phillip T. Pongracz and Karen Pongracz are husband and wife, and reside at 1325 East Livingston Street, Allentown, Pennsylvania, which residence is located approximately one block north of the AWC. (Compl., ¶ 6; Tr. Feb. 10 at 106.)
 5. Plaintiff Joseph A. Arietta resides in Allentown, Pennsylvania. (Compl., ¶ 1.)
 6. Plaintiff Donald Earl Cummings resides in Bethlehem, Pennsylvania. (Compl., ¶ 2.)
 7. Plaintiff Joseph F. O'Hara resides in Hobby, Pennsylvania. (Compl., ¶ 3.)
 8. Plaintiff Edward J. Kuchar resides in Allentown, Pennsylvania. (Compl., ¶ 4.)
 9. Plaintiff Kathleen R. Kuhns resides in Wyomissing, Pennsylvania. (Compl., ¶ 5.)
 10. Plaintiff Mary Ann Yorina resides in West Wyoming, Pennsylvania. (Compl., ¶ 7.)
 11. Defendant City of Allentown (the "City" or "Allentown") is the third largest city in the Commonwealth of Pennsylvania, and is located within the Eastern District of Pennsylvania. The City has a population of approximately 110,000. (Tr. Jan. 28 at 26.)
 12. Defendant Roy Afflerbach is the Mayor of Allentown.

(Compl., ¶ 20.)

13. Defendant Joseph Blackburn is the Chief of Police of the City's Police Department. (Compl., ¶ 12.)
14. Defendant Ronald Manescu is the Assistant Chief of Police of the City's Police Department and has been employed as a police officer since 1977. (Tr. Jan. 28 at 26.)
15. Inspector Frank Peters has been employed by the City's Police Department for approximately thirty years. (Tr. Feb. 10 at 134.)
16. Plaintiffs' Complaint alleges four counts against Defendants, as follows: Count I - 42 U.S.C. § 1983 (Deprivation of Right of Freedom of Speech); Count II - 42 U.S.C. § 1983 (Deprivation of Right to Freedom of Assembly); Count III - 42 U.S.C. § 1983 (Deprivation of Right to Free Exercise of Religion); Count IV - Supplemental State Law Claim (Civil Conspiracy). Counts I through III of Plaintiffs' Complaint hinge on the constitutionality of the Ordinance at issue in this matter.

The AWC and Its Location

17. On December 2, 2003, the AWC relocated from 1810 Steel Stone Road in Hanover Township, Pennsylvania to 1409 Union Boulevard in Allentown. (Tr. Jan. 28 at 62.)
18. The AWC is a corporation organized under the laws of

- Pennsylvania and provides medical services to women, including abortions. (Tr. Feb. 10 at 47, 55.)
19. Jennifer Boulanger has been employed as the Executive Director of the AWC since October 1997. (Tr. Jan. 28 at 61.)
 20. The AWC's facility is bound on the south by Union Boulevard, on the north by Keats Street, on the west by Nelson Street and on the east by Plymouth Street. (Defs.' Ex. 1.)
 21. The distance from the door of the AWC to Nelson Street is 166 feet. (Tr. Jan. 28 at 38.)
 22. The parking lot used by the AWC is across Keats Street. (Defs.' Ex. 1.)
 23. The AWC parking lot is bounded on the north by Livingston Street, on the west by Nelson Street and on the south by Keats Street, and measures 121 feet from Keats Street to Livingston Street. (Defs.' Ex. 1; Tr. Jan. 28 at 38.)
 24. There are several aprons on the Nelson Street-side of the parking lot for ingress to and egress from the lot. (Tr. Jan. 28 at 48.)
 25. The Keats Street entrance to the AWC is the primary entrance used by AWC staff and patients. (Tr. Jan. 28 at 30.)
 26. Keats Street is a fourteen-foot wide street with no sidewalks. (Tr. Jan. 28 at 36, 47; Tr. Feb. 10 at 141.)
 27. Keats Street is used by vehicular and pedestrian traffic.

(Tr. Jan. 28 at 28, 45.)

28. Union Boulevard, Nelson Street, Livingston Street and Plymouth Streets have sidewalks. (Tr. Jan. 28 at 36-37.)

The City of Allentown Ordinances and Their Construction

29. Section 311.02 of the Ordinance states:

All special events such as exhibits, fairs, athletic events, parades, concerts, block parties, church events or conventions, occupying, marching or assembling upon any street or public area of the City are permitted only after a permit for the holding thereof has been granted by the Mayor or his designee.

