

United States District Court  
For the Northern District of California

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IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

WALTER B. HOYE, II,  
Plaintiff,

No. C 07-06411 CRB

**MEMORANDUM AND ORDER**

v.

CITY OF OAKLAND,  
Defendant.

Plaintiff Walter Hoye, a pro-life demonstrator, brought suit against Defendant City of Oakland, challenging the constitutionality of Oakland Ordinance No. 12860, which creates an eight-foot buffer zone or “bubble” around people seeking access to reproductive healthcare clinics (“clinics”). Hoye claims that the ordinance is facially unconstitutional, unconstitutional as applied, unconstitutionally vague, and a violation of the Equal Protection Clause. Now pending before the Court are the parties’ cross-motions for summary judgment. For the reasons set forth below, the Court GRANTS Defendant’s motion for summary judgment and DENIES Plaintiff’s motion for summary judgment.

**I. BACKGROUND**

In the city of Oakland, California are multiple clinics which provide reproductive healthcare services to women. Because one of those services is abortion, the clinics have long been the sites of protest over the morality and legality of that medical procedure. Though each protest, like each protestor, is different, there is a long history of protests

1 creating significant barriers to patient access at the Oakland clinics. The executive director  
2 of one clinic described the protests as follows:

3 The anti-abortion protestors are so aggressive and invasive, that the [clinic] was  
4 forced to stop operating on Saturdays due to excessive protesting. The [clinic] has  
5 had situations where roughly three hundred protestors showed up to protest the  
6 clinic's abortion practices. Patients have had to climb through the back windows and  
7 fire escapes of the [clinic] to obtain health services, because anti-abortion protestors  
8 blockaded the front door of the clinic. Comy Decl. at 2.

9 The executive director of another clinic explained, "Before the Bubble Ordinance was  
10 enacted, I witnessed protestors blocking the way of patients as they tried to enter the clinic. . .  
11 . I have witnessed protestors swarming patient's vehicles . . . thereby preventing the patients  
12 from exiting the car and entering the clinic." Barbic Decl. at 2. A security guard at one  
13 clinic for the past three years stated:

14 Before the Ordinance was passed, I observed protestors approaching and talking to  
15 patients . . . I often saw them approach cars and thrust their hands into the car  
16 windows and doors to hand pamphlets to patients. I observed the protestors block car  
17 doors so that patients could not get out of their cars outside the clinic. . . .I have  
18 observed patients be chased to the front door of the clinic by protestors trying to talk  
19 to them. Ali Decl. at 1-2.

20 Recent protests have varied in number. See Hoke Decl. at 3 ("I have seen between seven and  
21 forty protestors outside the clinic since the Ordinance was passed"); and Barbic Decl. at 6  
22 ("Recently, I have seen between three and forty protestors gathered outside the clinic").

23 Plaintiff is a pro-life demonstrator in Oakland whose preferred means of pro-life  
24 demonstration is to approach women heading into the clinic and ask, "May I talk with you  
25 about alternatives to the clinic?" Plaintiff's Mot. at 3. Plaintiff contends that he and some of  
26 his fellow demonstrators do not block sidewalks or clinic entrances, and have never seen a  
27 pro-life demonstrator who has. Hitchcock Supp. Decl. at 2, Downer Decl. at 2, Kendall  
28 Decl. at 3, Hoye Supp. Decl. at 2. Accepting Plaintiff's representations as true, not having  
seen something does not mean it did or does not occur. Plaintiff protests outside just one  
clinic just once a week. Hoye Supp. Decl. at 1. Moreover, Plaintiff concedes that he  
sometimes approaches patients' cars, though he disputes the characterization of "mobbing"  
the cars or "thrusting [his] literature." Hoye Supp. Decl. at 2. The characterization is

1 subjective; while demonstrators might see nothing aggressive about approaching a patient's  
2 car, patients might experience the same action quite differently.

3 In December 2007, in response to more than ten years of complaints about protest  
4 activities at Oakland clinics, City Council member Nancy Nadel introduced the Ordinance.  
5 Nadel Decl. at 2. The City was concerned not only with women's access to the clinics, but  
6 also with the trauma and physical distress that demonstrators could cause to patients. See  
7 also Laden Decl. Ex. 4 at 4 (10/23/07 letter to Oakland Public Safety Committee). The  
8 City's goal was to "balance the rights of free speech and expression with the rights of privacy  
9 and unimpeded access to health care." Nadel Decl. at 2. The City Council held four  
10 meetings at which it heard testimony from both pro-choice and pro-life representatives.  
11 City's Mot. at 7 and Laden Decl. Exs. 7-10. Plaintiff was among the pro-life activists who  
12 spoke at the meetings, and later said he felt he had a "huge impact" on the City Council.  
13 Reding Decl. Ex. 3 at 12.

14 The original version of the Ordinance was passed in December 2007. Plaintiff's  
15 Request for Jud. Notice, Ex. C. Plaintiff filed this action that same month, alleging a civil  
16 rights violation and seeking injunctive relief. In a December 2007 hearing on Plaintiff's  
17 application for a temporary restraining order, this Court expressed its concern that the  
18 Ordinance contained impermissible viewpoint-based language, prohibiting only counseling  
19 designed to "persuade [an] individual not to access . . . reproductive health services." At this  
20 Court's strong suggestion, the City agreed to amend the Ordinance by removing that  
21 language. Plaintiff's Mot. at 12. In February 2008, the City passed the amended Ordinance  
22 at issue in this case. Laden Decl. Ex. 2 at 6.

23 That amended Ordinance lists the relevant prohibited conduct under the heading of  
24 "Prohibited Harassment of Individuals Seeking Access to Health Care Facilities." Id. at 5.  
25 Section 3(a) prohibits "force, threat of force, or physical obstruction" to "injure, harass,  
26 intimidate, or interfere with . . . any person because that person . . . is . . . providing or  
27 obtaining reproductive healthcare services." Section 3(b) states: "Within 100 feet of the  
28 entrance of a reproductive health care facility, it shall be unlawful to willfully and knowingly

1 approach within eight (8) feet of any person seeking to enter such a facility, or any occupied  
2 motor vehicle seeking entry, without the consent of such person or vehicle occupant, for the  
3 purpose of counseling, harassing, or interfering with such person or vehicle occupant.” Id.<sup>1</sup>  
4 The Ordinance defines “eight feet” as being measured from “any extension of the body of the  
5 individual seeking access” to “any extension of the body of, or any sign or object held by[,]  
6 another person.” Id. at 4. And it defines “counseling” as “engaging in conversation with,  
7 displaying signs to, and/or distributing literature to individuals seeking access to, passage  
8 from, or services within the reproductive health care facility.” Id.

9 In May 2008, Plaintiff again sought a temporary restraining order, which the Court  
10 denied.<sup>2</sup> In August 2008, the Court denied the City’s motion to dismiss. The parties now  
11 each seek summary judgment of Plaintiff’s claims that the Ordinance is facially  
12 unconstitutional, unconstitutional as applied, unconstitutionally vague, and a violation of the  
13 Equal Protection Clause. The Court will address each claim in turn.

