Exhibit 1 – Proposed Brief

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

BETTER PATH COALITION PLANNING GROUP, an unincorporated association; and KAREN FERIDUN, **Plaintiffs,** **v.** **CITY OF HARRISBURG; and Hon. WANDA R. D. WILLIAMS, Mayor, City of Harrisburg,** **Defendants.**	Case No. 1:22-cv-00623

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

I. INTRODUCTION

This First Amendment action for declaratory and injunctive relief challenges the City of Harrisburg's ("City") decision to impose unconstitutional arbitrary fees and myriad other improper preconditions on Plaintiffs' exercise of their speech and assembly rights. Plaintiff Better Path Coalition Planning Group and its principal organizer, Karen Feridun, are planning a "Climate Convergence" involving a series of events to occur in Harrisburg on June 11-13, 2022. Plaintiffs are organizing this peaceful, family-friendly event in Pennsylvania's capital city to increase awareness

around climate-change issues. Rather than facilitate this quintessential First Amendment activity, the City is pummeling Plaintiffs with a barrage of fees and other requirements, the net result of which is to stifle constitutionally protected speech, assembly and political expression in traditional public forums.

The City is conditioning Plaintiffs' right to assemble and demonstrate on, among other things: (a) arbitrary permitting fees; (b) shifting fees and costs for municipal employees and equipment purportedly required for traffic control; (c) overbroad insurance and indemnification requirements; (d) an agreement to reimburse the City for any damage, harm and/or litigation; (e) a 90-day advance-notice requirement; (f) submission of a traffic control plan; and (g) a requirement to notify area residents and businesses. When pressed for some explication of these conditions, the City pointed to an unintelligible web of error-laden permit-application and instruction forms. And those application and instruction forms do not include fee schedules or any other basis to calculate the costs citizens stand to incur if they want to organize marches, rallies or festivals in Harrisburg. Such details are simply left to the unbridled discretion of City officials.

The City's standardless approach, resulting in arbitrary fees and restrictions on groups like the Better Path Coalition, is unconstitutional on its face and as applied to Plaintiffs. The law is clear: citizens cannot be required to pay burdensome fees and jump through arbitrary hoops to exercise their First

Amendment rights. Accordingly, Plaintiffs seek an order declaring that the City's permitting scheme is unconstitutional and enjoining enforcement of the unconstitutional conditions. With Plaintiffs' planned events fast approaching, Plaintiffs seek this relief on an expedited basis so as to provide sufficient time to organize the Climate Convergence and assure prospective attendees that all activities comport with law.

II. FACTUAL AND PROCEDURAL BACKGROUND

Plaintiffs resolved earlier this year to hold the Climate Convergence in Harrisburg during the weekend of June 11, 2022. Compl. ¶ 9. They selected Harrisburg because it is the Commonwealth's seat of power and many public officials with the authority to address climate change have their business offices in the City. *Id.* The Convergence is intended to be a "diverse, inclusive, peaceful gathering organized to demand urgent legislative and administrative action on climate." *See* https://www.pennsylvaniaclimateconvergence.org/. Plaintiffs are planning a series of activities spanning three days:

- On Saturday, June 11, they are planning a climate-themed festival of art, music, theatre, talks, tabling and more at Harrisburg's Riverfront Park;

- On Sunday, June 12, they are planning a "day of action," starting with an interfaith service at Riverfront Park, followed by a march led by a youth contingent through downtown Harrisburg that passes by Pennsylvania agencies whose activities impact the climate, and concludes with a brief rally on the rear steps of the Capitol Building; and

- On Monday, June 13, participants hope to install a climate countdown clock and deliver a petition to elected officials in their offices at the State Capitol.

Compl. ¶ 12.

In February 2022, consistent with Plaintiffs' desire to ensure all events during the Convergence will be peaceful and safe for the families and young children in attendance, Plaintiff Feridun began investigating the applicable requirements to secure permits for marches and festivals. *Id.* ¶¶ 13-14. As a lay citizen, she encountered impenetrable websites and often-contradictory directions from officials at the multiple agencies who have varying responsibility over different aspects of the planned Climate Convergence events. Plaintiff Feridun's research revealed that three different government agencies had jurisdiction over the public forums they hoped to use during the weekend demonstrations:

- The Capitol Police, which are part of Pennsylvania's General Services Administration, regulate demonstrations at the Capitol Building;

- The Pennsylvania Department of Transportation ("PennDOT") regulates some of the roads on which Convergence demonstrators planned to march on Sunday, walking from Riverfront Park to the rear steps of the Capitol near Commonwealth Avenue; and

- The City of Harrisburg regulates use of Riverfront Park, the site of Saturday's festival and Sunday's interfaith service, and the starting point of the march to the Capitol. The City of Harrisburg also regulates several roads on Sunday's march route not governed by PennDOT.