30. Section 311.03 of the Ordinance sets forth the fee requirement for a permit application:

Applications for special events permits shall be accompanied by a fee. The exact fee shall be established by the Mayor and adopted by Administrative Regulation (AIM) in such amount as he may determine to be sufficient to cover the administrative cost of processing the permit.

31. Section 311.05 of the Ordinance sets forth the standards for permit issuance and denial as follows:

A. Standards for issuance. The Mayor or his designee shall issue a special events permit conditioned upon the applicant's written agreement to comply with the terms of such permit unless the Mayor or his designee finds any of the following:

1. The time, size and location of the special event will disrupt to an unreasonable extent the movement of traffic or the public peace;
2. The special event is of a size or nature that the diversion of so

great a number of police officers of the City that reasonable police protection would be denied to the City;

3. Such special event will interfere with another special event for which a permit has already been issued.

B. Standards for denial. The Mayor or his designee shall deny an application for a special events permit and notify the applicant of such denial where:

1. The Mayor or his designee makes any finding contrary to the findings required to be made for the issuance of a permit;
2. The information contained in the application is to be found to be false or nonexistent in any material detail;
3. The applicant refuses to agree to abide by or comply with all conditions of the permit.

32. On December 11, 2003, Assistant Chief Manescu issued a memorandum to officers under his command instructing them to prohibit anti-abortion protesters from blocking Keats Street. Chief Manescu explained that Keats Street is a public thoroughfare used by vehicular traffic and, therefore, police would not allow any type of protestors or anyone else from "occupying" it. (Tr. Jan. 28 at 28.)

33. "Occupying" means standing in one place in the street or blocking the street. (Tr. Jan. 28 at 28.)

34. Police would not allow anyone to block Keats Street for the safety of people going to and from the AWC and for anyone

- who chose to protest or demonstrate. (Tr. Jan. 28 at 28.)
35. Police would not allow anyone to block Keats Street because to do so would shut down the street and, consequently, shut down the AWC. (Tr. Jan. 28 at 30.)
36. Police did not want to limit the protestors' ability to deal with the people entering the AWC, but had to make sure that people could enter the AWC. (Tr. Jan. 28 at 35.)
37. The permit requirements give the police notice of how many protests, demonstrations, or other special events are occurring in and around the City so that the police department can plan for the number of officers needed on a given day. (Tr. Feb. 10 at 139-40.)
38. The City charges a \$5.00 fee to cover the administrative cost of processing the permit for any type of "special event" under the Ordinance, and the permit is good for several months. (Tr. Feb. 10 at 148.)
39. The City does not require insurance or police costs for small events. (Tr. Feb. 19 at 148.)
40. Chief Manescu agreed that Plaintiffs have First Amendment rights to leaflet, advocate, counsel and picket on Keats Street so long as they keep moving and stay on the side of Keats Street, i.e., they do not occupy the street by standing in the middle of Keats Street. (Tr. Jan. 28 at 45-46.)

41. Chief Manescu stated that a protestor could carry a picket sign and walk down Keats Street, past the entrance to the clinic, so long as the protestor keeps moving. (Tr. Jan. 28 at 44.)
42. Chief Manescu stated that protestors could walk in single file, without blocking Keats Street, and engage people in the protestors' message. (Tr. Jan. 28 at 44.)
43. Chief Manescu stated that, so long as they were not blocking the roadway, one or two protestors could stand on Keats street and not move. (Tr. Jan. 28 at 49.)
44. Inspector Peters testified that the Ordinance applies to groups, such as the one responsible for the January 10, 2004 protest, discussed below. (Tr. Feb. 10 at 135.)
45. Inspector Peters testified that the City requires permits so that the City has notice of events occurring on public streets or areas that may impact upon traffic, public safety and police services so that it can manage, and if necessary, limit the occurrence of such events. The City needs to know whether it has enough police officers available on shift to accommodate the special events as well as the normal police services it provides on any given day. (Tr. Feb. 10 at 139-40.)

Permits Issued

46. A separate anti-abortion group known as The Helpers of God's Precious Infants sought to protest on Livingston Street and police issued a permit for them to do so for a period of several months. (Tr. Jan. 28 at 29, 63.)
47. Plaintiffs requested a permit from the police to protest for a period of 24 hours a day, 7 days a week. (Tr. Jan. 28 at 29, 35.)
48. Police refused to issue Plaintiffs a permit for Keats Street, but did issue a permit to Plaintiffs for Nelson Street, Livingston Street, Plymouth Street, and Union Boulevard for 8:00 a.m. to 5:00 p.m., Monday through Saturday, or any time that the AWC was open. (Tr. Jan. 28 at 29-30, 35-36, 57; Tr. Feb. 10 at 137-39.)
49. The City waived the insurance requirement for the permit for Plaintiffs in this case. (Tr. Feb. 10 at 148.)