## 14 **II. STANDARD OF REVIEW**

15 Summary judgment is appropriate “if the pleadings, the discovery and disclosure  
16 materials on file, and any affidavits show that there is no genuine issue as to any material fact  
17 and that the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(c). A fact  
18 issue is “material” only if it could affect the outcome of the suit under the governing law.  
19 Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). A fact issue is genuine if the  
20 evidence is such that a reasonable jury could return a verdict for the nonmoving party. Id.

21 A principal purpose of the summary judgment procedure is to isolate and dispose of  
22 factually unsupported claims. Celotex Corp. v. Catrett, 477 U.S. 317, 323-24 (1986). The  
23 party moving for summary judgment has the burden to show initially the absence of a

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25 <sup>1</sup>There is also a Section 3(c), which prohibits approach within eight feet to injure or intimidate.  
Id. It is not relevant here.

26 <sup>2</sup>Plaintiff was arrested on May 13, 2008 for violating the Ordinance on April 29, 2008, when five  
27 witnesses saw Plaintiff approach within eight feet of at least eight different patients outside an Oakland  
28 clinic to hand them fliers and harass them. City’s Mot. at 8. At one point, a clinic director used a  
measuring tape to show Plaintiff that he was within eight feet of clinic patients. Id. On January 15,  
2009, Plaintiff was convicted for violating the Ordinance. Id. That conviction is not the subject of this  
motion.

1 genuine issue concerning any material fact. See Adickes v. S.H. Kress & Co., 398 U.S. 144,  
 2 159 (1970). Once the moving party has met its initial burden, the burden shifts to the  
 3 nonmoving party to establish the existence of an element essential to that party’s case, and on  
 4 which that party will bear the burden of proof at trial. See Celotex Corp. v. Catrett, 477 U.S.  
 5 317, 323-24 (1986). To discharge this burden, the nonmoving party cannot rely on its  
 6 pleadings, but instead must have evidence showing that there is a genuine issue for trial. See  
 7 id. at 324.

8 Special rules of construction apply to evaluating summary judgment motions: (1) all  
 9 reasonable doubts as to the existence of genuine issues of material fact should be resolved  
 10 against the moving party; and (2) all inferences to be drawn from the underlying facts must  
 11 be viewed in the light most favorable to the nonmoving party. T.W. Elec. Serv., Inc. v. Pac.  
 12 Elec. Contractors Ass’n., 809 F.2d 626, 630-31 (9th Cir. 1987).

### 13 **III. DISCUSSION**

#### 14 **1. Whether the Ordinance is Content- or Viewpoint-Based**

##### 15 **A. *Facial Challenge***

16 A government may impose reasonable restrictions on time, place, or manner of  
 17 protected speech, so long as the restrictions “are justified without reference to the content of  
 18 the regulated speech . . . are narrowly tailored to serve a significant governmental interest,  
 19 and . . . leave open ample alternative channels for communication.” Ward v. Rock Against  
 20 Racism, 491 U.S. 781, 791 (1989). Plaintiff argues that the Ordinance is content- and  
 21 viewpoint-based on its face because it was passed with discriminatory intent, is directed only  
 22 at reproductive healthcare clinics, and restricts “protest, education and counseling” while  
 23 leaving other speech unrestricted. Plaintiff’s Opp. at 12.<sup>3</sup> However, the Supreme Court

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 25 <sup>3</sup>Plaintiff also argues that there is a genuine issue of material fact as to the need for the  
 26 Ordinance. Plaintiff’s Opp. at 15-16. This is not so. While Plaintiff disputes some of the individual  
 27 historical facts the City presented in support of the passage of the Ordinance, there is no genuine issue  
 28 of material fact as to whether there was, on the whole, sufficient evidence of historical access problems.  
 The evidence the City relied on was reasonably believed to be relevant to the problem it addressed. See  
Gammoh v. City of La Habra, 395 F.3d 1114, 1126 (9th Cir. 2005); see also McCullen v. Coakley, 2009  
 WL 1942069 at \*6 (1st Cir. 2009) (test for content-neutrality requires only that evidence support  
 legislature’s conclusion that regulation serves “a legitimate governmental interest unrelated to

1 upheld the facial content-neutrality of an eight-foot bubble law nearly identical to the  
2 Ordinance at issue here. See Hill v. Colorado, 530 U.S. 703 (2000). Accordingly, Plaintiff’s  
3 facial challenge fails.

4 The City has introduced sufficient evidence that the problem it sought to address with  
5 the Ordinance was not objectionable speech, but conduct that restricted patients’ access to  
6 reproductive healthcare clinics. See, e.g., Laden Decl. Ex. 2 at 2 (Ordinance preamble states  
7 that “persons attempting to access reproductive health care facilities . . . have been subject to  
8 harassing or intimidating activity from extremely close proximity, tending to hamper or  
9 impede their access to those facilities and services”). The Court recalls that the original  
10 version of the Ordinance contained viewpoint-based language, but even assuming the illicit  
11 legislative motive Plaintiff urges, courts “will not strike down an otherwise constitutional  
12 statute on the basis of an alleged illicit legislative motive.” United States v. O’Brien, 391  
13 U.S. 367, 383 (1968). The Court in Hill explained that “the contention that a statute is  
14 ‘viewpoint based’ simply because its enactment was motivated by the conduct of the  
15 partisans on one side of a debate is without support.” 530 U.S. at 724. See also Menotti v.  
16 City of Seattle, 409 F.3d 1113, 1129 (9th Cir. 2005) (“That Order No. 3 predominantly  
17 affected protestors with anti-WTO views did not render it content based.”).

18 As in Hill, the Ordinance applies “equally to all demonstrators, regardless of  
19 viewpoint, and the statutory language makes no reference to the content of the speech.” 530  
20 U.S. at 719. And, as in Hill, “the State’s interest[] in protecting access . . . [is] unrelated to  
21 the content of the demonstrators’ speech.” Id. at 719-20. Indeed, the Court in Hill found that  
22 Colorado’s statute was “not a regulation of speech” but “a regulation of the places where  
23 some speech may occur.” Id. at 719 (internal quotations omitted). Any speaker was  
24 permitted to “attempt to educate unwilling listeners on any subject, but without consent may  
25 not approach within eight feet to do so.” Id. at 723. The same is true here.

26 Plaintiff tries to distinguish Hill because the statute there applied to “any entity that is  
27 licensed, certified, or otherwise authorized or permitted by law to administer medical  
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expressive content;” courts must give “significant” respect to legislature’s judgment).

1 treatment in this state,” while the Ordinance here is limited to reproductive healthcare clinics.  
 2 Plaintiff’s Mot. at 15. Hill did comment favorably on the “comprehensiveness” of  
 3 Colorado’s statute. 530 U.S. at 731. More relevant, however, is the Court’s holding that:

4 [F]lawed is [the] theory that a statute restricting speech becomes unconstitutionally  
 5 content based because of its application to the specific locations where that discourse  
 6 occurs. A statute prohibiting solicitation in airports that was motivated by the  
 7 aggressive approaches of Hare Krishnas does not become content based solely  
 8 because its application is confined to airports– the specific locations where that  
 9 discourse occurs. 530 U.S. at 724 (internal quotations and citations omitted).