Id. ¶¶ 14-17.

Each of these agencies imposed its own set of conditions, restrictions and charges for the use of their traditional public forums. *Id.* ¶ 18. Ultimately, with the help of undersigned counsel, Plaintiffs worked through the obstacles imposed by PennDOT and the Capitol Police, *id.*, leaving the City of Harrisburg's unconstitutional fees and requirements as the only barriers to Plaintiffs' exercise of First Amendment rights.

Divining how the City handles parades, marches, demonstrations and similar events in traditional public forums proved especially difficult. That is because Harrisburg does not have any ordinance to regulate use of City streets.[1] *Id.* ¶ 19-20. City officials are left with unbridled discretion to decide who gets to use certain public spaces and on what terms. *Id.* ¶ 21. When Plaintiff Feridun asked City officials what they require, they pointed her to three forms without mentioning the Parks ordinance. *Id.* ¶ 22.

The first document, entitled "Special Event Permit Procedures," appears to apply to "any event requesting to close access to a public street that does not fall under the Block Party Permit / Moving Truck Permit definitions." Compl., Ex. 3. It includes requirements that organizers apply for permits 60-90 days in advance,

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[1] While Harrisburg has an ordinance governing use of parks, Section 10–301, which would presumably apply to the June 11 festival, it has no ordinance governing the use of City streets or other public forums outside of parks. In any event, the parks ordinance does not contain any fee schedules or insurance and indemnity requirements, and the City did not point Plaintiffs to this ordinance when contacted about its permitting requirements for the Climate Convergence.

depending on whether state roads are involved, and that they provide a "traffic control plan" and pay an unidentified "service fee." *Id.*; Compl. ¶ 23. The reverse side of this two-page form discusses the "Approval Process" and references fees for traffic control and actual staffing, but provides no guidelines or standards for estimating the amounts of these fees. *Id.*

Second, City officials pointed Plaintiff Feridun to a document titled "Application for Special Events Permit." Compl., Ex. 4. This document adds requirements that applicants rent parking spaces for an unspecified amount, notify area businesses and residents and agree to a broad indemnity provision. *Id.*; Compl. ¶ 24. This form also requires applicants to provide a "Certificate of Insurance" showing $1 million in insurance, but without specifying the type of insurance. *Id.* And it states that, "All required fees must be paid prior to City Staff being scheduled for event," without specifying the amount of any fees. *Id.*

A third document identified by the City, titled "Release and Waiver of Liability," seemingly applies to use of City parks, as it references "Park Permit" and approval by "Parks and Recreation staff." Compl., Ex. 5. While there is no indication whether it applies to use of other public forums, like streets and sidewalks for marches and demonstrations, the Release and Waiver of Liability purports to require, among other things, promises to secure millions of dollars in insurance coverage and to indemnify and reimburse the City for all manner of costs

and risks. *Id.*; Compl. ¶ 25. By way of example, this form requires applicants to "assume all risk and responsibility" for damages relating to use of City facilities, regardless of actual fault, and to give the City a pre-release from any liability "in any way associated with" the event. *Id.* And it requires an agreement to "pay for all personnel and equipment" that the City may deem necessary for the event. *Id.*

In combination, the forms provided by the City generated the following laundry list of problematic conditions:

1. Unspecified permit and "service fees" for both Riverfront Park and the use of City streets;
2. Cost-shifting provisions requiring Plaintiffs to pay staffing and equipment costs for traffic control;
3. Unspecified rental fees for metered parking spaces;
4. Internally contradictory insurance requirements:
    a. One form requires insurance in the amount of $250,000 per person and $1 million per occurrence without identifying the type of insurance required, and
    b. Another form specifies three different types of insurance – (i) $1 million in event liability coverage, *plus* (ii) standard liability coverage with a limit of $1 million per occurrence and $2 million aggregate limit, *plus* (iii) another $1 million of auto liability coverage[2];
5. Overbroad indemnification and waiver of liability requirements, including agreements to reimburse the City for any damage, harm and/or litigation;

[2] City officials ultimately informed Plaintiff Feridun that the City would forgo the auto insurance provision, but not the other insurance conditions. Compl. ¶ 28.