Plaintiffs' Activities

50. Beginning in or around the second week of December, 2003, Plaintiffs began to walk back and forth on Keats Street, in front of the entrance, across the entire street and in the middle of the street. (Tr. Jan. 28 at 64; Defs.' Ex. 3.)
51. Plaintiffs' protest activities on Keats Street include praying, picketing, leafleting, walking and counseling.

- (Tr. Feb. 10 at 72, 100, 106.)
52. Police have warned Plaintiffs that they may be cited for protesting without a permit, loitering, harassment, hindering traffic and disturbing the peace because of their protest activities on Keats Street. (Tr. Feb. 10 at 74, 88, 92, 116.)
53. Plaintiffs want to protest on Keats Street because they claim it is the only place where their message can be effective and relayed in a normal tone of voice. (Tr. Feb. 10 at 74, 89, 101, 117, 120, 126, 130.)
54. Plaintiffs claim their protest activities have never blocked Keats Street or access to the AWC. (Compl., ¶ 37; K. Pongracz Aff., ¶ 17; Tr. Feb. 10 at 79, 100-01.)
55. Plaintiffs claim they have protested peacefully, orderly and quietly at all times material to the within Complaint and were victims of the City's malicious deprivation of their First Amendment rights. (Compl. ¶¶ 34, 38, 40-41, 48, 56, 58, 68, 77-78; Pls.' Mem. of Law in Supp. of T.R.O. at 1; K. Pongracz Aff., ¶¶ 5-6, 8; P. Pongracz Aff., ¶ 12; Tr. Jan. 28 at 4-5; Tr. Feb. 10 at 120.)
56. Plaintiffs Cummings and Phillip Pongracz have protested at the AWC almost daily while Plaintiffs Kuchar and Arietta protest during the week and on Saturdays. (Tr. Jan 28 at 65.)

57. The presence of Plaintiffs on Keats Street has made it difficult for people to get from the parking lot to the entrance of the AWC. People have had to walk out of their way around Plaintiffs in a maze-like fashion. Plaintiffs have made it difficult to walk through without an escort, and have even stopped traffic. (Tr. Jan. 28 at 66-68, 75; Tr. Feb. 10 at 18, 141; Defs.' Ex. 4.)
58. Plaintiffs on Keats Street have blocked the street making it difficult for AWC patients and nurses who work next door to the AWC to get into the parking lot from Keats Street. (Tr. Jan. 28 at 67.)
59. In order to avoid walking through Plaintiffs, some patients have been dropped off at the AWC's door. (Tr. Jan. 28 at 68.)
60. As a result of having to walk through Plaintiffs on Keats Street, patients of the AWC have become visibly upset, agitated, would not make eye-contact and would accept an escort to the door. (Tr. Feb. 10 at 34-35.)
61. Plaintiffs have walked on the parking lot during their protest activities. (Tr. Feb. 10 at 25-26.)
62. Plaintiffs have conducted their protest activity in the middle of Keats Street and stayed within a couple of yards of the door to the AWC. (Tr. Jan. 28 at 31-32, 64-65, 71; Tr. Feb. 10 at 15; Defs.' Ex. 3.)

63. The AWC hired a private security guard and uses escorts to keep the entrance to the AWC clear since Plaintiffs have been on Keats Street. (Tr. Feb. 10 at 30, 35-36.)
64. A sign used by Plaintiff Phillip Pongracz is approximately four to five feet wide and has been used on Keats Street. (Tr. Feb. 10 at 27.)
65. AWC employees "buzz" the protestors with their cars as the employees drive by the protesters. (Tr. Feb. 10 at 131.)
66. The AWC has never paid any police costs for the activities of the police at the AWC. (Tr. Jan 28 at 47; Tr. Feb. 10 at 67.)
67. The AWC does not employ off-duty police officers or anyone affiliated with the City of Allentown. (Tr. Feb. 10 at 36.)
68. On January 8, 2004, police cited Plaintiffs Arietta, Cummings, Kuchar and Phillip Pongracz for protesting without a permit while they were on Keats Street. (Compl., Ex. 3.)