10 The Ordinance is not unconstitutional simply because it is limited to conduct within 100 feet  
 11 of the entrance of a reproductive healthcare clinic; the entrances of reproductive healthcare  
 12 clinics are where discourse about reproductive healthcare often occurs. See also McGuire v.  
 13 Reilly, 260 F.3d 36, 44 (1st Cir. 2001) (hereinafter “McGuire I”) (“We conclude, without  
 14 much question, that the Act’s stated goals justify its specific application to [reproductive  
 15 healthcare clinics]”).

16 Plaintiff’s argument that the statute is unconstitutional on its face because it restricts  
 17 “protest, education and counseling,” while leaving other types of speech unrestricted,  
 18 Plaintiff’s Mot. at 15, is also unavailing. Courts have long upheld regulations targeting  
 19 specific categories of speech as long as they meet the standards for permissible time, place  
 20 and manner regulations. See, e.g., Schenck v. Pro-Choice Network of W. N.Y., 519 U.S.  
 21 357, 380 (1997) (upholding injunction prohibiting “demonstrations” around clinic entrances).

22 In Hill, as here, the plaintiff complained that “an individual near a health care facility  
 23 who knowingly approaches a pedestrian to say ‘good morning’ or to randomly recite lines  
 24 from a novel would not be subject to the statute’s restrictions,” and so “[b]ecause the content  
 25 of the oral statements made by the approaching speaker must sometimes be examined,” the  
 26 statute must be content-based. Hill, 530 U.S. at 720; see also Plaintiff’s Mot. at 16. The  
 27 Court dispensed with this argument, explaining,

28 It is common in the law to examine the content of a communication to determine the  
 speaker’s purpose. Whether a particular statement constitutes a threat, blackmail, an  
 agreement to fix prices . . . often depends on the precise content of the statement. We  
 have never held, or suggested, that it is improper to look at the content of an oral or  
 written statement in order to determine whether a rule of law applies to a course of  
 conduct. Id. at 721.

1 The Court explained that while it might sometimes be necessary to examine the content of  
2 statements made from within eight feet, “that review need be no more extensive than a  
3 determination whether a general prohibition of ‘picketing’ or ‘demonstrating’ applies to  
4 innocuous speech.” Id. While Oakland’s Ordinance will sometimes require a police officer  
5 to examine the content of speech, that inquiry is permissible under Hill. 530 U.S. at 720-21.

6 The Ordinance is content- and viewpoint-neutral on its face.

7 Notably, Plaintiff asked this Court at the motion hearing and again in its post-hearing  
8 supplemental brief to consider the testimony of Captain Toribio of the Oakland Police  
9 Department, in addition to the Ordinance itself, as part of Plaintiff’s facial challenge. In  
10 making this argument, Plaintiff relied principally on Forsyth County, Ga. v. Nationalist  
11 Movement, 505 U.S. 123, 131 (1992), in which the Supreme Court stated that “[i]n  
12 evaluating respondent’s facial challenge,” the Court would “consider the county’s  
13 authoritative construction of the ordinance, including its own implementation and  
14 interpretation of it.” But Forsyth does not support Plaintiff’s argument. The plaintiff in  
15 Forsyth had argued that an ordinance “[did] not prescribe adequate standards” for an  
16 administrator setting a permit fee, and so the Court looked to the county’s implementation of  
17 the ordinance to try to find “narrowly drawn, reasonable and definite standards.” 505 U.S. at  
18 130-33.

19 The cases relied on by Forsyth demonstrate that courts look beyond the face of a law  
20 to its implementation in search of narrowing constructions. See Ward, 491 U.S. at 795-96  
21 (“[i]n evaluating a facial challenge to a state law, a federal court must . . . consider any  
22 limiting construction that a state court or enforcement agency has proffered”); City of  
23 Lakewood v. Plain Dealer Publ’g Co., 486 U.S. 750, 770 n.11 (1988) (“when a state law has  
24 been authoritatively construed so as to render it constitutional, or a . . . practice has  
25 developed that has virtually the force of a judicial construction, the state law is read in light  
26 of those limits . . . even if the face of the statute might not otherwise suggest the limits  
27 imposed”); Gooding v. Wilson, 405 U.S. 518, 524-28 (1972) (finding that nothing had been  
28 done to narrow the construction of an overly broad statute). The two Ninth Circuit cases



1 Plaintiff cited to in his supplemental brief apply Forsyth in this same context. See Desert  
 2 Outdoor Adver. Inc. v. City of Oakland, 506 F.3d 798, 802 (9th Cir. 2007) (noting court’s  
 3 obligation “to interpret a statute, if it is fairly possible, in a manner that renders it  
 4 constitutionally valid”); Santa Monica Food Not Bombs v. City of Santa Monica, 450 F.3d  
 5 1022, 1035 (9th Cir. 2006) (discussing “limiting construction” of ordinance).

6 Courts search for narrowing constructions because, as the Court explained in Frisby v.  
 7 Schultz, 487 U.S. 474, 483 (1988), another case Plaintiff relies on, it is a “well-established  
 8 principle that statutes will be interpreted to avoid constitutional difficulties.” Plaintiff has  
 9 not directed this Court to any authority in which courts have looked beyond a facially  
 10 constitutional law to its implementation in order to find it facially unconstitutional. This  
 11 Court declines Plaintiff’s request that it do so here. See also McGuire v. Reilly, 386 F.3d 45,  
 12 58 (1st Cir. 2004) (hereinafter “McGuire II”) (“Logically, there is no way (save perhaps  
 13 when overbreadth is an issue) that an authority’s non-binding and non-authoritative  
 14 interpretation of a facially valid statute can make it more facially constitutionally vulnerable  
 15 than it would be otherwise”); McCullen v. Coakley, 2009 WL 1942069 at \*13 (1st Cir.  
 16 2009) (“we do not believe that an official’s interpretation can render clear statutory language  
 17 vague so as to make the statute vulnerable to a facial . . . attack”). The City’s implementation  
 18 of the Ordinance, and Capt. Toribio’s testimony, are addressed below as part of Plaintiff’s as-  
 19 applied challenge.<sup>4</sup>

20 *B. As-Applied Challenge*

21 *i. Actions of Clinic Escorts*

22 Plaintiff argues that the Ordinance is content- and viewpoint-based as  
 23 applied, because it is enforced in such a way that it prohibits pro-life activists from  
 24 approaching women to ask if they would like to hear about alternatives to abortion, but  
 25 allows individuals Plaintiff describes as pro-choice activists to “invite women into the clinic,  
 26 tell them to disregard Plaintiff’s message, and advocate a pro-abortion position.” Plaintiff’s  
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28 <sup>4</sup>This is how Plaintiff addressed the matter in his briefing prior to the motion hearing. See  
 Plaintiff’s Opp. at 16.

1 Mot. at 12-13. His chief complaint is with the presence and actions of clinic escorts, the  
 2 volunteers who help patients into the clinics. The Ordinance recognizes “volunteers who,  
 3 with the consent of the reproductive health care facility, assist in conducting patients of such  
 4 facility safely into the facility,” along with doctors, nurses and clinic employees, as  
 5 individuals who “[provide] reproductive health services.” Laden Decl. Ex. 2 at 4. The  
 6 Police Training Bulletin interpreting the Ordinance recognizes escorts as well. Laden Decl.  
 7 Ex. 6. at 2. To identify themselves, escorts wear orange vests, which the clinic stores. Cole  
 8 Decl. at 1. The escorts do not work for the clinic, but meet regularly with clinic staff. Barbic  
 9 Decl. at 4. The escorts work on an “as-needed basis,” only offering assistance when pro-life  
 10 protestors are present. Id.

