

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 11-1982

KATHLEEN KUHNS, JOYCE MAZALEWSKI, and KATHLEEN TEAY,
Plaintiffs-Appellants,

v.

CITY OF ALLENTOWN, CHIEF OF POLICE ROGER MacLEAN,
ALLENTOWN WOMEN'S CENTER, and JENNIFER BOULANGER,
Defendants-Appellees.

On Appeal from the United States District Court for the Eastern
District of Pennsylvania, No. 08-CV-02606 (Hon. James Knoll Gardner)

**BRIEF FOR APPELLEES ALLENTOWN WOMEN'S CENTER
AND JENNIFER BOULANGER**

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I. COUNTER STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

This is an appeal from an order of the district court entered on March 17, 2011, as corrected by order entered March 22, 2011, granting the amended motion for summary judgment of defendants City of Allentown and Chief of Police Roger MacLean and granting in part and denying in part the motion for summary judgment of defendants Allentown Women's Center and Jennifer Boulanger. A66. The district court had jurisdiction pursuant to 28 U.S.C. § 1331 because claims were asserted under 42 U.S.C. § 1983.

Plaintiffs' notice of appeal was filed on April 14, 2011. A67. This Court has jurisdiction pursuant to 28 U.S.C. § 1291 inasmuch as the district court's order of March 17, 2011 disposed of all remaining claims, except plaintiffs' claim against Allentown Women's Center and Jennifer Boulanger for public nuisance, which was dismissed without prejudice by stipulation on March 22, 2011. A66.

II. COUNTER STATEMENT OF THE ISSUE PRESENTED

Whether the district court properly granted summary judgment to defendants on plaintiffs' civil rights claim under 42 U.S.C. § 1983 when, after over two years of litigation, plaintiffs failed to adduce evidence creating a genuine issue for trial as to the existence of a conspiracy between the municipal defendants and the private party defendants necessary to transform purely private action into state action, which is an essential element of plaintiffs' claim.

III. COUNTER STATEMENT OF THE CASE

In this civil rights action, plaintiffs (“the protesters”) allege that the Allentown Women’s Center, a privately owned and operated women’s health center, and its executive director Jennifer Boulanger (collectively, “the Women’s Center”), conspired with the City of Allentown and the Chief of the Allentown Police Department (collectively, “the City”) to deprive the protesters of their constitutional rights to free speech, religious freedom and equal protection of the law, and to create a public nuisance. The sole claim at issue in this appeal is the protesters’ First Amendment claim in Count One of the complaint.

The protesters allege that the City and the Women’s Center are permitting clinic escorts – private individual volunteers not employed by the Women’s Center who provide support and assistance to patients entering the Center – to accompany patients through a crosswalk leading from the Center’s parking lot to its entrance while using three strategies to shield the patients from direct contact with the protesters: (1) the escorts hold two plastic tarpaulins seven feet apart within the crosswalk, which separates patients from protesters; (2) the escorts form a “human shield” around patients to prevent protesters from having “access” to them; and (3) the escorts create “vocal noise” for the purpose of drowning out the protesters’ message. A71-72.

After over two years of litigation and extensive discovery, the district court, per the Honorable James Knoll Gardner, entered summary judgment against the protesters on their First Amendment claim, holding that there was no evidence that the City engaged in the challenged private conduct, and that the undisputed facts adduced by the parties rebutted any possible inference of conspiracy that would be sufficient to turn the Women's Center defendants into state actors under Section 1983. A6-8. In so holding, the district court correctly applied the law and committed no error warranting reversal.

A. Previous Litigation Involving The Parties

There has been no previous litigation between the plaintiffs and the Women's Center. However, the present litigation follows on the heels of two previous civil rights actions by anti-abortion protesters against the City of Allentown and the Allentown Police Department stemming from confrontational protests at and around the entrance to the Women's Center's medical facility. *See Arietta v. City of Allentown* ("Arietta I"), C.A. No. 04-0226 (E.D. Pa.); *Arietta v. City of Allentown*, ("Arietta II"), C.A. No. 04-5306 (E.D. Pa.).

Two of the three plaintiffs in the instant case, Kathleen R. Kuhns and Kathleen Teay, also were plaintiffs in *Arietta II*; Kuhns was a plaintiff in *Arietta I*, as well. Both Kuhns and Teay signed a comprehensive Settlement Agreement and General Release ("Settlement Agreement") in *Arietta II* to which was appended a

Consent Order (“Consent Order”) that the district court entered as a final judgment. *See* A222-24; A225-28; and A229. The Consent Order sets out detailed rules governing the conduct of police and protesters at and around the entrance to the Women’s Center. *See* A225-28. Specifically, the Consent Order created a seven-foot-wide crosswalk spanning Keats Street, which is the street running between the Women’s Center’s private parking lot and its entrance; the crosswalk bisects the fourteen-foot-wide Keats Street and leads from the parking lot pedestrian gate to the Women’s Center’s door. A226. In addition, the Consent Order created a four-foot-wide painted walkway along Keats Street adjacent to the Women’s Center’s parking lot. *Id.*

The Consent Order further provided:

h. Plaintiffs may stand or walk along the walkway within the crosswalk past the parking lot gate in either direction during their pro-life advocacy. *However, if a patient, staffer, volunteer, or other person affiliated with Allentown Women’s Center elects to enter and use the crosswalk and is in the process of going to or from AWC, any Plaintiff present shall withdraw from the crosswalk until said person(s) have entered AWC or the parking lot, as the case may be.*

i. When AWC-related persons are using the crosswalk, Plaintiffs may walk back and forth across Keats Street on either or both sides of the crosswalk, to engage in pro-life advocacy, until the AWC-related persons have entered AWC or the parking lot, as the case may be. *Non-consensual physical contact is prohibited between Plaintiffs and clinic employees, patients or visitors.*

A226-27 (emphasis supplied).

Toward the conclusion of *Arietta II*, the Women's Center unsuccessfully attempted to intervene upon learning the broad outlines of the proposed Consent Order. The City opposed the Women's Center's intervention, as did the *Arietta II* plaintiffs. The Women's Center's motion to intervene was denied. *See* A239.

The district court's opinion denying the motion to intervene stated that "Defendants [City of Allentown and the Allentown Police] told the Women's Center early and often that they would not adopt all the positions for which the Center advocated. The Women's Center had clear notice that its interests diverged from those of defendants." A244. The district court further held that "[t]he existing parties' settlement agreement does not bind the Women's Center in any way with respect to possible future FACE Act [Freedom of Access to Clinic Entrances Act, 18 U.S.C. § 248] or Fourteenth Amendment litigation. The Center is a non-party and will not be bound by res judicata principles." A284. In addition, the district court made clear that the *Arietta II* settlement agreement "does not compel employees, patients or visitors of the Allentown Women's Center to utilize the designated crosswalk. Those affiliated with the Women's Center are free to seek passage across Keats Street in either direction *in any manner they choose.*" A287 (emphasis supplied).