Protest Event on January 10, 2004

69. On January 10, 2004, police issued a permit for a group demonstration near the AWC consisting of approximately 70-90 people. Several police officers were assigned to the area. (Tr. Jan. 28 at 31-32; Tr. Feb. 10 at 135.)
70. On January 10, 2004, protest activity blocked Keats Street. Plaintiffs were "occupying" the street. Police believed the

situation created a hazard and directed them over a two-and-on-half-hour period to leave the street, but they repeatedly refused. Plaintiff Phillip Pongracz was one of those who refused to move. Inspector Peters arrested him and charged him with protesting without a permit and loitering.

(Compl., Ex. 3; Tr. Jan. 28 at 32; Tr. Feb. 10 at 136.)

71. On January 10, 2004, an unidentified woman drove down Keats Street while Plaintiffs were in the street. She stopped her vehicle, got out, and began yelling at Plaintiffs. (Tr. Jan. 28 at 66-67.)
72. On January 10, 2004, an unidentified driver of a patient dropped off at the AWC sat in his car in the parking lot and started shouting at Plaintiff Phillip Pongracz who protested right in front of the man's car on Keats Street. (Tr. Jan. 28 at 68.)
73. On January 10, 2004, approximately 12 cars traveled on Keats Street in a one-hour period. (Tr. Feb. 10 at 12-14.)
74. On January 10, 2004, there were less than ten police cars present to assist with protests at the AWC. (Tr. Feb. 10 at 145.)

Additional Protest Activity After January 28, 2004

75. After the first day of evidentiary hearings in this case on January 28, 2004, Plaintiffs blocked Keats Street by congregating at the corner of Nelson and Keats Streets, which prevented a car from entering Keats Street. Boulanger called the police. (Tr. Feb. 10 at 40.)
76. After January 28, 2004, Plaintiffs also stood in the street on Union Boulevard, a major thoroughfare, with large signs. The police cited them for hindering traffic. (Tr. Feb. 10 at 88, 90, 92-93, 107-08, 115.)

II. CONCLUSIONS OF LAW

1. Permanent injunctive relief can be granted if the following three conditions are satisfied:

First, the plaintiff must demonstrate that the court's exercise of equity jurisdiction is proper. Second, the plaintiff must actually succeed on the merits of [his or her] claims. Third, the plaintiff must show that the balance of the equities tips in favor of injunctive relief.

Roe v. Operation Rescue, 919 F.2d 857, 867 n.8 (3d Cir.

1990). The first prerequisite has three additional subparts. The plaintiff must show that: (1) he or she has no adequate legal remedy; (2) the threatened injury is real, not imagined; and (3) no equitable defenses exist. Id.

2. At the outset, we find that Plaintiffs have satisfied the

first requirement for permanent injunctive relief that the Court's exercise of equity jurisdiction is proper, which requirement contains three subparts, that there is no adequate legal remedy, the threatened injury is real, and no equitable defenses exist. See Roe, 919 F.2d at 867 n.8. First, no adequate legal remedy exists here since, "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." Elrod v. Burns, 427 U.S. 347, 373 (1976) (citing New York Times Co. v. United States, 403 U.S. 713 (1971)). Second, Plaintiffs have been able to demonstrate that their "First Amendment interests were either threatened or in fact being impaired" at the time that they sought injunctive relief from this Court. See id. Finally, while Defendants present the equitable defense of unclean hands, we do not credit that testimony as demonstrating that Plaintiffs' conduct rose to the level of inequitable conduct necessary for the defense.²

² Defendants argue that a permanent injunction should not issue because the Court's exercise of equitable jurisdiction is precluded by the defense of "unclean hands." A valid defense of "unclean hands" divests the Court of equitable jurisdiction regardless of the actual merits of the plaintiffs' claim. Northeast Women's Center, Inc. v. McMonagle, 665 F. Supp. 1147, 1154 (E.D. Pa. 1987). The clean hands maxim demands that one who comes to equity seeking relief must come with clean hands and must keep those hands clean throughout the pendency of the litigation. Id. The defense requires the defendants to make two showings. First, they must establish that the plaintiffs'

3. The First Amendment protects speech and other expressive activity in public places, and the degree of protection depends upon the type of forum at issue. See Kreimer v. Bureau of Police, 958 F.2d 1242, 1255-56 (3d Cir. 1992).
4. The United States Supreme Court has identified three types of fora. See Perry Education Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37 (1983). They include: (1)

conduct is inequitable. Second, they must show that the plaintiffs' inequitable conduct relates to the subject matter of the plaintiffs' claim. Id.