11 Plaintiff states that the escorts “will approach [a patient], going right up to within a  
 12 couple of feet . . . and start talking to her.” Plaintiff’s Mot. at 5.<sup>5</sup> He asserts that the escorts  
 13 “tell women not to listen to Plaintiff, that he is only there to harass her, that she will only be  
 14 safe with the escorts, and not to take his literature . . . because it is inaccurate.” Id. He  
 15 complains that escorts walk alongside the women, between him and the patients, and either  
 16 talk to the patients, or “simply make noise to drown out Plaintiff’s voice.” Id. He also states  
 17 that on some occasions he has seen escorts snatch his literature out of the women’s hands.  
 18 Hoye Supp. Decl. at 3. See also Hitchcock Supp. Decl. at 3; Downer Decl. at 3; Kendall  
 19 Decl. at 3.

20 As an initial matter, simply facilitating a patient’s access to reproductive healthcare  
 21 services is not pro-choice advocacy. If it were, the Supreme Court in Hill could not have  
 22 found that Colorado’s bubble statute, which was, among other things, intended to facilitate  
 23 access, was either content- or viewpoint-neutral. See 530 U.S. at 725. If it were, the First  
 24 Circuit in McGuire I could not have found that Massachusetts’s bubble statute, which

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 26 <sup>5</sup>Barbara Hoke, the escort coordinator, presents a different picture, stating that the escorts “ask  
 27 for consent to assist the patient into the clinic.” Hoke Decl. at 2. She states that the escorts immediately  
 28 back away if the patients decline their offers of help, that escorts speak softly to avoid intimidating  
 patients, and that if a patient is present, the escorts “do not engage the protestors in conversation.” Id.  
 Nevertheless, for the purpose of this Order, the Court will construe all facts in the light most favorable  
 to Plaintiff.

1 explicitly exempted clinic agents and employees, was either content- or viewpoint-neutral.  
2 260 F.3d at 46 (“since a primary purpose of the law is to facilitate safe access, the employee  
3 exemption serves the basic objectives of the Act”).<sup>6</sup> See also McCullen, 2009 WL 1942069  
4 at \*7 (finding, as to the Massachusetts law that replaced the law at issue in the McGuire  
5 cases, that “exception for persons associated with [reproductive healthcare clinics] remains  
6 reasonably related to the legislature’s legitimate public safety objectives”). Escorts who  
7 simply facilitate access are thus distinct from the hypothetical pro-choice demonstrator  
8 imagined by Justice Kennedy in Hill who “chants in praise of the Supreme Court and its  
9 abortion decisions.” 530 U.S. at 725.

10 Nor does simply facilitating access violate the Ordinance, which forbids the knowing  
11 and unconsented approach within eight feet of a patient “for the purpose of counseling,  
12 harassing, or interfering.” Laden Decl. Ex. 2 at 5. Escorts who approach women for the  
13 purpose of facilitating their access into a clinic are not approaching “for the purpose of  
14 counseling, harassing, or interfering.” This is so even under the Ordinance’s broad definition  
15 of counseling, which includes “engaging in conversation with.” Id. at 4. Engaging in  
16 conversation with patients is secondary to facilitating access, and allowing escorts to talk to  
17 patients for the limited purpose of facilitating patient access is consistent with the  
18 Ordinance’s purpose.

19 To the extent that escorts deviate from their role of simply facilitating access and  
20 engage instead in pro-choice advocacy, they do so in violation of the Ordinance. In such a  
21 scenario, the escorts would be approaching patients “for the purpose of counseling,  
22 harassing, or interfering.” See Laden Decl. Ex. 2 at 5. Plaintiff cannot prevail on his as-  
23 applied challenge without first providing proof that this has happened. Thus the court in  
24 McGuire I, 260 F.3d at 47, a facial challenge, invited plaintiffs to return with an as-applied  
25 challenge to the Massachusetts bubble statute “if, as the plaintiffs predict, experience shows  
26 that clinic staffers in fact are utilizing the exemption as a means either of proselytizing or of  
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28 <sup>6</sup>The Ordinance here has no escort exemption, but does recognize escorts as people who provide reproductive health services and are thus protected under Section 3(a).

1 engaging in preferential pro-choice advocacy.” In their as-applied challenge three years  
2 later, McGuire II, 386 F.3d at 50-52, plaintiffs complained of escorts’ actions that are  
3 remarkably similar to Plaintiff’s complaints here: escorts sometimes told patients they did not  
4 need to listen to the pro-life protestors, took the pro-life protestors’ literature out of patients  
5 hands, chattered loudly to drown the pro-life protestors out, and “repeated ‘[p]ro-abortion  
6 rhetoric,’ such as ‘We have help. We’ll help you get inside.’” The court found that such  
7 actions by the escorts “are not violations of the Act.” Id. at 64-65.

8 Plaintiff has provided no evidence that escorts have ever, as he claims, “advocate[d] a  
9 pro-abortion position.” See Plaintiff’s Mot. at 12-13. Of course, the City’s declarants say  
10 that “escorts do not engage in abortion-related speech when volunteering as escorts,” and that  
11 escorts “do not counsel patients.” See, e.g., Hoke Decl. at 2; see also Barbic Decl. at 4  
12 (“Patients do not consult with escorts about any medical decisions.”). Neither side contends  
13 that escorts wear clothing conveying political messages, distribute fliers, or hold signs  
14 displaying a message. Plaintiff’s support for this assertion consists simply of the City’s  
15 alleged lack of an enforcement policy for escorts (discussed below), Barbara Hoke’s  
16 deposition testimony about Plaintiff’s leaflets, given in Plaintiff’s criminal trial, and the  
17 escort’s flexible, self-written guidelines, an exhibit to Hoke’s deposition. Plaintiff’s Opp. at  
18 17. The Court declines to take judicial notice of the deposition testimony given by clinic  
19 escorts in Plaintiff’s criminal trial. Such testimony is hearsay and does not meet the  
20 requirements of the former testimony exception in Federal Rule of Evidence 804(b)(1).  
21 There is no evidence that any of the escorts are unavailable, and the City did not have a  
22 similar motive to develop the escorts’ testimony in Plaintiff’s criminal trial as it would in the  
23 present case.<sup>7</sup> Even if the guidelines were admissible evidence, they are not proof that  
24 escorts engaged in advocacy.

25 Nevertheless, Plaintiff’s proof does go beyond that in McGuire II. Specifically,  
26 Plaintiff states that at times when he has held a sign stating, “Jesus loves you and your baby.

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28 <sup>7</sup>The Court does take judicial notice of Plaintiff’s testimony in his criminal case, as it is a party admission. Fed. R. Evid. 801(d)(2).