6. A 90-day advance-notice requirement for events involving State roads;

7. Responsibility to develop a traffic control plan; and

8. A requirement to notify area residents and businesses 30 days prior to the event.

Conspicuously absent from all of these forms is any schedule of fees and costs, or standards for imposing them. Compl. ¶ 27. The City has nevertheless sought to impose a number of charges for Plaintiffs' First Amendment activity, while also requiring them to incur the costs of insurance coverage. When the City provided estimates for fees referenced in the foregoing documents, they were too high for a low-budget coalition. *Id.* ¶ 28. Meanwhile, Plaintiffs' initial attempts to purchase the requisite insurance failed, as insurers proved unwilling to insure a "political" event. *Id.* This increased Plaintiffs' discomfort with the overbroad indemnification provisions, which purported to transfer liability for damage and costs beyond Plaintiffs' control. *Id.* And the requirements to notify nearby residents and businesses and develop traffic-control plans were beyond Plaintiffs' capabilities. *Id.*

On March 31, 2022, undersigned counsel sent a letter to Mayor Williams identifying numerous constitutional deficiencies in Harrisburg's informal permitting process, and asked her to waive the costs and fees, insurance, indemnification, parking, and traffic-control requirements. Compl., Ex 6. After an

exchange of communications with the City's solicitor, on April 24, the parties reached an impasse. Compl. ¶ 31. While the City informally offered to waive the insurance and indemnification requirements for the June 12 march and referred Plaintiffs to a company willing to insure the June 11 festival, it continues to insist on payment for purported traffic-control and equipment use fees—on top of the amounts Plaintiffs paid to secure a permit and for insurance premiums for the festival—and has said nothing of the unreasonable notice requirements. *Id.* All told, the City's requirements would cost Plaintiffs:

- $610 in permitting fees for the festival at Riverfront Park, which the City informed Plaintiffs would have been $1,110 for a non-resident applicant; *plus*
- $917 in insurance premiums for the one-day festival; *plus*
- $480 in purported staffing fees for traffic control[3]; *plus*
- $96 for a purported "equipment use fee" connected to the march[4]; *plus*
- An estimated $44 *per parking space* for an as-yet undisclosed number of metered spaces located on the streets on Plaintiffs' march route.

Id. ¶ 32. Now, with precious few weeks remaining to complete the planning for the Climate Convergence, Plaintiffs are forced to decide between ceding to these

[3] This fee was quoted in an email from a City official simply stating: "2 Staff and 1 Manager for the 4 Hour minimum call in would be $480." Compl., Ex. 7. The City did not disclose its basis for this staffing level, what their hourly rates are, or why they have a 4-hour "minimum."

[4] The equipment use fee comes from the same City official who quoted the staffing fee and represents a 20% kicker on top of the $480 staffing charge. *Id.*

unreasonable and unconstitutional demands, or curtailing their constitutionally protected speech. Plaintiffs therefore filed this action seeking immediate declaratory and injunctive relief to clear a path for their festival, march and demonstration in the Commonwealth's capital.

III. ARGUMENT

The City's conditions on First Amendment Activity violate multiple First Amendment doctrines, including well-established prohibitions on delegating standardless discretion, content-based distinctions and overbroad restrictions on core political speech in traditional public forums. Absent preliminary injunctive relief enjoining Defendants' enforcement of insurance, overbroad indemnification, fee-shifting, and other requirements for the Climate Convergence festival and march on June 11-12, Plaintiffs will suffer irreparable harm for which there is no adequate remedy at law. The requested injunctive relief is thus necessary to prevent summary violation of Plaintiffs' most fundamental rights.

Rule 65 of the Federal Rules of Civil Procedure requires this Court to consider four factors in deciding Plaintiffs' request for a preliminary injunction: (1) whether Plaintiffs have shown a reasonable probability of success on the merits of their underlying claims; (2) whether Plaintiffs will be irreparably harmed by denial of the relief; (3) whether granting preliminary relief will result in even greater harm to the non-moving party; and (4) whether the requested relief is in the

public interest." *B.H. v. Easton Area Sch. Dist.*, 725 F.3d 293, 302 (3d Cir. 2013) (en banc). Each of these factors weighs in favor of granting a temporary restraining order and preliminary injunction in this case.

A. PLAINTIFFS ARE LIKELY TO PREVAIL ON THE MERITS OF THEIR FIRST AMENDMENT CLAIM

Plaintiffs bring this action pursuant to 42 U.S.C. § 1983, which imposes liability for "the deprivation of any rights, privileges, or immunities secured by the Constitution and laws" of the United States. Plaintiffs claim that the many burdens the City is placing on their ability to assemble deprive them of their fundamental rights to free speech and assembly. For the reasons described below, Plaintiffs are likely to succeed on the merits of their claim that the City's conditions violate time-honored First Amendment precepts.