Here, Defendants allege that Plaintiffs' representations and portrayals are disingenuous and false. Specifically, Defendants challenge Plaintiffs' repeated portrayals of themselves to this Court as "peaceful, quiet and orderly" protestors, (see, e.g., Compl., ¶¶ 34, 38, 40-41, 48, 56, 58, 68, 77-78; Pls.' Mem. of Law in Supp. of T.R.O. at 1; K. Pongracz Aff., ¶¶ 5-6, 8; Phillip T. Pongracz Aff., ¶ 12; Tr. Jan. 28 at 4-5), and as protestors "who have not in any way obstructed Keats Street or access to the abortion facility." (See, e.g., Compl., ¶ 37; K. Pongracz Aff., ¶ 17; Tr. Feb. 10 at 79, 100-01.)

Defendants direct the Court's attention to some of Plaintiffs' conduct as follows: Plaintiffs have conducted their activities in the middle of Keats Street and stayed within a couple of yards of the door to the AWC (Tr. Jan. 28 at 31-32, 64-65, 71; Tr. Feb. 10 at 15; see also, Defs.' Exs. 3, 4); Plaintiffs' occupation of Keats Street has sometimes created difficulty for a vehicle or person to traverse, even stopping traffic (Tr. Jan. 28 at 66-68, 75; Tr. Feb. 10 at 18, 141; Defs.' Ex. 4); Plaintiffs congregated at the corner of Nelson and Keats Streets in such a manner as to block a vehicle's access to the center's parking lot (Tr. Feb. 10 at 40); Plaintiffs created a hindrance to traffic on Union Boulevard by standing in the street with large signs (Tr. Feb. 10 at 27, 88, 90, 92-93, 107-08, 115); patients were visibly upset and agitated after having to move through Plaintiffs on Keats Street (Tr. Feb. 10 at 34-35); and the AWC has had to use escorts and hired a security guard because of Plaintiffs' conduct on Keats Street. (Id.)

traditional public fora, such as streets, parks and public sidewalks long considered as places for public assembly and the communication of ideas; (2) designated public fora, areas the government has specified for First Amendment activities; and (3) nonpublic fora, places that are not by tradition or designation fora for public communication, i.e., private property. Kreimer, 958 F.2d at 1255-56.

5. The parties in this matter do not dispute that the forum at issue in this case, Keats Street, a public thoroughfare located in the City of Allentown, is a traditional public forum. (See, e.g., Pls.' Proposed Findings, Conclusions of Law, ¶ 8 (unpaginated); Defs.' Proposed Findings at 13, 15.)
6. The parties in this matter do not dispute that picketing, leafleting and speaking with members of the public in a traditional public forum are constitutionally protected activities. See Hill v. Colorado, 530 U.S. 713, 715 (2000).
7. For traditional fora, government regulation of First Amendment activities is subject to higher judicial scrutiny than regulation in nonpublic fora. Kreimer, 958 F.2d at 1255. In these fora, regulation of First Amendment activity is constitutional if three conditions are met. First, the regulation must be content-neutral, that is, "justified without reference to the content of the regulated speech." Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989).

Second, it must be "narrowly tailored to serve a significant governmental interest." Id. Third, it must "leave open ample alternative channels for communication of the information." Id.

8. Plaintiffs make facial and as applied challenges to the constitutionality of the City's permit Ordinance. (See Pls.' Mem. of Law in Supp. of T.R.O. at 7-8; Pls.' Proposed Findings, Conclusions, ¶ 8 (unpaginated).)

First Amendment Facial Challenge

9. Plaintiffs make a facial challenge to the permit ordinance, arguing that the ordinance is an unconstitutional prior restraint on speech that: (a) allows for denial of a permit based on the unfettered discretion of the Mayor of Allentown or his designee and (b) conditions speech in public fora on payment of open-ended costs for administration and the obtainment of a \$1 million liability policy. (Pls.' Proposed Findings, Conclusions, ¶ 5 (unpaginated).)
10. A facial challenge "means a claim that the law 'is invalid in toto - and therefore incapable of any valid application.'" Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 495 (1982) (quoting Steffel v. Thompson, 415 U.S. 452, 474 (1974)). It is well-established that in the area of freedom of expression,

parties have standing to facially challenge ordinances that delegate overly broad discretion to government officials or that contain impermissible content-based restrictions on speech. See, e.g., R.A.V. v. City of St. Paul, 505 U.S. 377, 381 (1992); City of Lakewood v. Plain Dealer Publishing Co., 486 U.S. 750, 759 (1988); see also, Peachlum v. City of York, 333 F.3d 429, 434-35 (3d Cir. 2003).