B. Procedural History

The volunteer escorts began using tarpaulins to help patients enter the Women's Center in November 2007. The protesters took no action against the City under the Consent Order – suggesting they well understood that the Consent Order did not apply to the use of tarpaulins by private parties – nor did they move to dissolve, clarify, or amend the Consent Order. Instead, the protesters' counsel corresponded with the City in an effort to secure the City's agreement that the Allentown police would stop the escorts from using the tarpaulins. The City declined to do so.

Apparently no longer happy with the bargain struck in *Arietta II* – but unwilling to use procedures available to them to re-visit the Consent Order in that case – plaintiffs Kuhns and Teay, joined by plaintiff Mazalewski, filed a new action on June 4, 2008 against the City of Allentown and its police chief. For the first time in their litigation history, plaintiffs also named as defendants the Allentown Women's Center and its executive director, Ms. Boulanger. A70. The protesters alleged in their complaint that the Women's Center had acted jointly with the City to deprive the protesters of their civil rights. The complaint provided no details of the alleged conspiracy or how that conspiracy violated the protesters' rights, other than to allege that the defendants were permitting volunteer clinic escorts to accompany Women's Center patients through the crosswalk on Keats

Street using the three strategies described above to shield patients from direct contact with the protesters. *See* A71-72.

The Women's Center moved to dismiss the complaint, and, on March 31, 2009, the district court granted in part and denied in part that motion. A57.¹ The court dismissed Count II, alleging violations of the Pennsylvania Constitution, and Count III, claiming a denial of equal protection of the laws. However, the district court permitted plaintiffs to proceed with Count I, brought pursuant to 42 U.S.C. § 1983 and claiming that defendants conspired to deprive plaintiffs of their First Amendment rights, and Count IV, a pendant state law claim alleging a public nuisance. Following the Supreme Court's decision in *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009), the district court granted the Women's Center's request to move for reconsideration of that part of the ruling that denied the motion to dismiss, but the court denied the motion for reconsideration by order dated February 12, 2010. A59. The parties conducted discovery between August 2009 and March 24, 2010.

The City and the Women's Center each filed motions for summary judgment on June 30, 2010.² A60, 61. On March 17, 2011, the district court

¹ This decision is reported at *Kuhns v. City of Allentown*, 636 F. Supp. 2d 418 (E.D. Pa. 2009).

² The City had previously filed a summary judgment motion that was not decided, so the motion it filed on June 30, 2010 was styled as an amended motion. A59, A60-61.

issued an order and opinion granting the City's amended motion and granting in part and denying in part the Women's Center's motion. A42-44; A1-41. The court dismissed Count I of the complaint as to all defendants and granted the City's motion as to Count IV, the state-law public nuisance claim.

In granting summary judgment on the First Amendment claim, the district court concluded that the protesters' alleged harm was not caused by a constitutional violation. The undisputed facts established that the challenged actions outside the Women's Center had been performed by private parties who are not state actors. The court noted that, while "a private party defendant . . . may be deemed to be a state actor for the purposes of Section 1983 liability where the private party conspires with a government official," A35, the court concluded that here the protesters had failed to carry their burden of producing sufficient evidence of conspiracy:

[P]laintiffs have not sufficiently alleged a pre-arranged plan or collaborative relationship between defendants Center and its Director, on the one hand, and the City defendants, on the other, which would imbue the Center defendants with state power sufficient to render them state actors for purposes of Section 1983 liability. I also concluded that plaintiffs have not adduced sufficient evidence from which a neutral factfinder could conclude that defendants engaged in a civil conspiracy to violate plaintiffs' constitutional rights.

A7-8. In so holding, the district court correctly stated and applied the summary judgment standard, noting specifically that "[p]laintiffs cannot avert summary

judgment with speculation or by resting on the allegations in their pleadings, but rather they must present competent evidence from which a jury could reasonably find in their favor.” A10 (citing *Ridgewood Bd. of Educ. v. N.E. for M.E.*, 172 F.3d 238, 252 (3d Cir. 1999); *Woods v. Bentsen*, 889 F. Supp. 179, 184 (E.D. Pa. 1995)).

An order correcting the March 17 summary judgment order issued on March 22, 2011, clarifying that the district court had granted summary judgment on the state public nuisance claim as to the City but not as to the Women’s Center. A66. The parties subsequently stipulated to the dismissal of the protesters’ public nuisance claim against the Women’s Center, thereby resolving all claims before the district court. A67.

This appeal followed. A67.

IV. STATEMENT OF RELATED CASES AND PROCEEDINGS

There are no related completed cases or proceedings that have previously been before this Court or that are currently before this Court.

V. COUNTER STATEMENT OF THE FACTS

Plaintiffs are opponents of abortion rights who routinely protest at the Allentown Women's Center and engage in various activities in order to, according to the complaint, "counsel and inform expectant mothers and their companions at AWC in an attempt to persuade them not to abort their unborn children." A70. Allentown Women's Center is a private health care clinic that provides reproductive health care, including abortion services. *Id.* Defendant Jennifer Boulanger is the Women's Center's Executive Director. A70-71.

The Women's Center is within the jurisdiction of the City of Allentown Police Department. A70. Defendant Roger MacLean is the Chief of the Allentown Police Department. *Id.* Although he is a named defendant in this action, Chief MacLean has had only limited interaction with the Women's Center over the past several years, and his knowledge regarding the subject of this lawsuit is limited to the information provided to him in his official capacity through Allentown's City Solicitor's office and through the Assistant Chief of Police, Joseph Hanna. *See* A217; A219-20 (MacLean Dep. excerpts).

This dispute centers around the activity that takes place outside the Women's Center while patients attempt to make their way into the Center. A71-72. The protesters allege that defendants are permitting clinic volunteer escorts to accompany Women's Center patients through the crosswalk on Keats Street using

three strategies to shield the patients from direct contact with the protesters: (1) holding two six-foot by fifteen-foot tarpaulins seven feet apart within the crosswalk, which separates patients from protesters; (2) forming a “human shield” around patients to prevent protesters from having “access” to them; and (3) creating “vocal noise” for the purpose of drowning out the protesters’ message. *Id.*

The protesters allege that the City and the Women’s Center acted jointly with respect to this activity and thereby conspired to violate the protesters’ constitutional rights. However, the undisputed evidence shows that the Women’s Center did not consult with the City or the police department prior to using these tactics, and the City adopted a consistently neutral, “hands-off” policy when called to referee disputes at the Women’s Center. According to the City, the Women’s Center “never received approval from the City of Allentown nor its police department to use” any of the challenged tactics. *See* A306 (City of Allentown and Chief Roger MacLean’s Answers and Objections to Plaintiffs’ Second Set of Interrogatories).