1 Let us help,” escorts have held blank signs in front of it. Plaintiff’s Mot. at 6. The Court  
 2 viewed with great displeasure video clips taken over the course of two days in which escorts  
 3 can be seen intermittently walking alongside Plaintiff and blocking Plaintiff’s sign with their  
 4 own, all-white signs. See Millen Decl. Ex.D. Other pro-life demonstrators have also had  
 5 their signs blocked. Hitchcock Supp. Decl. at 2; Kendall Decl. at 2. While the Court  
 6 believes that the escorts are motivated by a desire to minimize patients’ distress, the Court  
 7 considers it a violation of the Ordinance for escorts to hold signs in front of demonstrators’  
 8 signs in a knowing attempt to block demonstrators’ messages. This is so even if the signs the  
 9 escorts hold are blank, and even if the escort holding the blank sign is herself more than eight  
 10 feet away from a patient, so long as she is working in concert with an escort who is actively  
 11 escorting a patient.<sup>8</sup> The Court notes that this practice appears to have been sporadic, see  
 12 Lubin Decl. Ex. 3 (video footage taken from the same days as Plaintiff’s video footage,  
 13 showing Plaintiff holding sign without being blocked); Hitchcock Supp. Decl. at 2 (“[o]ther  
 14 times, they would . . . [block] our signs”); and Cole Decl. Exs. 2 and 3 (photographs from  
 15 March 2009 showing unencumbered display of pro-life signs/messages outside Oakland  
 16 clinics), and that the City represented at the motion hearing that it has ceased.<sup>9</sup>

17 ii. State Action

18 Despite the evidence that escorts did not always act “as escorts” and  
 19 simply facilitate patient access, Plaintiff’s as-applied challenge has a fatal flaw. Just as in  
 20 McGuire II, 386 F.3d at 60, what Plaintiff objects to is purely private action, and “[t]he First  
 21 Amendment is concerned with government interference, not private jousting in the speech  
 22 marketplace.” As the First Circuit explained, “there is no state action if what the plaintiff is  
 23 really aiming at are the acts of private persons that are actually illegal under the statutory  
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 26 <sup>8</sup>Of course, escorts also may not physically block demonstrators; the Ordinance, not the escorts,  
 27 should protect patients from unconsented approaches within eight feet for improper purposes.

28 <sup>9</sup>In support of this contention, the City cited to the testimony of escort Lucy Kasdin in Plaintiff’s  
 criminal trial. As already discussed, the Court declines to take judicial notice of such testimony, as it  
 is hearsay.

1 scheme, because then the acts do not reflect the policy of the state.” Id. Plaintiff’s fight is  
2 with the escorts; he has failed to show unlawful action by the City.

3 Plaintiff must show that although the law is facially neutral, the City is applying it in a  
4 viewpoint discriminatory manner. See id. (“[t]he only challenge they have left in this case is  
5 to the way the law has been enforced”). He must show a pattern of unlawful favoritism. See  
6 Thomas v. Chi. Park Dist., 534 U.S. 316, 325 (2002) (“Granting waivers to favored speakers  
7 (or, more precisely, denying them to disfavored speakers) would of course be  
8 unconstitutional, but we think that this abuse must be dealt with if and when a pattern of  
9 unlawful favoritism appears.”). Though the clinics have presumably been open for several  
10 hundred days since the amended Ordinance was passed in February 2008, Plaintiff points to  
11 just two incidents that he claims demonstrate selective enforcement of the Ordinance.

12 First, he argues that Deputy City Attorney Vicki Laden was present at one clinic on  
13 April 29, 2008, after which she notified police that Plaintiff had violated the Ordinance that  
14 day, but did not mention “that escorts were approaching patients and speaking to them.”  
15 Plaintiff’s Mot. at 10. Plaintiff does not reveal the contents of the escorts’ statements to the  
16 patients that day, and there is no indication that the speech constituted pro-choice advocacy,  
17 let alone that Laden was aware of such advocacy. In fact, in the City’s responses to  
18 Plaintiff’s second set of requests for admission, the City explicitly denied that Vicki Laden  
19 had witnessed escorts approaching within eight feet of patients without consent for the  
20 purpose of engaging them in conversation. Millen Decl. Ex. H at 4. The City’s actions  
21 therefore appear to be consistent with the Ordinance.

22 Second, Plaintiff relates an incident on June 3, 2008 in which demonstrator Virginia  
23 Hitchcock witnessed “escorts approaching women heading toward the clinic, without the  
24 women’s consent, and speaking to them.” Plaintiff’s Mot. at 10. This is the only example  
25 Plaintiff provides of pro-life demonstrators calling the police to report the alleged misdeeds  
26 of escorts. Hitchcock and a friend (Mary Arnold) notified the police, who responded and  
27 explained that the escorts were not subject to the Ordinance because they are “professionals.”  
28 Id. at 10-11. In fact, Hitchcock testified in her deposition simply that “there was a lot of

1 activity with the escorts and the staff” and that she had not seen anything she thought was  
2 illegal. Reding Decl. Ex .2 at 13. She also testified that upon arriving, the police “talked to  
3 the escorts and the staff,” Id. at 14-15, presumably investigating her report. Plaintiff  
4 submitted no evidence that the escorts’ speech that day was pro-choice advocacy, or that the  
5 police were aware of any such advocacy. The officer’s statement that the escorts are  
6 “professionals,” as well as Hitchcock’s deposition testimony that the police said “it doesn’t  
7 apply to them,” either reflects the police’s misstatement of the law (the Ordinance does apply  
8 to escorts who are not acting as escorts), or the police’s conclusion that the escorts had been  
9 acting as escorts. The latter is at least as reasonable an interpretation, as even Hitchcock had  
10 not seen anything she thought was illegal.

11 Notably, the only evidence in the record that the police were aware that escorts  
12 sometimes held blank signs in front of demonstrators’ signs is also from the July 3, 2008  
13 incident. In an email Mary Arnold wrote about the incident, she mentioned that she had told  
14 the responding officer that since the ordinance was passed, she had “witnessed one escort . . .  
15 hold up a large sign in order to prevent women from reading [Plaintiff’s] sign.” Reding Decl.  
16 Ex. 1 at 38. Arnold’s email describes the officer as being “pleasant and courteous” and  
17 saying, “It’s best if a judge decides but I do want the report to be made.” Id. The record  
18 does not reflect whether Arnold ever followed up on this. Aside from the incidents of  
19 April 29, 2008 and June 3, 2008, Plaintiff is forced to argue not about how the Ordinance has  
20 been enforced, but about how it might be enforced in the future. Plaintiff points to the  
21 30(b)(6) testimony of Captain Toribio of the Oakland Police Department, who testified about  
22 the City’s interpretation of the Ordinance. Toribio testified that it would not be a violation of  
23 the Ordinance for an escort to tell a woman, “It’s your right to have an abortion.” Millen  
24 Decl. Ex. F at 57. Toribio agreed that “the City’s Enforcement Policy is not to enforce the  
25 Bubble Ordinance against escorts acting as escorts.” Millen Decl. Ex. F at 48. He also said:  
26 “if the escort is performing within or doing something within the scope of their duties to  
27 facilitate entrance and exit, there are no concerns.” Reding Decl. Ex. 4 at 14-15.