11. An ordinance requiring a permit and a fee before authorizing public speaking, parades, or assemblies in the archetype of a traditional public forum, is a prior restraint on speech. Although there is a heavy presumption against the validity of a prior restraint, the Supreme Court has recognized that government, in order to regulate competing uses of public forums, may impose a permit requirement on those wishing to hold a march, parade, or rally. Such a scheme, however, must meet certain constitutional requirements. It may not delegate overly broad licensing discretion to a government official. Further, any permit scheme controlling the time, place, and manner of speech must not be based on the content of the message, must be narrowly tailored to serve a significant governmental interest, and must leave open ample alternatives for communication. Forsyth County v. The Nationalist Movement, 505 U.S. 123, 130 (1992).
12. The principal inquiry in determining content neutrality in

speech cases generally, and in time, place, or manner cases in particular, is whether the government has adopted a regulation of speech because of disagreement with the message it conveys. Hill v. Colorado, 530 U.S. 703, 719 (2000) (citing Ward, 491 U.S. at 791). The government's purpose is the controlling consideration. Ward, 491 U.S. at 791. A regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or message but not others. Id. Government regulation of expressive activity is content neutral so long as it is justified without reference to the content of the regulated speech. Id.

13. In evaluating a facial challenge, we consider the City's authoritative constructions of the ordinance, including its own implementation and interpretation of it. Forsyth, 505 U.S. at 131.
14. In this case, we find that the standards for issuance of a permit under Section 311.05 do not place unfettered discretion in the Mayor or his designee. Under Section 311.05, a permit "shall" issue unless one of three specific situations is present: (a) the time, size and location of the special event will unreasonably disrupt the movement of traffic or the public peace; (b) the special event is of a size or nature that the City's police officers would be

diverted away from reasonable protection of the City; or (c) the special event will interfere with another special event for which a permit has already issued. Pursuant to Section 311.05, the Mayor or his designee will deny a permit application only in the following situations: (a) if the Mayor or his designee makes a finding contrary to the findings required to be made for the issuance of a permit; (b) the information in the permit application is to be found to be false or nonexistent in any material detail; or (c) the applicant refuses to agree to abide by or comply with all conditions of the permit.

15. We find that, under Section 311.05, a permit may be denied only in certain enumerated circumstances that do not consider the content of the special event. Significantly, the characteristics of the "special event" are reported by the applicant and not characterized by the Mayor or his designee. Thus, the City does not "examine the content of the message that is conveyed" in its determination of whether to grant or deny the permit. See Forsyth, 505 U.S. at 134. Further, there is sufficient guidance set forth in Section 311.05 that prevents a decisionmaker from exercising his discretion in a content-based manner. See id. at 133.
16. The Ordinance at issue here does not authorize the Mayor or his designee to pass judgment on the content of speech.

None of the grounds for denying a permit involve an assessment of what a speaker might say. See Thomas v. Chicago Park District, 534 U.S. 316, 322 (2002).

17. We find that the Ordinance contains adequate procedural safeguards to guide the decisionmaker's decision whether or not to issue a permit to prevent the vesting of unbridled discretion in a government official. See Forsyth, 505 U.S. at 133; see also, Thomas v. Chicago Park District, 534 U.S. 316, 324 (2002).
18. The City's grant of a permit to another anti-abortion group, The Helpers of God's Precious Infants, as well as a permit to Plaintiffs to protest on any of the streets surrounding the AWC except for Keats Street, evidences a content-neutral application of the Ordinance.
19. We recognize that a content-neutral time, place and manner regulation can be applied in such a manner as to stifle free expression, such as where the licensing official enjoys unduly broad discretion in determining whether to grant or deny a permit, in which case, there is a risk that he will favor or disfavor speech based on its content. See Thomas, 534 U.S. at 322. For that reason, a time, place, manner regulation must contain adequate standards to guide an official's decision. Id. As discussed above, adequate safeguards are in place in the City's Ordinance to prevent

the decisionmaker's unbridled discretion. Further, the City's grant of a permit to a group who, like Plaintiffs, opposes abortion evidences the City's content-neutral application of the permit Ordinance.

20. Plaintiffs' contention that the Ordinance places unfettered discretion in the Mayor or his designee to grant or deny a permit based on the content of the speech is not supported by the evidence.
21. The second basis asserted in Plaintiffs' facial challenge to the ordinance is that Section 311.05 does not prescribe adequate standards for the administrator to apply when he sets a permit fee, and that the setting of any fees or costs are content-based.
22. We again consider the City's authoritative constructions of the ordinance, including its own implementation and interpretation of it. Forsyth, 505 U.S. at 131.
23. The fee for a permit is \$5.00 for anyone who applies for a permit. (Tr. Feb. 10 at 148.) Since the fee remains the same for anyone who applies for a permit, the setting of a permit fee is not based on the content of the message.
24. Insurance costs are waived for small events. (Tr. Feb. 10 at 148.) Since the insurance costs are based on the size of the event only, the setting of such costs cannot be said to be based on the content of the message.