The facts giving rise to this litigation came to a head in November 2007, when volunteer escorts at the Women’s Center had the idea of using tarpaulins on Keats Street as a method of helping patients move through the crosswalk from the Women’s Center parking lot to the door of the Center. *See* A302; *see also* A304 (Boulangier Dep. excerpts). The Women’s Center did not

obtain permission from the City before using the tarpaulins. A304. The City did not know of the escorts' idea to use the tarpaulins before the tarpaulins were used and provided no support for those plans. Assistant Chief of Police Joseph Hanna testified that he did not know when the tarpaulins first were used on Keats Street and that he and the City of Allentown only learned about the use of the tarpaulins after November 3, 2007, when a police officer responded to plaintiff Kuhns's complaint about the use of the tarpaulins. *See* A308; *see also* A309; A132 (“[t]he idea of the tarps was thought up by the escorts”). Assistant Chief Hanna did not talk to Ms. Boulanger about the plan to use tarpaulins before they were in use. A308 (Hanna Dep. excerpts).

Plaintiff Teay testified as follows with respect to the first day the tarpaulins were used by the escorts:

. . . the day the tarps went up, we called, the police came that day. We told them that the tarps were erected, we would like them to take them down. And I believe the officer that came to the scene that day said I would have to check with my superiors prior to letting you know. But he made them take them down that day.

A512-13. After learning about the use of the tarpaulins from the protesters' call to the police, the City investigated their use and ultimately and unilaterally concluded that the conduct did not violate any law or court order. Describing the City's analysis of the challenged conduct, Assistant Chief Hanna testified:

[The Allentown Police Department was] not in a position to approve or disapprove the use of the tarps. So . . . our involvement, our purpose was solely to see whether or not it was a violation of any statutes, any Commonwealth statutes. It was determined in a conference with the Solicitor's office that there was not. And as a result of that, we did not issue any violations – vehicle code violations . . . it was not our position to condone the act or refute what they were doing.

A310. After the City learned about the tarpaulins, Assistant Chief Hanna spoke to the Women's Center "perhaps once, maybe twice" about use of tarpaulins. *Id.*

After the City conducted an initial analysis and concluded that the challenged activity was neither criminal nor unlawful, counsel for the protesters repeatedly complained to the City about the activity. On December 13, 2007 and December 20, 2007, Denis Brennan wrote to the City, complaining about the use of the tarpaulins and summarizing repeated correspondence with the City about the tarpaulins. A316-19.

In response to the letters, the City considered the complaints and again analyzed the allegations in light of the *Arietta II* Consent Order. The City concluded that if a tarpaulin was blocking the walkway, then the Consent Order may be violated. A322. The Solicitor instructed the City's outside counsel to ask Mr. Brennan for photographs and to advise that the City would continue to investigate the situation. *Id.* Mr. Brennan provided the City with a videotape. *See* A321. The City conducted further investigation and found that the escorts had not

erected immovable tarpaulins across Keats Street but rather were carrying them across the street only for the length of time it took the patient to cross from the parking lot entrance to the door. As a result of their investigation, the City concluded that the escorts' use of moving tarpaulins, which do not block the walkway, does not violate the Consent Order or any provision of the Pennsylvania Motor Vehicle Code. *See* A322-23 (email exchange between Joseph Hanna and Allentown Police officers; email from Joseph Hanna to Solicitor Jerry Snyder).

On January 15, 2008, Mr. Brennan wrote to the City's outside counsel confirming that he was "unaware of any City official who authorized or granted a privilege to [the Women's Center] with respect to using tarps on both sides of the corridor between [the Women's Center] parking lot and its abortion facility."

A326. Plaintiffs' counsel also stated that he would "advise the court [in a private criminal dispute] that the City has neither authorized nor granted any privilege to [the Women's Center]." *Id.* Thereafter, Mr. Brennan again wrote to counsel for the City complaining about the challenged activity. A324-25. As a result of the City's independent determination that the clinic escorts' actions did not violate any laws, however, it took no steps to stop the escorts' actions.

The City's position with respect to the tension between the Women's Center and the protesters, including plaintiffs, has been one of neutrality for all activity at the Women's Center, including the use of tarpaulins detailed above, as

well as the use of “human shields” or noise. The City has maintained this neutrality in responding to complaints by any parties regarding activity at the Women’s Center. In Police Command Meeting Minutes, the police department repeatedly memorialized – over the course of two years beginning prior to the settlement in *Arietta II* – the approach to be used when dealing with the Women’s Center and the protesters:

- “The Women’s Center on Keat[s] Street is getting letters with threats . . . we will continue to use a hands-off approach.” A327-38.
- “A/Chief Hanna said to treat the Women’s Center with a hands-off approach.” A120.
- “All complaints will be handled on a case by case basis. The department will make arrests if warranted but does not want to be in the referee position between the two parties.” A330-31.
- “The Women’s Center is heating up. Protesters have filed suit against the Women’s Center, APD and the City. We will investigate assaults or threats. If there is even an inference of a threat, we will investigate. We need to remain neutral. We must also talk to the protesters and get information from both sides. Be specific on the reports, get names.” A121-22.
- “There was a problem at the Women’s Center on Keats Street. Each incident must be handled separately. The City’s position is neutral but if warranted arrests will be made on either side.” A333-34.

This position of neutrality was articulated by Assistant Chief Hanna in his deposition testimony, when he testified that he had a “professional relationship with Jennifer Boulanger” in which he “understood the challenges they had in

operating a business, and equally understood the passion behind the pro-life advocates.” A311. Assistant Chief Hanna and the police department “tried to maintain a neutrality and disseminate that down through the ranks and to patrol officers that would be responding [at the Women’s Center].” *Id.* After the Consent Order was entered, the City responded to several complaints both by protesters (including plaintiffs) and by the Women’s Center, but it has not issued any citations either against individuals associated with the Women’s Center or the protesters. A312 (Hanna Dep. excerpts).