1. Defendants Bear the Burden of Proof and Persuasion in this First Amendment Case.

In First Amendment cases, the *Defendant* carries the burden of proof and persuasion. *United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 816 (2000) ("When the Government restricts speech, the Government bears the burden of proving the constitutionality of its actions.") (citations omitted); *McTernan v. City of York,* 564 F.3d 636, 652 (3d Cir. 2009); *Phillips v. Borough of Keyport*, 107 F.3d 164, 172-73 (3d Cir. 1997) (en banc). Thus, once Plaintiffs have shown a restraint on free expression, the burden shifts to the City both to articulate the

reasons for the restraint and to justify the restraint under the relevant First Amendment standard. *Phillips*, 107 F.3d at 172-73 (government "carries the burden of production and persuasion, not the plaintiffs"). Strict scrutiny applies in this case, but even if the Court were to apply intermediate scrutiny, the City cannot satisfy its burden.

2. The City's Arbitrary Fees and Conditions Cannot Be Justified Under any Applicable First Amendment Standard.

Political expression of the type involved here—namely, demonstrations, marches, vigils and the like on streets, sidewalks and parks—is quintessential First Amendment activity entitled to maximum constitutional protection. *Boos v. Barry*, 485 U.S. 312, 318 (1988). When such expressive activities take place in traditional public forums, the "government's ability to permissibly restrict expressive conduct is extremely limited. . . ." *United States v. Grace*, 461 U.S. 171, 177 (1983). Any restrictions the City places on Plaintiffs' use of parks and streets for the purpose of engaging in constitutionally protected expressive activities trigger a "heavy presumption" against validity. *The Nationalist Movement v. City of York*, 481 F.3d 178, 183 (3d Cir. 2007) (citing *Forsyth Cnty. v. Nationalist Movement*, 505 U.S. 123, 130 (1992)).

While some of the City's conditions might be constitutional when applied to large-scale commercial events, they are clearly unconstitutional as applied to non-

commercial events designed to express views on topical issues. Even insofar as these conditions are designed to regulate the time, place, and manner of speech in traditional public forums, it is well-established that such regulations are only constitutional if they: (1) do not "delegate overly broad licensing discretion to a government official;" (2) are content-neutral; (3) are narrowly tailored to serve a significant governmental interest; *and* (4) leave open ample alternatives for communication. *Forsyth*, 505 U.S. at 130. Each of the conditions imposed by the City here fails at least one of these factors.

a. *The City's cost, fee and permitting scheme vests unconstitutional discretion in government officials.*

The City's entire permitting scheme for use of City streets fails under the first *Forsyth* factor because no aspect of the process is tied to any statute, regulation or ordinance restricting the discretion of City officials to impose whatever fees, costs and other conditions they want. Without an officially promulgated permit system, the City's licensing scheme for demonstrations is facially unconstitutional. "[A] law subjecting the exercise of First Amendment freedoms to the prior restraint of a license" must contain "narrow, objective, and definite standards to guide the licensing authority." *Forsyth*, 505 U.S. at 131. And as this Court held, in a portion of its decision in *The Nationalist Movement* decision that went unchallenged on appeal, "[w]ithout specific guidelines calculating the insurance and deposit requirements using content-neutral factors,

thereby limiting the scope of the city officials' discretion, these provisions contain 'the possibility of censorship through uncontrolled discretion.'" *The Nationalist Movement v. City of York*, 425 F. Supp. 2d 574, 585 (M.D. Pa. 2006) (Kane, J.), *aff'd in part, rev'd in part and remanded*, 481 F.3d 178 (quoting *Forsyth*, 505 U.S. at 133).

The lack of guiding standards is particularly evident with respect to the costs and fees the City is charging Plaintiffs to exercise their constitutional rights. The City has ***no*** guidelines for calculating ***any*** of the fees or costs the City may impose on permit applicants or predicting what other requirements applicants may face. The $576 charge for the purported costs of traffic control and equipment use perfectly illustrates the point. The City quoted this amount to Plaintiffs as part of a back-and-forth that reveals City officials unilaterally made up the fee amount using an arbitrary determination of how much personnel the City would deploy, for an arbitrary "minimum" of four hours, yielding a total of $480 for anticipated staff time. City officials then simply tacked on an additional 20% for "equipment use fee," bringing the total to $576. *See* Compl., Ex. 7 (staffing fee assumed "2 Staff and 1 Manager for the 4 Hour minimum call in" and an "[e]quipment use fee" assumed "20% of staff time = $96"). None of this is spelled out in ***any*** document—much less a duly promulgated ordinance—identifying any criteria for

calculating traffic control charges or fees for "equipment use."[5] The result is exactly the type of variable fee that the Supreme Court deemed unconstitutional in *Forsyth*, 505 U.S. at 133.