25. Plaintiffs' contention that the fees and costs are content-based is not supported by the evidence.
26. It is a traditional exercise of the States' police powers to protect the health and safety of their citizens. Hill v. Colorado, 530 U.S. 703, 715 (2000). The State has a strong interest in ensuring public safety and order, in promoting the free flow of traffic on public streets and sidewalks, and in protecting the property rights of all its citizens. Madsen v. Women's Health Center, Inc., 512 U.S. 753, 768 (1994). The government's interest in public safety is clearly a valid interest. Schenck v. Pro-Choice Network of Western New York, 519 U.S. 357, 376 (1997). The City's interests in public safety and the free flow of traffic are significant ones.
27. A regulation of the time, place or manner of protected speech must be narrowly tailored to serve the government's legitimate, content-neutral interest but it need not be the least restrictive or least intrusive means of doing so. Ward, 491 U.S. at 798. The requirement of narrow tailoring is satisfied so long as the regulation promotes a substantial government interest that would be achieved less effectively absent the regulation. Id. at 799. This standard does not mean that a time, place, or manner regulation may burden substantially more speech than is

necessary to further the government's legitimate interests.

Id.

28. Here, the Ordinance requiring a permit for special events is narrowly tailored to further the City's legitimate interests of public safety and free flow of traffic. The permit gives the City notice of the date, time, location and numbers of expected participants for the event, so that the City can properly determine the numbers of police required to maintain public safety and the free flow of traffic throughout the City. The Ordinance, as discussed above, does not require an assessment of the content of the message to be conveyed during the special event and, thus, speech is not burdened more than necessary to further the City's legitimate interests.
29. The Ordinance survives Plaintiffs' First Amendment facial challenge.

First Amendment As Applied Challenge

30. However, Plaintiffs also challenge the Ordinance as applied to them and their individual protest activities.
31. Section 311.02 describes special events as including, but not limited to, "exhibits, fairs, athletic events, parades, concerts, block parties, church events or conventions, occupying, marching or assembling upon any street or public

area of the City"

32. Defendants suggest that a reasonable interpretation of "special events" as including those activities which involve, as here, "occupying, marching or assembling upon any street or public area of the City." (Defs.' Proposed Findings at 13.) This Court, in evaluating the application of Section 311.02 to Plaintiffs, must consider the entire section, including the first half of the section which states: "[a]ll special events such as exhibits, fairs, athletic events, parades, concerts, block parties, church events or conventions"
33. Section 311.05 provides an illustrative, not exhaustive, list of possible "special events" with the use of the words "such as." Evaluating the illustrative list of "special events," we find that a characteristic that is common to the examples is the implication of large-scale attendance at the event. This view is supported by Inspector Peters, who testified that the Ordinance applies to groups, such as the one responsible for the January 10, 2004 protest. (Tr. Feb. 10 at 135.)
34. There are no prohibitions against individuals walking down Keats Street, so long as they do not block the street or stand in the middle of the street.
35. Plaintiffs in this case are individuals who volunteer their

time to advocate their pro-life message, and are not affiliated with any group. The Ordinance does not state that it applies to individuals, nor does it state that it applies to counseling, leafleting, praying and picketing. We find that the Ordinance has been unreasonably applied to Plaintiffs, as individuals and not affiliated with a group.

36. Applying the intermediate scrutiny test discussed above, we find that the City has not demonstrated that requiring a single, individual protestor to obtain a permit is a narrowly tailored regulation to serve the government's legitimate interests in public safety and the free flow of traffic. Accordingly, we find that imposing the Ordinance on Plaintiffs here, who are individuals and not affiliated with any group, infringes on each of their individual First Amendment rights to counsel, leaflet, pray and picket in the quintessential public forum of a public street.
37. Thus, Plaintiffs have satisfied the second requirement for permanent injunctive relief that they have prevailed on the merits of their as applied First Amendment challenge to the Ordinance.
38. As to the third requirement for permanent injunctive relief, Plaintiffs have sufficiently demonstrated that the balance of the equities weighs in their favor. Defendants have not demonstrated that Plaintiffs pose a significant threat to

public safety. Further, the public interest is best served by vindicating constitutional rights when the exercise of those rights outweighs harm or inconvenience to the public. See Swartzwelder v. McNeilly, 297 F.3d 228, 242 (3d Cir. 2002).