On May 16, 2008, Jerry Snyder, Allentown’s City Solicitor, responded to complaints made by Ms. Boulanger and a videotape provided by the Women’s Center to the police department depicting a compilation of incidents at the Women’s Center. Solicitor Snyder concluded that he “would not recommend prosecution based on the evidence as compiled in this videotape.” *See* A118. He further concluded that he would “not recommend any action on behalf of the City alleging that the protestors are in violation of the stipulation in Arietta II.” *Id.*

Solicitor Snyder also stated:

as you [Assistant Chief Hanna] and I have previously discussed any evidence from either the protestors or the Women’s Center of alleged criminal violations will be reviewed thoroughly While both the protestors and Ms. Boulanger have widely divergent interests, they will be treated no differently than any other citizen of the City of Allentown, *as the City is neither an advocate for the protestors nor an advocate for the Women’s Center.*

Id. (emphasis supplied). In correspondence with plaintiff Kuhns, Assistant Chief Hanna offered to meet with her to discuss her request for proposed guidelines at the Women's Center. A336-37. He wrote, "I would be very much interested in speaking with you on this matter. The police department maintains a neutral position and respects one's right to freedom of speech." A336. He further stated that "[w]e understand that emotions run high on both sides of this topic and we try to carry out our duties in a diligent and respectful way." *Id.*

VI. COUNTER STATEMENT OF THE STANDARD OF REVIEW

This Court conducts a plenary review of a district court's decision granting summary judgment. *MCI Telecomm. Corp. v. Bell Atlantic-Pennsylvania*, 271 F.3d 491, 515 (3d Cir. 2001).

VII. SUMMARY OF ARGUMENT

The district court committed no error in granting summary judgment to defendants on plaintiffs' civil rights claim. After over two years of litigation, the protesters failed to adduce evidence creating a genuine issue for trial as to whether a conspiracy existed between the City and the Women's Center. In fact, the protesters' conspiracy theory amounts to nothing more sinister than an aggrieved person calling the police and being told that the actions about which the person has complained are not illegal. If this constituted a conspiracy, countless everyday decisions not to pursue a criminal matter made by every police department in every city and town across the United States would transform private citizens into state actors and would give rise to a flood of constitutional litigation. This is not the law, and with good reason.

Such an extreme and unprecedented expansion of the civil rights laws would create two undesirable incentives: First, individuals would have an incentive to complain to the police about activity of another private individual, no matter how lawful, because once they did (even if the police determined the activity was lawful), there would be the basis for a Section 1983 conspiracy lawsuit. Second, the police, fearful of being accused of conspiracy merely for having determined that this private action was lawful, would have an incentive to ignore the private complaint.

Plaintiffs' theory would open police departments and private individuals to endless constitutional litigation based on the everyday and socially-beneficial action of private individuals asking the police to investigate whether another private individual's conduct violates the law. As the district court correctly applied the law as it is – and not as plaintiffs would interpret it – this Court should affirm the district court's judgment.

VIII. ARGUMENT

A. The District Court Applied The Correct Standard In Granting Summary Judgment To Defendants On The Protesters' First Amendment Claim.

Rule 56 of the Federal Rules of Civil Procedure provides that a moving party is entitled to summary judgment when the record demonstrates that “there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). The moving party demonstrates this entitlement when the non-movant is unable to produce evidence of an essential element for which the non-movant has the burden of proof. *Celotex*, 477 U.S. at 323; *Bixler v. Central Pa. Teamsters Health & Welfare Fund*, 12 F.3d 1292, 1302 (3d Cir. 1993). Thus, when the moving party does not shoulder the burden of proof on the claims asserted, its burden is “discharged by showing – that is, pointing out to the district court – that there is an absence of evidence to support the [plaintiff’s] case.” *Celotex*, 477 U.S. at 325. When responding to such a motion, the non-moving party must demonstrate that there are “specific facts showing that there is a genuine issue for trial.” *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) (citing Fed. R. Civ. P. 56(e)). The district court correctly ruled that the protesters failed to make that showing here.

The protesters seize upon the district court's references to a "neutral" factfinder, A8, A38, as proof that the court does not know the correct standard to apply to motions for summary judgment. Br. for Appellants at 26. The district court's opinion refutes this argument. The opinion carefully examines the record and accords the protesters the benefit of all disputed facts.³ Describing the factfinder as "neutral" does not mean that the court failed to consider the evidence in the light most favorable to the protesters. In fact, the district court clearly stated that "all reasonable inferences from the record are drawn in favor of the non-movant," A10, which is the exact standard plaintiffs complain the district court did not apply.

Inasmuch as the protesters did not adduce any evidence to the contrary, the district court properly regarded as undisputed the facts that "the Center did not obtain permission from the City before using the tarpaulins, and that defendant Boulanger did not advise the City or any of its representatives that the Center intended to use the tarps." A37. As Rule 56 makes clear, refutations that

³ While the protesters find fault with the district court's overreliance on defense exhibits, *see* Br. for Appellants at 39, the protesters claim that they themselves "actually proved [their] allegations on the basis of defendants' own documents and admissions." *See id.* at 23. In any event, there is no significance to which side tendered the exhibits that are relevant and that inform the district court's conclusions. Moreover, the fact that one party presents evidence on a motion for summary judgment does not render that evidence pertinent, as the district court recognized. A10.

contain no citation to the record need not be considered by the court, and the facts they purport to rebut may be regarded as undisputed. *See* Fed. R. Civ. P. 56(c)(1)(A), (c)(3), (e)(2).

The protesters' failure to produce any conflicting evidence to draw these facts into dispute continues in this Court.⁴ Instead, they simply insist that the existence of a conspiracy is a fact question that, without more, precludes entry of summary judgment against them, as if they had no burden to produce evidence creating at least a question of material fact justifying a trial. *See* Br. for Appellants at 45-46. To be sure, the existence of a conspiracy is a matter of fact, but there is no dispute here as to the non-existence of the conspiracy baldly alleged by the protesters in their complaint. Only the presence of disputed issues of material fact can forestall summary judgment.

B. The District Court Correctly Held That The Undisputed Facts Show That The Women's Center Did Not Act Under Color Of

⁴ The protesters state that their contrary evidence consists of "deposition admissions by both Boulanger and Hanna of an agreement between the City and AWC via Hanna as emissary to MacLean, who presided over a meeting of the police department command structure at which approval of AWC's tarp deployment was confirmed as City policy." *See* Br. for Appellants at 46. But this conclusory characterization of the City's response to the tarpaulins as an "agreement" does not call into question that the Women's Center did not obtain permission from the City before using the tarpaulins, or that Ms. Boulanger did not advise the City or any of its representatives that the Women's Center intended to use the tarpaulins. Those facts were and continue to be undisputed.

State Law By Conspiring With The City To Violate The Protesters' Constitutional Rights.