As explained by the Third Circuit in *The Nationalist Movement*, the Supreme Court "found such a variable fee to be violative of the First Amendment" in relevant part because:

> [T]here were no standards directing the setting of the fee, such that it was "left to the whim of the administrator." [*Forsyth*, 505 U.S.] at 133, 112 S.Ct. 2395. "The First Amendment prohibits the vesting of such unbridled discretion in a government official" because such power could be easily used in a political fashion. *Id.*

481 F.3d at 183.

The same is true of the per-space fees to "rent" metered parking spaces along Plaintiffs' march route, as that condition is untied to any law or ordinance, and the application form referencing parking space rental provides no guidelines regulating the amount to be charged. City officials thus have unbridled discretion to charge any amount for these parking spaces. The $44 per-space rental fee

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[5] This cost-shifting requirement would also fail for the independent reason that it is not narrowly tailored to the City's purported needs. Given the City's apparent inability to explain the amount it elected to charge Plaintiffs, it is unlikely the City could satisfy its burden of demonstrating that "this amount, and not some lesser amount, is necessary" to meet its actual expenses. *iMatter Utah v. Njord*, 774 F.3d 1258, 1269 (10th Cir. 2014) (citing *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 196 (1997)). In any event, these conditions fail under any First Amendment analysis because the City delegates unbridled discretion to its officials, regardless of whether the City could theoretically show that they used such discretion to closely approximate actual costs.

communicated to Plaintiffs is not documented ***anywhere***, and the City has yet to specify how many spaces will need to be rented at this rate.

The $610 flat fee quoted to obtain a permit for Plaintiffs' use of Riverfront Park ($1,110 for non-residents) fares no better. While the City did not expressly make this fee variable depending on the size or subject of the event, the City did not tie the fee amount to ***anything***. The City's ordinance governing use of parks, Section 10–301, does not provide any basis for calculating fees, and the fact that the quoted fee is flat makes it no less discretionary. The absence of any promulgated standards again leaves City officials with unbridled discretion to set whatever fee they want in violation of the standards articulated in *Forsyth*.

In addition, the City's insurance, indemnity and liability waiver conditions fail under the first *Forsyth* factor because City officials have unbridled discretion to determine which applicants will be burdened with these requirements. As outlined in the Complaint, at ¶ 25, the bulk of the City's burdensome insurance and indemnity conditions are set forth in a document titled "Release and Waiver of Liability," which City officials instructed Plaintiffs to sign in response to Plaintiff Feridun's inquiries about her plans for the Climate Convergence. While this document only references a "Park Permit" and approval "by Parks and Recreation staff," Compl., Ex. 5, it is unclear whether City officials require signatures on this document—acknowledging each of its burdensome liability provisions and

agreeing to procure several million dollars in additional insurance coverage—in order to get permits to march on City streets. The lack of clarity in the scope and application of these requirements leaves City officials to decide when to impose these significant additional burdens on applicants, like Plaintiffs, seeking to demonstrate on City streets and other traditional public forums outside of parks.[6] The fact that City officials inexplicably excused Plaintiffs from auto insurance, but not the other insurance requirements, demonstrates the highly discretionary nature of these conditions.

Ultimately, the City's permitting process is doomed by pervasive standardless discretion. This facial unconstitutionality precludes the City from assessing any fee or imposing any of the City's other problematic preconditions on the exercise of Plaintiffs' First Amendment rights to free speech, assembly and political expression.

[6] Even the Certificate of Insurance requirement set forth in the City's "Application for Special Events Permit" form, which calls for $1 million of insurance coverage, fails under the first *Forsyth* factor because it does not specify a particular type of insurance and leaves City officials to say what type of insurance will satisfy this condition. This gap in specificity "could easily be used in a political fashion" to impose the higher burdens of more expensive types of insurance coverage on certain applicants. *The Nationalist Movement*, 481 F.3d at 183.

b. *The City's conditions also fail under other First Amendment doctrines.*

In addition to the unconstitutional discretion that dooms Harrisburg's entire permitting scheme, several of the specific conditions outlined in the Complaint fail for multiple other independent reasons, as outlined below.

(i) The cost-shifting requirement and resulting $576 traffic control fee fail under the Forsyth content-neutrality requirement.

Even though the City did not expressly invoke the content of Plaintiffs' message in calculating the traffic control fee, the variable cost-shifting arrangement is in reality content based because it burdens political and controversial speech more than other speech. Even if the City requires *all* event applicants to reimburse purported costs of staffing an event, thus giving a superficial appearance of content neutrality, the resulting fee is heavily dependent on each speaker's identity and message. As both the Supreme Court and the Third Circuit have observed, "'it cannot be said that the fee's justification has nothing to do with content' given that an accurate estimation of the necessary security would 'necessarily' involve an examination of the content of the speech, an estimate of the response of others, and a determination of the 'number of police necessary to meet that response.'" *The Nationalist Movement*, 481 F.3d at 185 n. 7 (quoting *Forsyth*, 505 U.S. at 134).