28

1 It is consistent with both the Ordinance and Hill not to enforce the Ordinance against  
2 escorts who are “acting as escorts”— that is, escorts who are simply facilitating patient access.  
3 However, the Court finds that, provided the other requirements of Section 3(b) were met,  
4 Capt. Toribio was wrong when he testified that it would not violate the Ordinance for an  
5 escort to tell a patient, “It’s your right to have an abortion.” See Millen Decl. Ex. F at 57.  
6 While such a statement arguably facilitates access, it goes beyond that narrow function and  
7 may constitute “counseling” under the Ordinance. See Laden Decl. Ex. 2 at 5.<sup>10</sup> Toribio’s  
8 testimony was given in response to a question which Defendant’s counsel objected to as  
9 speculative and an incomplete hypothetical. Certainly it was that (an escort could  
10 permissibly tell a woman it was her right to have an abortion if the two were standing in line  
11 at a supermarket across town from a clinic), but more importantly, it is not evidence that  
12 escorts make such statements, or that the police turn a blind eye to them. An answer to a  
13 hypothetical is not evidence that discrimination has occurred. See, e.g., Boyd v. City of  
14 Oakland, 458 F. Supp. 2d 1015, 1043 (N.D. Cal. 2006) (police captain’s conjectural  
15 responses to hypothetical questions did not constitute admissible evidence of discrimination).  
16 As in McGuire II, “there is no evidence that the police turned a blind eye toward pro-abortion  
17 speech while not turning a blind eye to possible transgressions by plaintiff[.]” 386 F.3d at  
18 65.

19 Plaintiff has provided no evidence that the police have targeted pro-life demonstrators.  
20 Compare Menotti, 409 F.3d at 1148 (finding genuine issue of material fact as to whether  
21 police were unfairly targeting only anti-WTO protestors). He claims that no clinic escort  
22 having been arrested or prosecuted for violating the Ordinance is evidence of disparate  
23 enforcement. Plaintiff’s Mot. at 11. Of course it is not, barring any evidence that escorts  
24 violated the Ordinance and that police were aware of it. Moreover, the only arrest Plaintiff  
25 cites to of a pro-life demonstrator under the Ordinance is his own, following repeated

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26  
27 <sup>10</sup>Escorts may of course say such things as: “would you like help getting into the clinic,” “the  
28 clinic is this way,” “you can follow me to the clinic,” and “the clinic opens in 10 minutes.” The  
distinction between these statements and “it’s your right to have an abortion” is that the latter purports  
to advise the woman about her rights and arguably addresses not only her access to the clinic but what  
she could or should do once inside it.



1 violations. City’s Mot. at 22. In fact, Plaintiff testified that the police have “been great,  
2 actually . . . they[] hear our side of it, their side of it.” See Reding Decl. Ex. 3 at 14-15.  
3 Plaintiff has not demonstrated a pattern of selective enforcement. See Brown v. City of  
4 Pittsburgh, 543 F. Supp. 2d 448, 486 (W.D. Penn. 2008) (holding that plaintiff failed to show  
5 a pattern of unlawful behavior based on two incidents of police enforcement of city bubble  
6 ordinance).

7 Plaintiff has failed to demonstrate that the City is enforcing the Ordinance in a  
8 discriminatory manner; the Ordinance is content- and viewpoint-neutral as applied to  
9 Plaintiff.

10 2. Whether the Ordinance is Narrowly Tailored to Serve the Asserted  
11 Governmental Interest

12 The Ordinance must also be narrowly tailored to serve a significant government  
13 interest. Ward, 491 U.S. at 791. Plaintiff argues that protecting women’s access to  
14 reproductive healthcare clinics is not a significant interest, and that the City has not justified  
15 the Ordinance. Plaintiff’s Mot. at 23-24. Plaintiff characterizes Madsen v. Women’s Health  
16 Ctr., Inc., 512 U.S. 753 (1994) as having found that “the interest in protecting access to an  
17 abortion clinic did not justify a restriction on unconsented approaches.” Id. at 24. But the  
18 Court in Madsen cited approvingly a Florida Supreme Court holding that “the State has a  
19 strong interest in protecting a woman’s freedom to seek lawful medical or counseling  
20 services in connection with her pregnancy,” and found that interest and other relevant  
21 interests “quite sufficient to justify an appropriately tailored injunction to protect them.” 512  
22 U.S. at 767-68. That the Court went on to find that a prohibition of any unconsented  
23 approach within 300 feet of a clinic was not narrowly tailored, Id. at 760, 773-74, is not  
24 dispositive here, where the Ordinance only prohibits approaches within eight feet of patients  
25 who are within 100 feet of a clinic entrance. Laden Decl. Ex. 2 at 5.

26 Moreover, the Court in Hill acknowledged that the state’s interest in protecting the  
27 health and safety of its citizens “may justify a special focus on unimpeded access to health  
28 care facilities and the avoidance of potential trauma to patients associated with  
confrontational protests.” 530 U.S. at 715. The Court went on to hold:

1 Persons who are attempting to enter health care facilities– for any purpose– are often  
2 in particularly vulnerable physical and emotional conditions. The State of Colorado  
3 has responded to its substantial and legitimate interest in protecting these persons  
4 from unwanted encounters, confrontations, and even assaults by enacting an  
5 exceedingly modest restriction on the speakers’ ability to approach. Id. at 729.

6 The City enacted the Ordinance in response to more than ten years’ of complaints  
7 about protest activities at Oakland clinics, following four separate meetings at which it heard  
8 testimony from both pro-choice and pro-life representatives, and having concluded that  
9 “existing federal and state laws do not adequately protect the rights of those seeking or  
10 providing reproductive health care services.”<sup>11</sup> Laden Decl. Ex. 2 at 3. See Nadel Decl. at 2;  
11 City’s Mot. at 7; Laden Decl. Exs. 7-10. The City’s interests in protecting women’s access  
12 to reproductive healthcare clinics is thus both justified and “substantial and legitimate” under  
13 Hill.

14 Plaintiff also asserts that the Ordinance is not narrowly tailored to restrict only  
15 unwanted approaches. Plaintiff’s Mot. at 25-29. He urges a reading of Hill in which the  
16 Court “did not understand the statute to prohibit the speaker from approaching in the absence  
17 of the person taking some action to prevent that approach.” Plaintiff’s Mot. at 26. This  
18 reading is incorrect. The bubble statute in Hill also expressly prohibiting approach without  
19 consent. 530 U.S. at 708 n.1.

20 Plaintiff urges that the Ordinance is not narrowly tailored to prohibit unconsented  
21 approaches, but all approaches, due to “the layout of the sidewalk and street surrounding the  
22 clinic” and the limited window he has to reach patients who are dropped off in front of the  
23 clinic. Plaintiff’s Mot. at 27-28. He claims a “necessity of approaching significantly closer  
24 than eight feet in order to communicate with women seeking to enter the clinic.” Id. at 28.  
25 This argument also fails, as Hill approved an eight-foot bubble ordinance without limitation  
26 to particular physical settings. 530 U.S. at 703. Just as in Menotti, 409 F.3d at 1133-34,

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26 <sup>11</sup>See also Laden Decl. Ex. 4 at 5-6 (10/23/07 letter to Oakland Public Safety Committee,  
27 explaining among other things that California’s FACE law does not prohibit harassing or counseling  
28 as defined in the Ordinance and does not establish a zone of protection around an individual); and Hill,  
530 U.S. at 729 (“the statute’s prophylactic aspect is justified by the great difficulty of protecting, say,  
a pregnant woman from physical harassment with legal rules that focus exclusively on the individual  
impact of each instance of behavior.”).