The protesters can succeed on their Section 1983 claim against the Women's Center only if they can establish that it acted under color of state law. As the district court held in its opinion on the Women's Center's motion to dismiss:

A defendant acts under color of state law when he exercises power "possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law." *West v. Atkins*, 487 U.S. 42, 49, 108 S.Ct. 2250, 2255, 101 L.Ed.2d 40, 49 (1988); *Bonenberger v. Plymouth Township*, 132 F.3d 20, 23 (3d Cir. 1997).

"[I]t is settled that otherwise private acts are performed under color of state law for purposes of 42 U.S.C. § 1983, when they are part of a conspiracy with state officials." *Goadby v. PECO*, 639 F.2d 117, 120 n.2 (3d Cir. 1981). The Third Circuit has explained that

a defendant acts under color of state law if there is such a close nexus between the State and the challenged action that seemingly private behavior may be fairly treated as that of the State itself. A plaintiff may show such a nexus by establishing that the state and a private actor conspired with one another to violate an individual's rights.

Adams v. Teamsters Local 115, 214 Fed. Appx. 167, 172 (3d Cir. 2007) (internal punctuation omitted).

Thus, a private party defendant, whether an entity or individual, may be deemed to be a state actor for the purpose of § 1983 liability where the private party conspires with a government official. *Groman v.*

Township of Manalapan, 47 F.3d 628, 638 (3d Cir. 1998); *M&M Stone Co. v. Pennsylvania*, [No. 07-CV-04784,] 2008 U.S. Dist. LEXIS 76050, *64 (E.D. Pa. 2008) (Gardner, J.).

636 F. Supp. 2d at 430-31.

Here, the undisputed facts showed no nexus whatsoever, let alone a “close nexus,” between the state and the challenged action of the private party so that the challenged action may fairly be attributed to the state. *See Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 151-52 (1970). Instead, the undisputed evidence showed that the City was not even aware of the escorts’ plans to engage in the challenged activities and that the City provided no support – let alone active support – for those plans. Assistant Chief Hanna and Ms. Boulanger both testified that the City was not alerted to the escorts’ plans and that the City was not consulted in any way before the tarpaulins were used for the first time – and there is no evidence to suggest otherwise. A304; A308-09; *see also* A131-32. Even after it learned of the tarpaulins, the City had only limited communications with the Women’s Center about the challenged conduct and ultimately concluded, unilaterally and based on its independent analysis of the Consent Order and the Pennsylvania law, that it had no basis to require the escorts to cease the challenged conduct because their actions did not violate any law.

Allowing this claim of conspiracy to go forward on these facts would have had the potential to seriously disrupt police practice, turning even the smallest

of matters into a cause of constitutional dimension. If the district court had validated the protesters' view, every time police or other municipal officials concluded, in response to a private complaint, that a private citizen had not violated the law, that private citizen would suddenly turn into a state actor, with potential liability under Section 1983, and the police would be liable for the citizen's actions as well. But that is not, and cannot be, the law.

Indeed, if that were the law, the protesters themselves would be state actors that the Women's Center could sue for violating its constitutional rights. Just as the protesters complained to the City that the clinic escorts violated their rights, the Women's Center complained multiple times to the City that the protesters were violating the Women's Center's and its patients' rights. *See* A118-19 (letter from Solicitor Snyder to Assistant Chief Hanna in response to those complaints). And, just as the City decided that the clinic escorts' actions did not violate any law in response to the protesters' complaints, the City also decided that the protesters' actions did not violate any law in response to the Women's Center's complaints. *Id.* Because the City found that the protesters' actions did not violate the law, the protesters would also become state actors subject to constitutional restraint if their theory of the law were validated. Whichever side one considers – the protesters or the Women's Center – the same conclusion obtains:

constitutional litigation simply cannot be the consequence of state actors determining that acts by private individuals did not violate the law.

If it were otherwise, the law of state action would create an incentive system contrary to public policy. Individuals, such as the protesters, who wanted to quash the behavior of other private individuals, such as the clinic escorts, but had no basis to do so under private law, could complain to the police about the other individuals' behavior solely so that the police would, in the words of the protesters, "approve" the behavior as not against the law. Once the police did so, under the protesters' theory of state action, the other private individuals (here, the clinic escorts) would be state actors as co-conspirators with the police, their behavior now "approved" by the state. Now, without a basis in private law to sue the other private individuals, the whole body of constitutional law would be available to the complainants. Expanding the basis of liability would incentivize innumerable police complaints for completely lawful behavior.

Moreover, the protesters' theory of state action would create a dangerous incentive for the state to shirk its obligations. State actors, out of fear of becoming co-conspirators with private individuals (and thus responsible for their actions) for merely finding that the private individual's behavior was lawful (or, in the words of the protesters, "approved"), would have an incentive to ignore private complaints. Doing so would avoid ever being put in the situation of becoming a

co-conspirator with respect to purely private action. After all, if the public defendants here had never investigated the protesters' complaint about the clinic escorts' actions, they would have never found those actions to be lawful (or "approved"), which is the basis for the conspiracy claim here.

This incentive for the police to ignore complaints and the incentive for private individuals to complain just to create constitutional liability are the logical result of the protesters' theory of state action. Such perverse incentives are not based in the case law, and they clearly demonstrate why the protesters' theory must be rejected. Because the protesters failed to offer any evidence that the Women's Center acted under color of state law, as recognized by the courts, the district court properly dismissed their claim under 42 U.S.C. § 1983.

In fact, as the district court noted, there is abundant documentary evidence showing the *absence* of conspiracy between the City and the Women's Center. A36-38. *See also* A528 (Apr. 18, 2007 Command Meeting Minutes) (directing police "to treat the Women's Center with a hands-off approach"); A534-35 (Apr. 30, 2007 Command Meeting Minutes) (advising that police "policy will continue as it has with no individual action taken unless something life threatening occurs"); A540 (March 18, 2009 Command Meeting Minutes) ("The City's position is neutral but if warranted arrests will be made on either side."); A118 (May 16, 2008 letter from Solicitor Snyder to Assistant Chief Hanna) (noting that

“the City is neither an advocate for the protestors nor an advocate for the Women’s Center”).

In addition to this documentary evidence, the history of conflict between the City and Women’s Center belies any inference that they are co-conspirators. For example, the City vigorously opposed the Women’s Center’s motion to intervene in *Arietta II*. See A263-64 (noting City’s opposition to Women’s Center’s motion to intervene). Likewise, the City concluded that the Consent Order permits protesters to reach into the crosswalk, a position diametrically opposed to the Women’s Center’s interests. See A487 (Boulanger Dep. excerpts) (noting City’s position that the Consent Order permits protesters to reach into crosswalk).