How many people are likely to attend the demonstration, how many might show up to protest, and the potential for strife between the two will dictate the level of traffic control and security, which necessarily requires consideration of the permittee's identity and message. The Third Circuit Court of Appeals struck down York's variable cost-recovery requirement because it was a content-based regulation of speech. *Id.* The City of Harrisburg's requirement that Plaintiffs pay an amount ($576) that is based on unidentified employees' discretionary determination about how much traffic control personnel and equipment will be necessary to deal with Plaintiffs' anticipated crowd is materially indistinguishable.

(ii) The insurance requirements also fail because they are content-based and overbroad.

First, political expression on governmental affairs and public issues "has always rested on the highest rung of the hierarchy of First Amendment values." *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 913 (1982) (quoting *Carey v. Brown*, 447 U.S. 455, 467 (1980)). *See also Boos*, 485 U.S. at 318 (citations omitted); *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964) ("There is a 'profound national commitment' to the principle that "debate on public issues should be uninhibited, robust, and wide-open").[7] The City's insurance

[7] "Whatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that Amendment

requirements violate these foundational principles by effectively favoring non-political speech over political expression, in the form of higher insurance premiums. When insurance companies learned that the march was "political," they declined to provide coverage, Compl. ¶ 29, and are charging more than anticipated to cover the festival, *id*. ¶ 31.

Thus, the insurance requirements imposed here fail for the same reasons that doomed York's requirements in *The Nationalist Movement*, 425 F. Supp. 2d at 583-85. Like the ordinance struck down in that case, Harrisburg's insurance requirements create the risk that Plaintiffs will be "unconstitutionally 'charge[d] a premium in the case of a controversial political messaged delivered before a hostile audience.'" *Id.* (quoting *Forsyth*, 505 U.S. at 136). Indeed, the City's insurance requirement has literally caused Plaintiffs in this case to pay a premium for political expression. Plaintiffs were initially unable to find an insurer to issue a policy to cover any part of their "political" event, and then were only able to procure insurance for the festival portion of their event from an insurer recommended by the City, at a rate of $917 for two days. Plaintiffs remain unable

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was to protect the free discussion of governmental affairs." *Mills v. Alabama*, 384 U.S. 214, 218 (1966). "[S]peech concerning public affairs is more than self-expression; it is the essence of self-government." *Garrison v. Louisiana*, 379 U.S. 64, 74-75 (1964); *see also Eu v. San Francisco Cty. Democratic Cent. Comm.*, 489 U.S. 214, 223 (1989) (noting that "the First Amendment 'has its fullest and most urgent application'" to political speech).

to obtain insurance for the march portion of the Climate Convergence, further demonstrating the impact of political content on the ability to comply with the City's insurance requirements. The City cannot evade content neutrality by outsourcing its discrimination against political speech to insurers who charge more based on the perceived risks of political demonstrations as compared to non-political activities. *See E. Conn. Citizens Action Grp. v. Powers*, 723 F.2d 1050, 1056 n.2 (2d Cir. 1983) ("brokers or underwriters often consider political beliefs of those who have applied for insurance coverage, the likelihood of adverse publicity to the insurance company, the lack of business experience of the group, and other invidious or irrelevant factors"); *Collin v. Smith*, 578 F.2d 1197, 1209 (7th Cir. 1978) ("It is true that the [insurance] requirement does not turn on the content of a proposed demonstration, except in the sense that controversial groups will likely be unable to obtain insurance, as here. . . . But it is most assuredly not facially neutral towards First Amendment activity . . . .").

Second, the City's burdensome insurance requirements are patently overbroad and unnecessary to address any purported need for the City to protect itself against liability. To justify time, place and manner restrictions, government must establish that such restrictions are designed to address harms that are "real, not merely conjectural," and show that the restrictions do "not burden substantially more speech than is necessary to further the government's legitimate interests."

Phillips v. Borough of Keyport, 107 F.3d 164, 175 (3d Cir. 1997) (quoting *Turner Broadcasting Sys., Inc. v. FCC*, 512 U.S. 622 (1994) (Kennedy, J., concurring)). As the Supreme Court and Third Circuit have emphasized, this test requires the government to "'demonstrate that alternative measures that burden substantially less speech would fail to achieve the government's interests, not simply that the chosen route is easier.'" *Bruni v. City of Pittsburgh*, 824 F.3d 353, 367 (3d Cir. 2016) (quoting *McCullen v. Coakley*, 573 U.S. 464, 495 (2014)).