Pennsylvania State Law Claim for Civil Conspiracy

39. A pendent state claim may provide a basis for injunctive relief regardless of the merits of the federal claim or claims. Roe, 919 F.2d at 867.
40. Plaintiffs allege a pendent state law claim for civil conspiracy. (Compl., ¶¶ 105-111.) Plaintiffs allege that such conspiracy is demonstrated by Defendants' "joint carrying out of an agreed upon plan, scheme and policy of silencing defendants' [sic] [Plaintiffs'] message through the use of police power and intimidation, the threat of groundless prosecution under inapplicable ordinances, and the unlawful denial by the Mayor and his designates of a 'permit to protest' in the only forum where plaintiffs' protest would be effective." (Id.)
41. There is no evidence that individual Defendants in this matter intentionally agreed upon a plan to silence Plaintiffs' message.
42. Accordingly, Plaintiffs' alleged state law claim for civil

conspiracy must fail.

For the foregoing reasons, Plaintiffs' request for injunctive relief is **GRANTED IN PART** and **DENIED IN PART**, to the extent that the Ordinance does not apply to Plaintiffs, as individuals and not affiliated with any group, who volunteer their time to advocate their pro-life message through counseling, leafleting, praying and picketing on Keats Street, a public thoroughfare and a traditional public forum. Furthermore, Plaintiffs are permitted to engage in their protest activities on Keats Street so long as they conduct their protest activities along the public walkways of Keats Street in a lawful manner that does not obstruct traffic on Keats Street, or the entrances to the AWC and the AWC parking lot.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JOSEPH A. ARIETTA, et al., : CIVIL ACTION
 Plaintiffs, :
 :
 v. :
 :
CITY OF ALLENTOWN, et al., :
 Defendants. :
 : No. 04-226

O R D E R

AND NOW, this day of August, 2004, upon
consideration of the Motion for Temporary Restraining Order (Doc.
No. 2) and Memorandum in Support of the Motion for Temporary
Restraining Order (Doc. No. 3) filed by Plaintiffs Joseph A.
Arietta, Donald Earl Cummings, Joseph F. O'Hara, Edward J.
Kuchar, Kathleen R. Kuhns, Phillip T. Pongracz, Karen Pongracz,
Mary Ann Yorina (collectively, "Plaintiffs") and the Brief in
Opposition to Plaintiffs' Motion for a Temporary Restraining
Order (Doc. No. 7) filed by Defendants Roy Afflerbach, Joseph
Blackburn, City of Allentown and Ronald Manescu (collectively,
"Defendants"); the matters addressed during a full evidentiary
hearing on January 28, 2004 and February 10, 2004; and
Defendants' Motion for Judgment on Partial Findings Pursuant to
F.R.C.P. 52(e) (Doc. No. 15), Defendants' Proposed Findings and
Legal Conclusions (Doc. No. 16), Plaintiffs' Proposed Findings of
Fact and Conclusions of Law (Doc. No. 18) and Plaintiffs'
Memorandum of Law in Further Support of Motion for a Temporary
Restraining Order/Preliminary Injunction (Doc. No. 23); **IT IS**
ORDERED that:

1. Defendants' Motion for Judgment on Partial Findings (Doc. No. 15), to which no objection has been filed by Plaintiffs, is **GRANTED**.
2. Plaintiffs' Motion for Temporary Restraining Order (Doc. No. 7), which, by agreement of the parties, has been converted to a Motion for Preliminary Injunction is now converted into a Motion for Permanent Injunction.
3. Plaintiffs' converted Motion for Permanent Injunction (Doc. No. 7) is **GRANTED IN PART** and **DENIED IN PART**, as follows:
 - a. Defendants are permanently enjoined from enforcing Sections 311.01 to 311.13 of the City of Allentown Codified Ordinances against Plaintiffs, as individuals and not affiliated with any group, who volunteer their time to advocate their pro-life message through counseling, leafleting, praying and picketing, on Keats Street, a public thoroughfare and a traditional public forum; and
 - b. Plaintiffs, as individuals, are permitted to engage in their protest activities on Keats Street so long as they conduct their protest activities along the public walkways of Keats Street, in a lawful manner that does not obstruct traffic on

Keats Street, or the entrances to the AWC and the
AWC parking lot.

4. In all other respects, Plaintiffs' Motion for Permanent Injunction (Doc. NO. 7) is **DENIED**.
5. The Clerk of Court is directed to **CLOSE** this matter for statistical purposes.

BY THE COURT:

JAMES MCGIRR KELLY, J.