C. The Protesters’ Efforts To Characterize Ordinary Police Interactions With The Public As Evidence Of Conspiracy Are Unavailing.

The protesters hang their entire case on characterizing the City’s reaction to the escorts’ use of tarpaulins as “approval” or “authorization,” equating this to a conspiracy. Br. for Appellants at 15-19, 30-34. Viewing the evidence in a light most favorable to the protesters, the two police communications referencing “approval” or “authorization,” see Br. for Appellants at 16, are not state action, as long-standing Supreme Court precedent has made eminently clear. See *Blum v. Yaretsky*, 457 U.S. 991, 1004-05 (1982) (“Mere approval of or acquiescence in the

initiatives of a private party is not sufficient to justify holding the State responsible for those initiatives”). The undisputed evidence shows that the City responded to private citizens’ complaints and came to an independent judgment about the legality of the challenged conduct. “Approval” that is nothing more than an after-the-fact judgment that the use of the tarpaulins is not illegal falls far short of evidence of conspiracy because it does not imply a “pre-arranged plan [between the police and the private entity] by which the police substituted the judgment of private parties for their own official authority.” *Cruz v. Donnelly*, 727 F.2d 79, 80 (3d Cir. 1984).

Nor can the protesters salvage their claim by arguing that “approval” by the City is sufficient to permit the drawing of an inference of conspiracy, and, without such an inference, they cannot avoid summary judgment:

In the past, the standard rule has been that in deciding a motion for summary judgment, a court must view the facts in the light most favorable to the nonmoving party and draw all inferences in that party’s favor. However, the Supreme Court of the United States has recently refined that standard, concluding that “facts must be viewed in the light most favorable to the nonmoving party only if there is a ‘genuine’ dispute as to those facts. . . . When opposing parties tell two different stories, one of which is blatantly contradicted by the record, so that no reasonable jury could believe it, the court should not adopt that version of the facts for the purposes of ruling on a motion for summary judgment.” *Scott v. Harris*, 550 U.S. 372, 380 (2007)., That is, this court must determine “the relevant set of facts and draw[] all inferences in favor of the nonmoving party *to the extent*

supportable by the record.” Scott, id. at n.8 (emphasis in the original).

Phillips v. Northwest Reg’l Commc’ns, 669 F. Supp. 2d 555, 569 (W.D. Pa. 2009) (quotation marks and citations omitted).

Beyond their constant repetition of the mantra that the City “approved” of the escorts’ activities, the protesters have presented a welter of irrelevancies. Plaintiff Kuhns imagines a conspiracy in the City’s failure to compel the Women’s Center to remove snow and ice from Keats Street last winter. *See* A526 (Kuhns Affidavit). Plaintiff Mazalewski’s affidavit characterizes as “cozy” the City’s relationship with the Women’s Center, based on nothing more than her own subjective conclusion that the police act with more alacrity in responding to complaints by the Women’s Center than to her complaints. A520-22. Equally irrelevant to the existence of a conspiracy is plaintiff Mazalewski’s charge that the City did not investigate purported physical attacks or threats of violence by “patrons” of the Women’s Center. A521. She also sees a conspiracy in the Allentown Police Department’s reasonable exercise of judgment in not initiating a child abuse investigation of the Women’s Center when visitors who, to Mazalewski, appeared to be minors entered the Center. *See* A522. The fact that the police saw no reason to suspect child abuse under these circumstances is not probative of a conspiracy; if anything, it is another manifestation of the City’s policy of disengagement. To the extent this evidence bears at all on the conspiracy

claim, it merely shows the City investigating alleged unlawful activity and making its own determination not to proceed further, something the City has done repeatedly with respect to complaints lodged by the Women's Center as well as by the protesters.

In fact, not one of the protesters' summary judgment exhibits contains evidence tending to prove the existence of a conspiracy. To the contrary, Exhibit 1 to plaintiffs' motion below, a video disc containing selective excerpts of images taken of plaintiffs and escorts, supports the City's assertion that police have taken a "hands-off" approach to protest activity at the Women's Center and, as a result, do not attempt to control protests. A391. And the protesters' claim that the numerous communications between the Women's Center and the city defendants are evidence of conspiracy is one that has no support in the law, as private citizens are entitled to contact law enforcement without an inference arising that they are, by virtue of the complaints, co-conspirators in an effort to violate constitutional rights. *See Bailey v. Harleysville Nat'l Bank & Trust*, 188 Fed. Appx. 66, 68 (3d Cir. 2006) ("[A] business's summons of a police officer to deal with a possible disturbance does not make it a state actor."); *see also Cvetko v. Derry Twp. Police Dept.*, No. 09-1260, 2010 U.S. Dist. LEXIS 43323, at *8 (M.D. Pa. May 4, 2010) ("[A] private actor does not proceed under color of state law merely by furnishing the police with information pertaining to a possible public disturbance.").

The protesters read great import into the Women's Center's holiday gift of cookies to the Allentown police in 2007, *see* Br. of Appellants at 18, 28, 42, 44, and the defendants' custom of addressing each other by first name.⁵ *See* Br. of Appellants at 18-19, 28. The evidence shows that the "gift of cookies" was a holiday gesture by the Women's Center to acknowledge the police department's "tough job" and to thank the police department for "[their] quick response and fairness with all that goes on [at the Women's Center]." *See* A339 (email exchange between Jennifer Boulanger and Joseph Hanna). As for Ms. Boulanger being on a first-name basis with the police, so was plaintiff Kuhns. *See* A336 (Assistant Chief Hanna's response to Kuhns's email in which he addresses her as "Kathy"). The district court thus correctly concluded that no reasonable jury could construe these commonplace courtesies as proof of a conspiracy.

Throughout, the protesters' analysis of the relationship between the City and Women's Center relies upon innuendo and contorted logic. The protesters hypothesize a conspiracy, and then attempt to characterize the failure of the City and Women's Center to disclose this conspiracy to them as "furtive behavior evidencing conspiracy." *See* Br. for Appellants at 14. The Women's

⁵ Counsel for plaintiffs, Denis Brenan, is also on a first-name basis with the municipal defendants. For example, Mr. Brenan addressed the City's lawyer by his first name in correspondence complaining about the tarpaulins, in which he also referred to Ms. Boulanger by her first name. A316-17.