As to the insurance requirements in particular, the City must establish that the insurance coverages "align with" the government's actual risk exposure, such that the required amount of coverage, "and not some lesser amount, is necessary." *iMatter*, 774 F.3d at 1269 (citing *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 196 (1997)). The Tenth Circuit's analysis of similar insurance requirements in *iMatter* is instructive. 774 F.3d at 1266-72. The court there noted that such government-immunizing provisions do not promote any purported governmental interest in "public order, preventing traffic and sidewalk obstructions and promoting public safety." *Id*. at 1266. And like the insurance requirements in *iMatter*, there is no correlation between Harrisburg's insurance requirements and the government's actual costs or risk of exposure. *Id.* at 1270. Indeed, like Utah, Pennsylvania's Political Subdivision Tort Claims Act provides Harrisburg with tort immunity. *See* 42 Pa. C.S. § 8541.

(iii) The indemnification requirements and liability waivers are also overbroad.

The City's effort to immunize itself through broad indemnification and liability waivers also fails the narrow tailoring requirement for the same reasons that the insurance requirements fail. *See iMatter*, 774 F.3d at 1266-72. Neither insurance nor indemnification "have any effect on the direct expenses [the government] incurs in hosting a parade." *Id.* at 1267. And Harrisburg's statutory tort immunity renders it unnecessary to ask Plaintiffs to voluntarily assume the risk of additional tort liability.

The City's indemnification requirements are overbroad in yet another way. The Supreme Court has held that an organization exercising its First Amendment rights may not be held liable for the conduct of a third party "without a finding that [it] authorized—either actually or apparently—or ratified unlawful conduct." *Claiborne Hardware*, 458 U.S. at 931. The City's requirement here that the permittee "assume all risk and responsibility of damage to the property of the City of Harrisburg as it relates to my event," and to "ho[l]d [sic] the City of Harrisburg, it's agents and representatives harmless for any and all suits relating to the use of City owned facilities," makes it unconstitutionally overbroad for this independent First-Amendment reason.

(iv) The City's other conditions are also overbroad and unconstitutionally vague.

Finally, the other conditions Harrisburg is placing on Plaintiffs' speech and assembly also fail because they are overbroad, unconstitutionally vague, or both.

First, the requirement that Plaintiffs seek approval 90 days prior to their event for a plan involving State roads is not narrowly tailored to the government's interests. Even to the extent that the City needs advanced notice of an event to work out staffing needs and logistics, it can provide no basis for concluding that 90 days, "and not some lesser amount," is necessary for every event. *iMatter*, 774 F.3d at 1269. An ordinance must allow for a much faster turnaround to enable demonstrators to use traditional public forums to express themselves in response to current events, which is why courts have stricken even 30-day-advance-notice requirements. *See, e.g., Sullivan v. City of Augusta*, 511 F.3d 16, 38-40 (1st Cir. 2007) (striking down a thirty-day notice requirement for parades on city streets); *Grossman v. City of Portland*, 33 F.3d 1200, 1206 (9th Cir. 1994) (holding a seven day notice requirement for every demonstration in a public park too restrictive).

Second, Harrisburg's requirement that Plaintiffs develop a traffic control plan is also overbroad. Plaintiffs, and likely most people applying to use public forums, have no expertise in traffic control. The City does.

Placing this inchoate requirement on demonstrators is an unjustifiable burden.

Third, the requirement to provide individual advanced notice of the event to area residents and businesses is both overbroad and vague. This requirement violates the Supreme Court's vagueness standards because it does not specify critical details, such as the form(s) of notice that will satisfy the requirement, to guide City officials' discretion in deeming notice sufficient. *See Minn. Voters Alliance v. Mansky*, -- U.S. --, 138 S. Ct. 1876, 1890-91 (2018). In *Mansky*, the Court emphasized that any discretion involved in applying speech restrictions "must be guided by objective, workable standards." *Id.* at 1891; *see also Ctr. For Investigative Reporting v. SE Pa. Transp. Auth.*, 975 F.3d 300, 316 (3d Cir. 2020) (holding an "ill-defined" policy was "susceptible to erratic application" and "carries the opportunity for abuse") (citations and internal quotation omitted).

And it is overbroad because the City requires individual notice to each resident and business—as opposed to, for example, posting signs or flyers on the impacted streets—without any indication that it such burdensome individualized notice is actually necessary. Insofar as the City has a significant interest in notifying residents and businesses of an upcoming street closure, it cannot establish that less burdensome alternatives like sign

postings "would fail to achieve the government's interests." *McCullen*, 573 U.S. at 495.

The numerous First-Amendment flaws in the City's permitting scheme and the conditions it places on free-speech rights[8] makes it likely that Plaintiffs will succeed on the merits of their claim that the City's requirements are unconstitutional.