1 where the Ninth Circuit found that an order “covered only enough territory for the WTO  
2 delegates and the President to move safely from their hotels to the [WTO] convention and  
3 lasted only during the conference,” the Ordinance is narrowly tailored to only limit  
4 approaches within eight-feet of people entering the clinic, thus allowing safe access. See  
5 also McCullen, 2009 WL 1942069 at \*7-11 (finding that law establishing a 35-foot buffer  
6 zone around reproductive healthcare clinics was narrowly tailored). The Court also notes  
7 that while Plaintiff appears to take a relatively mild-mannered approach to demonstrating, the  
8 Ordinance must take into account that not all demonstrators or potential demonstrators are  
9 Plaintiff. The Ordinance is narrowly tailored.

10 3. Whether the Ordinance Leaves Open Ample Alternative Channels of  
11 Communication

12 A content-neutral time, place and manner restriction that is narrowly tailored to serve  
13 a significant government interest must also leave open ample alternative means of  
14 communication. Ward, 491 U.S. at 798. Plaintiff argues that while the Court in Hill, a facial  
15 challenge, found that “[s]igns, pictures, and voice itself can cross an 8-foot gap with ease,”  
16 530 U.S. at 729, they cannot so easily reach patients in Oakland. Plaintiff’s Mot. at 17-18.  
17 Plaintiff complains of the escorts blocking his sign, standing between him and patients, and  
18 making noise to drown out his voice. Id. at 18. He complains about the City’s enforcement  
19 policy, which he claims bars him from standing still and lifting his arm to hand a patient a  
20 leaflet. Id. at 19. And he complains that the City’s enforcement policy permits an escort to  
21 essentially veto a patient’s consent to Plaintiff’s approach. Id. at 20. Plaintiff also argues  
22 that the eight-foot bubble makes it “virtually impossible to start up a conversation with  
23 someone from eight feet away,” and that there “is no substitute or ‘ample alternative’ to  
24 approaching . . . a person . . . to strike up a conversation.” Id. at 22. Plaintiff testified that  
25 being required to stay eight feet away from the patients “just wouldn’t seem natural” and  
26 “would seem impolite.” Reding Decl. Ex. 3, at 6. Plaintiff also complains that “the brief  
27 period of time to speak to women entering the clinic is insufficient to ask for consent to  
28 approach” since many women are dropped off just outside the clinic. Plaintiff’s Mot. at 3-4.

1 Addressing these concerns in reverse order, while Plaintiff might prefer to express  
2 himself by striking up a polite conversation with patients from a close distance, “the First  
3 Amendment does not guarantee the right to communicate one’s views . . . in any manner that  
4 may be desired.” Menotti, 409 F.3d at 1138 (internal citations omitted). Plaintiff has no  
5 right to communicate at a polite (i.e., close) distance. See Colacurcio v. City of Kent, 163  
6 F.3d 545, 548 (9th Cir. 1998) (rejecting argument that because “table-dancing” is a “unique  
7 form of expression,” ten-foot distance requirement amounts to a complete ban on a unique  
8 form of expression); McCullen, 2009 WL 1942069 at \*9 (“the Constitution neither  
9 recognizes nor gives special protection to any particular conversational distance”).

10 Nothing in the Ordinance prevents Plaintiff from approaching within eight feet of an  
11 escort for the purpose of communicating with a patient. Section 3(b) provides that “it shall  
12 be unlawful to willfully and knowingly approach within eight (8) feet of any person seeking  
13 to enter such a facility. . . without the consent of such person . . . for the purpose of  
14 counseling, harassing, or interfering with such person.” See Laden Decl. Ex. 2 at 5  
15 (emphasis added). However, under Section 3(a), one may not use force, threat of force, or  
16 physical obstruction– at any distance– to harass any person providing reproductive health  
17 services, including escorts. Id. This is consistent with the Training Bulletin, which identifies  
18 escorts on its list of protected individuals. Laden Decl. Ex. 6 at 2. It is also consistent with  
19 Hill. 530 U.S. at 708 n.1 (ordinance prohibited unconsented approach of “another person,”  
20 not limited to patients). Nothing prevents a demonstrator from approaching within eight feet  
21 of an escort if the approach is not to harass “that person” but to communicate with a patient  
22 eight feet away.

23 Next, nothing in the Ordinance prevents a demonstrator from leafleting, provided the  
24 demonstrator is eight feet away from an unconsenting patient. The Ordinance defines “eight  
25 feet” as measured from any extension of the body. Laden Decl. Ex. 2 at 4. The City’s  
26 Training Bulletin is consistent with this. Laden Decl. Ex. 6 at 3. Capt. Toribio’s testimony,  
27 Millen Decl. Ex. F at 84, that a demonstrator who stands still but lifts his arm toward a  
28 patient is “approaching” that patient, is consistent with the Ordinance; provided the

1 demonstrator’s outstretched arm is eight feet from the patient, that is not a violation. As in  
2 Hill, nothing in the Ordinance prevents a leafletter “from simply standing near the path of  
3 oncoming pedestrians and proffering his or her material, which the pedestrians can easily  
4 accept.” See 530 U.S. at 727.

5 Most importantly, while Plaintiff does not have all of his preferred channels of  
6 communication open to him, he still has ample alternative channels. He can speak to patients  
7 from eight feet away without their consent, from within eight feet with their consent, or from  
8 within eight feet regardless of consent beyond 100 feet of clinic entrances.<sup>12</sup> The Court in  
9 Hill held that eight feet “allows the speaker to communicate at a ‘normal conversational  
10 distance,’” and, though Hill was a facial challenge, the Court imagined that there might be  
11 background noise and other speakers competing for patients’ attention. 530 U.S. at 726-27.

12 Indeed, Plaintiff admits that he “has had some success in engaging in conversation” –  
13 his preferred means of expression– “with patients since the Ordinance passed,” though he  
14 hastens to add that “his successes were ‘many more’ before the Ordinance.” Plaintiff’s Opp.  
15 at 9. As already discussed, while there is evidence that escorts sometimes held signs in front  
16 of Plaintiff’s sign, this practice appears to have happened only sporadically. As in Hill, the  
17 Ordinance places no limitations on signs’ “number, size, text or images,” or on “the number  
18 of speakers or the noise level” of oral protest. 530 U.S. at 726.

19 The evidence shows that pro-life demonstrators continue to get their message across.  
20 See, e.g., Hoke Decl. at 3-4 (“The protestors are impossible to miss. . . . I have observed the  
21 protestors holding large signs . . . . I have seen a pickup truck with pro-life stickers parked  
22 across the street. . . . The protestors are very loud. They sing songs, pray, and pass out  
23 fliers.”); Barbic Decl. at 6 (“I have seen . . . protestors carry large signs that can be read from  
24 across the street. They pass out pamphlets. The protestors sing and pray. Their voices  
25 easily carry across the street and can be heard inside and outside the clinic.”); and Quan

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27 <sup>12</sup>The Court notes that Plaintiff argued at the motion hearing that the Ordinance creates a “super-  
28 escort privilege” by taking the eight-foot bubble from Hill and applying it within 100 feet from the  
clinic’s entrance. But the statute in Hill also dealt with an eight-foot bubble that operated within 100  
feet of a facility’s entrance. 530 U.S. at 708 n.1. The Court characterized that statute as “an  
exceedingly modest restriction on the speakers’ ability to approach.” Id. at 729.