Center can hardly be faulted for failing to copy the protesters on correspondence with police about clinic protests. The Women’s Center has privacy and security interests that preclude the casual sharing of sensitive information with the protesters and their associates. This is hardly “furtive behavior evidencing conspiracy”; it speaks more to the climate of fear that surrounds the provision of abortion care in Pennsylvania as a result of targeted harassment campaigns aimed at individual medical providers and their patients.⁶ As the district court correctly determined, the ordinary business interactions between the police and Women’s Center – taken individually or cumulatively – cannot rationally be construed to constitute a conspiracy.

D. The District Court Correctly Applied The Law Governing Conspiracy As Articulated In This Court’s Recent Rulings.

The protesters rely heavily on *Startzell v. City of Philadelphia*, 533 F.3d 183 (3d Cir. 2008), but *Startzell* supports the defendants, particularly in its rejection of the protesters’ Section 1983 civil rights conspiracy claim against Philly Pride. The *Startzell* Court upheld the district court’s award of summary judgment

⁶ See, e.g., *Gonzales v. Dunkle*, No. 07-CV-03577 (E.D. Pa. Nov. 8, 2007) (holding protester John Dunkle civilly liable for violating the federal Freedom of Access to Clinic Entrances Act, 18 U.S.C. § 248, by posting internet death threats against Ms. Boulanger and several other individuals associated with Pennsylvania abortion providers while participating in protests at the Women’s Center during the pendency of *Arietta II*).

to the municipal and private party defendants upon finding that the plaintiffs, a group of anti-gay protesters, had raised no issue of material fact regarding the existence of any understanding between the City of Philadelphia and Philly Pride to deprive the protesters of their First Amendment rights. *See id.* at 192, 205. This Court affirmed, stating:

To constitute a conspiracy, there must be a “meeting of the minds.” Indeed, the evidence demonstrates that Philly Pride and the City “took diametrically opposed positions” regarding how to deal with [the protesters’] presence at OutFest. . . . The City rejected Philly Pride’s requests to exclude [the protesters] from attending OutFest; moreover, the police forced the Pink Angels to allow [the protesters] to enter OutFest under threat of arrest. It was also the vendors’ complaints, not requests by Philly Pride, that led the police officers to order [the protesters] to move toward OutFest’s perimeter. There is no evidence of a conspiracy between the City and Philly Pride.

Id. at 205 (quoting *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 158 (1970))

(citations omitted). Here, as in *Startzell*, the City and the Women’s Center have taken diametrically opposite positions regarding how to deal with protesters at the Women’s Center. In the Consent Order, the City agreed with the protesters to create an unworkable, absurdly narrow crosswalk that exposes every patient and medical worker to harassment and physical confrontation. On the other hand, the Women’s Center opposed this settlement and sought to intervene to prevent it, which the City vigorously opposed. The City has adopted and repeatedly

expressed a “hands-off” policy regarding the protests at the Women’s Center, as evidenced in multiple writings and as documented in plaintiffs’ own exhibits, whereas the Women’s Center believes that it is entitled to meaningful police protection during disruptive protests and that such protection is lacking.

In *Startzell*, the police ordered the anti-gay protesters to move to the perimeter of the festival, an action which, while not going as far as Philly Pride wanted, comported with Philly Pride’s desire to contain the protesters. Here, the police are taking no action whatsoever to keep the protesters from obstructing, harassing, and confronting patients and staff, and have adopted an explicit policy of non-intervention in the absence of physical assault, contrary to the Women’s Center’s requests. Thus, there has been no “meeting of the minds” between the City and the Women’s Center, anymore than there was a meeting of the minds in *Startzell*.

Furthermore, the sections of the *Startzell* opinion on which the protesters rely addressed the constitutionality of *actions* by the Philadelphia police during the demonstration, having nothing to do with the claimed conspiracy between Philly Pride and the police. Here, the protesters accuse the City of *not* acting in response to their demands. In this context, *Startzell* is irrelevant. The protesters try to overcome this critical distinction by suggesting that the City had a duty to stop the use of the tarpaulins and other challenged activity. But that

suggestion is without merit.⁷ *Startzell* concludes that the police acted lawfully, but nowhere does it suggest the police were obligated to act in any particular way or in support of either side in the demonstration.⁸

The protesters make much of the comment that “[t]he right of free speech does not embrace a right to snuff out the free speech of others,” 533 F.3d at 197, but this comment was intended to justify the decision of the police to exercise some control over the protesters, whose disruptive activities threatened the public safety. Both the protesters and the Women’s Center believe that the City should do more to protect each side from the activities of the other, but that belief does not impose any duty on the City.⁹ Regardless, whether or not the City has a duty here

⁷ Moreover, the breach of such a (non-existent) duty by the City would not support a civil rights claim against the Women’s Center.

⁸ *Amicus curiae* National Legal Foundation goes so far as to suggest that *Starzell* recognizes a constitutional hierarchy of free speech rights, granting superior rights to “the first speaker,” whose speech has been sanctioned by government permit and who is thereby entitled to governmental protection of that speech. See Br. for *Amicus Curiae* at 12-13. In recognizing a governmental *interest* in protecting permitted speech, however, *Startzell* nowhere creates superior rights for the “first speaker,” and does not impose any affirmative *duty* on the government to extend police protection to permitted speakers. Doing so would expand First Amendment doctrine beyond any previously recognized boundaries. Thus, even if the Consent Order could be properly analogized to a governmental permit – which it cannot – *Startzell* in no way obligates the City to ensure that the protesters have free access to Women’s Center patients.

⁹ As the Supreme Court held in *DeShaney v. Winnebago County Dept. of Soc. Servs.*, 489 U.S. 189, 196 (1989), “[O]ur cases have recognized that the Due Process Clauses generally confer no affirmative right to governmental aid, even

(continued...)

is irrelevant to the ultimate issue in this appeal, which is whether the Women's Center conspired with the City. No reading of the evidence, in light of settled law defining state action, can establish such a claim because no such conspiracy existed between these two groups of defendants who had diametrically-opposed views on how to handle these protests.

Ultimately, viewing the evidence in the light most favorable to the protesters, their case presents the same factual situation as in *Citizens for Health v. Leavitt*, 428 F.3d 167 (3d Cir. 2005), which this Court found did not constitute state action. Referring to a hypothetical situation involving the Fourth Amendment and legislation that approved private searches (but one which is equally applicable to the First Amendment and police approval of private restrictions on speech), the Court commented:

By way of analogy, assume Congress were to pass legislation permitting private cinema operators, at their discretion, to search all moviegoers for any reason, without any showing of probable cause or reasonable suspicion. Although the Fourth Amendment would preclude the federal government from conducting such a search, private cinema operators are not bound by the Fourth Amendment, and absent any other law prohibiting it, private cinema operators were already "permitted" to conduct such a search before the new legislation took

(continued...)

where such aid may be necessary to secure life, liberty, or property interests of which the government itself may not deprive the individual."

effect. To the extent that this new legislation changes the legal landscape at all, then, it only codifies a power that cinema operators had already. The codification does not transform the private exercise of the codified power into “state action.” Similarly, although the codification itself is clearly government action, it seems insufficient to endow a moviegoer’s challenge to a search by a cinema operator with constitutional significance given that the codification has neither enhanced nor diminished the individual moviegoer’s rights.