B. PLAINTIFF WILL SUFFER IRREPARABLE HARM IF THE COURT DECLINES TO ISSUE THE INJUNCTION

As the Supreme Court has noted, "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373-74 (1976) (emphasis added); *American Civil Liberties Union v. Reno*, 217 F.3d 162, 180 (3d Cir. 2002) (generally in First

[8] Many other courts have declared unconstitutional insurance, indemnification, cost-shifting, hold-harmless, and payment-recovery requirements, finding them to be content based or overbroad or both. *See, e.g., Long Beach Area Peace Network v. City of Long Beach*, 574 F.3d 1011 (9th Cir.2009) (hold harmless); *Cent. Fla. Nuclear Freeze Campaign v. Walsh*, 774 F.2d 1515, 1524-25 (11th Cir.1985) (police fees); *E. Conn. Citizens Action Grp. v. Powers*, 723 F.2d 1050 (2d Cir. 1983) (insurance); *Collin v. Smith*, 578 F.2d 1197, 1207-09 (7th Cir. 1978) (insurance); *Stand Up Am. Now v. City of Dearborn*, 969 F. Supp. 2d 843 (E.D. Mich. 2013) (indemnification); *Coe v. Town of Blooming Grove*, 567 F. Supp. 2d 543 (S.D.N.Y. 2008), *aff'd in part and vacated in part*, 429 F. App'x 55 (2d Cir. 2011) (insurance); *Van Arnam v. Gen. Servs. Admin.*, 332 F. Supp. 2d 376 (D. Mass. 2004) (indemnification); *Courtemanche v. Gen. Servs. Admin.*, 172 F. Supp. 2d 251, 268 (D. Mass. 2001) (indemnification); *Invisible Empire of the Knights of the KKK v. Mayor of Thurmont*, 700 F. Supp. 281, 285 (D. Md. 1988) (insurance and police fees); *Invisible Empire Knights of the KKK v. West Haven*, 600 F. Supp. 1427, 1434 (D. Conn. 1985) (police fees).

Amendment challenges plaintiffs who meet the merits prong of the test for a preliminary injunction "will almost certainly meet the second, since irreparable injury normally arises out of the deprivation of speech rights.") (citation omitted); *Abu-Jamal v. Price*, 154 F.3d 128, 135–36 (3d Cir. 1998) (same). In this case, absent a preliminary injunction, Plaintiffs will be unable to move forward with their march without jumping through a series of facially unconstitutional hoops. Plaintiffs will then be faced with the choice of foregoing its important political expression, or exercising its rights under threat of interference, injury or even arrest.

C. THE CITY WILL SUFFER NO IRREPARABLE HARM IF THIS INJUNCTION ISSUES

The requested order will not prejudice the City's ability to provide for the health, safety and welfare of its citizenry. At most, the City might have to make accommodations for a short time to enable the Climate Convergence to pass through City streets, as often happens in Pennsylvania's capital. The City regularly needs to provide services for traffic accidents and constructions projects, neither of which involve constitutionally protected activities. Providing services necessary to facilitate the exercise of First-Amendment-protected rights is not irreparable harm.

D. GRANTING THE INJUNCTION WILL SERVE THE PUBLIC INTEREST

The First Amendment safeguards this time-honored use of our streets for political speech by members of the public. "[S]treets and parks . . . have immemorially been held in trust for the use of the public . . . for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens." *Hague v. CIO*, 307 U.S. 496, 515-16 (1939). "[T]he streets and sidewalks . . . [are] an undisputed quintessential public forum." *Starzell v. City of Philadelphia*, 533 F.3d 183, 196 (3d Cir. 2008). The public's interest is served by respecting the Plaintiffs' rights to have their voices heard, and to spread their message to Commonwealth agencies and officials with authority over the policies and actions that may have a positive impact on our environment. *See Council of Alt. Pol. Parties v. Hooks*, 121 F.3d 876, 883-84 (3d Cir. 1997) ("In the absence of legitimate, countervailing concerns, the public interest clearly favors the protection of constitutional rights . . . ."). There is no conceivable public interest in restricting their ability to spread this message.

This being a non-commercial case involving purely injunctive relief, and the balance of hardships favoring the Plaintiff, the Fed. R. Civ. P. 65(c) security bond

requirement should be waived. *See Elliot v. Kiesewetter*, 98 F.3d 47, 59-60 (3d Cir. 1996); *Temple Univ. v. White*, 941 F.2d 201, 219-20 (3d Cir. 1991).

IV. CONCLUSION

For all the foregoing reasons, Plaintiffs respectfully request that this Court issue the requested injunctive relief.

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