Id. at 182. Private entities such as the Women’s Center are not bound by the First Amendment and can take actions that, were the Women’s Center a governmental entity, it could not do. Even if a public entity, such as the police, “permitted” or “approved” the Women’s Center’s actions, it is of no “constitutional significance,” because the police action has “neither enhanced nor diminished” plaintiffs’ rights. *See id.* In this Court’s conclusion, “To the extent the [City’s ‘approval’] changes the legal landscape at all, then, it only [recognizes] a power that [the Women’s Center] had already. The [recognition] does not transform the private exercise of the codified power into ‘state action.’” *Id.*¹⁰

¹⁰ The “heckler’s veto” cases discussed at pages 7-11 of the Brief for *Amici Curiae* on the whole support the Women’s Center. These cases do not stand for the proposition that the state has a duty to shield speakers holding government-issued permits from hecklers who are interfering with the speakers’ message. Rather, they demonstrate that government-imposed speech restrictions cannot be justified by reference to heckling which stops short of incitement to imminent violence. In fact, these cases support the principle that the First Amendment does not guarantee speakers a right to speak without interference or competing speech from other speakers.

E. The Protesters' Other Conspiracy Theories Should Be Rejected.

For the first time on appeal, the protesters argue that even if no conspiracy existed at the time the tarpaulins were first used, there was a continuing series of violations every time a tarpaulin “blockade”¹¹ occurred during which the City and Women’s Center acted collaboratively. Hence, since each “blockade” was a separate offense which the City took no action to prevent, the district court erred by failing to find evidence of a conspiracy arising after the tarpaulins came into use. The protesters seek to expand the definition of conspiracy to include any post-hoc understanding held by both a municipal actor and a private party that the private party’s actions did not violate any law. The district court did not, as the protesters contend, commit “legal error in requiring an explicit ‘pre-arranged plan’ in § 1983 conspiracy cases.” Br. for Appellants at 59. In fact, the court did not limit its discussion of conspiracy only to pre-arranged plans or only to express agreements. *See* A34-37 (discussing elements of civil conspiracy and close nexus and collaborative plan tests). The protesters failed to produce evidence of a conspiracy under any of these formulations.

¹¹ The protesters repeatedly use the inflammatory term “blockade” to describe the carrying of two plastic sheets across a fourteen-foot-wide street. This characterization finds no support in the record. *See* A486 (Boulanger dep. excerpts) (tarpaulins in Keats Street are hand-held, not stationery).

The protesters also argue that the Women’s Center admitted outright that it had conspired with the City, and the district court erred in overlooking this admission of liability. This argument is based on a distortion of the Women’s Center’s position before the district court. Because so much of the protesters’ innuendo and speculation about the relationship between the City and the Women’s Center relates to events pre-dating the resolution of *Arietta II* in 2007, the Women’s Center pointed out to the district court that plaintiffs Kuhns and Teay, parties to *Arietta II*, have released any claims they may have had against the Women’s Center for conduct occurring before the *Arietta II* settlement agreement was signed.¹² The Women’s Center reasoned that, if in fact the protesters were correct that the Women’s Center had conspired with the City, then the *Arietta II* general release expressly applied to the Women’s Center as well:

[Plaintiffs] release and forever discharge Releasees. . . .
*and all other persons acting through, under or in concert
with them* from any and all claims, damages, judgments,
debts and proceedings in law or in equity of any nature
whatsoever, whether known or unknown, asserted or
unasserted, matured or unmatured. . . from the beginning

¹² Plaintiff Mazalewski, who was not a plaintiff in *Arietta II*, cannot challenge any activity before the fall of 2006. As she explained in her deposition, this was because she did not begin protesting regularly at the Women’s Center until the fall of 2006, long after the complaint in *Arietta II* was filed. A294. Given her late entry as a protester, she lacks standing to challenge any activity before the fall of 2006. She conceded as much at her deposition when she answered “Not personally” to the question, “Are you making any claim in this lawsuit with respect to activities that occurred prior to 2006 personally?” *Id.*

of the world to the date on which this Settlement Agreement is last signed.

A230 (emphasis supplied). As the protesters allege that the Women's Center conspired with the City against them, the protesters cannot simultaneously claim that the Women's Center was not "acting through, under, or in concert with" the City. Thus, if the protesters' theory is correct, they have released the Women's Center. If their theory is incorrect, the Women's Center is not a state actor. Either way, there can be no claim against the Women's Center for events prior to the settlement in *Arietta II*. This argument obviously does not constitute an admission of conspiracy; it merely illustrates that the protesters' position relating to pre-settlement activity is untenable.

Even in their appellate brief, *see* Br. for Appellant at 5-7, the protesters continue to hang their conspiracy theory from the scaffolding of old, pre-2007 allegations which they have released or which they have no standing to raise. Once stripped of the narrative color of the protesters' version of pre-2007 events, however, the protesters' claim lacks the evidentiary support necessary to survive summary judgment.

F. The Protesters Are Not Entitled To Summary Judgment.

The district court correctly rejected the protesters' untimely and improper suggestion that summary judgment should be entered in their favor. This suggestion, renewed on appeal, *see* Br. for Appellants at 59-60, should be rejected

again. The district court found that plaintiffs did not meet their burden on the essential element of conspiracy, making it unnecessary to consider any other elements of a civil right claim. If the district court was wrong – notwithstanding the compelling support for its holding – then there is, at a minimum, a disputed factual issue regarding that element. In addition, there are other unresolved factual disputes, such as whether the escorts’ conduct actually prevented any protester from exercising her First Amendment rights and whether the escorts’ actions can be imputed to the Women’s Center. Thus, the protesters’ belated, and procedurally defective, attempt to obtain summary judgment is devoid of merit.

IX. CONCLUSION

For the foregoing reasons, the Court should affirm the judgment of the district court.

Dated: August 1, 2011

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Thomas E. Zemaitis, hereby certify that, on August 1, 2011, in addition to filing ten (10) hard copies of the Brief with the Clerk's Office, I served a true and correct copy of Brief of Appellees Allentown Women's Center and Jennifer Boulanger by electronic case filing and by first class mail on the following:

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