1 Decl. Exs. 1 and 2 (photographs of pro-life protestors gathered outside Oakland clinic in  
2 March 2009). This is sufficient. See Menotti, 409 F.3d at 1138 (“Given the protestors’  
3 ability to communicate directly across the street from most WTO venues, and given the  
4 violence that Order No. 3 was aimed at preventing, we think the better analysis favors the  
5 conclusion that Order No. 3 provided ample alternatives for communication.”); McCullen,  
6 2009 WL 1942069 at \*9 (finding ample alternative channels of communication where law  
7 provided for 35-foot buffer zone around reproductive healthcare facilities, because  
8 demonstrators “can speak, gesticulate, wear screen-printed T-shirts, display signs, use  
9 loudspeakers, and engage in the whole gamut of lawful expressive activities” from 35-feet  
10 away).<sup>13</sup>

11 4. Whether the Ordinance is Unconstitutionally Vague As Applied

12 Plaintiff next argues that the Ordinance is unconstitutionally vague as applied.  
13 Plaintiff’s Mot. at 29. A statute is vague if it either “fails to provide people of ordinary  
14 intelligence a reasonable opportunity to understand what conduct it prohibits” or “authorizes  
15 or even encourages arbitrary and discriminatory enforcement.” Hill, 530 U.S. at 732.

16 Some of Plaintiff’s concerns are plainly without merit. There is nothing  
17 unconstitutionally vague about “vehicle[s] seeking entry” to the clinic. See Laden Decl. Ex.  
18 2 at 5. As vehicles cannot drive into clinic waiting rooms, the term is properly interpreted as  
19 vehicles pulling up to the clinic’s parking lot or curb. Similarly, while “approach” is not  
20 defined in the Ordinance, its definition in the Training Bulletin (“to come near or nearer to”)  
21 is the common definition. See id., Laden Decl. Ex 6 at 4. That a demonstrator who stands  
22 still but lifts his arm toward a patient is considered to be “approaching” that patient is both  
23 logical and consistent with the Ordinance’s measurement of eight feet “from any extension of  
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25 <sup>13</sup>The Court rejects the argument in Plaintiff’s supplemental brief that Edwards v. City of Coeur  
26 D’Alene, 262 F.3d 856, 866-67 (9th Cir. 2001) shows that the Ninth Circuit takes a more jealous view  
27 of the “ample alternatives” prong than does the First Circuit. Plaintiff’s Supp. Brief at 3-4. The Ninth  
28 Circuit in Edwards struck down a ban on the use of wooden sticks to hold up signs carried during  
parades and assemblies, but did so because at “mass gatherings,” “it is often difficult to see more than  
a few feet in any direction, or to hear anyone who isn’t standing nearby.” 262 F.3d at 867. Plaintiff has  
not demonstrated that an eight-foot bubble outside clinic entrances presents the same obstacles to  
communication as a crowded parade.

1 the body.” Laden Decl. Ex. 2 at 4. See also Hill, 530 U.S. at 733. Also “consent,” though  
2 undefined in the Ordinance, is certainly clear; “[t]he likelihood that anyone would not  
3 understand [such a] common word[] seems quite remote.” See id. at 732.

4 Plaintiff accurately notes that while Section 3(b) of the Ordinance refers to persons  
5 “seeking to enter” a clinic, the Training Bulletin states (and Capt. Toribio testified) that the  
6 Ordinance is interpreted to include persons both entering and exiting. Plaintiff’s Mot. at 30.  
7 The omission does not render the Ordinance unconstitutionally vague. The Ordinance  
8 defines “interfering,” prohibited by Section 3(b), to include “access” and “egress,” and  
9 defines “counseling,” prohibited by Section 3(b), to include persons “seeking access to” or  
10 “passage from” clinics. Laden Decl. Ex. 2 at 4 and 5. It also defines “eight feet,” the  
11 distance identified in Section 3(b), as relating to a person “seeking access to” or “passage  
12 from” a clinic. Id. Thus a person of ordinary intelligence would understand that, as in Hill,  
13 530 U.S. at 708 n.1, the ordinance “as a whole” prohibits interference with persons both  
14 entering and exiting clinics. See Grayned v. City of Rockford, 408 U.S. 104, 110 (1972).

15 Plaintiff complains again that it is unclear under the Ordinance whether he can  
16 approach within eight feet of an escort walking with a patient when his intent is only to  
17 communicate with the patient, and whether he can approach within eight feet of an escort  
18 standing alone in front of the clinic. Plaintiff’s Mot. at 31-32. As already discussed, the  
19 Ordinance does not prevent a demonstrator from approaching within eight feet of an escort—  
20 standing or walking— if the approach is not to harass “that person” but to communicate with  
21 someone else eight feet away.

22 A closer question is what kind of communication is permissible under the Ordinance  
23 between a demonstrator and an unconsenting escort (or patient) within eight feet. Plaintiff’s  
24 Mot. at 31. Plaintiff disputes the City’s assertion that a demonstrator could approach an  
25 escort to talk about the Super Bowl “because the protestor would not be harassing the  
26 escort,” noting that “the City overlooks its own extremely broad definition of ‘harassing.’”  
27 Plaintiff’s Reply Brief at 14. Indeed the City’s definition of harassing includes “counseling,”  
28

1 and its definition of “counseling” includes “engaging in conversation with.” Laden Decl. Ex.  
2 2 at 4.

3 This raises a legitimate concern about overbreadth, but it is not fatal. First, the court  
4 in Hill, 530 U.S. at 732, found in reference to Colorado’s statute that “protest, education, or  
5 counseling” were common words, and that it seemed “quite remote” that anyone would not  
6 understand them. Sections 3(a) and 3(b) fall under the heading of “Prohibited Harassment,”  
7 and the Ordinance’s preamble states that “persons desiring or needing access to [reproductive  
8 health care services] should not be intimidated, hampered, impeded, harassed, or restrained  
9 from obtaining those services.” Laden Decl. Ex. 2 at 2, 5. It is clear that, as a whole, the  
10 Ordinance prohibits interference with access, not casual conversation about the Super Bowl.  
11 See Grayned, 408 U.S. at 110; and Hill, 530 U.S. at 740 (Souter, J. concurring) (“Someone  
12 planning to spread a message by accosting strangers is likely to understand the statute’s  
13 application to ‘education.’”). Second, as in Hill, 530 U.S. at 732, Oakland’s Ordinance  
14 contains a scienter requirement that should ameliorate any concern that persons of ordinary  
15 intelligence would be trapped by arguably vague language. See Laden Decl. Ex. 2 at 5.  
16 Third, as in Thomas, 534 U.S. at 324-325, where Plaintiffs complained that the criteria in the  
17 ordinance was “insufficiently precise,” any abuse in enforcement is better addressed “if and  
18 when a pattern of unlawful favoritism appears.” See also Grayned, 408 U.S. at 110  
19 (“condemned to the use of words, we can never expect mathematical certainty from our  
20 language”) and Ward, 491 U.S. at 794 (“perfect clarity and precise guidance have never been  
21 required even of regulations that restrict expressive activity”).

22 Accordingly, the Ordinance is not unconstitutionally vague.

23 5. Whether the Ordinance Violates the Equal Protection Clause

24 Plaintiff’s final argument, that the Ordinance violates the Equal Protection Clause,  
25 rests on his contention that “the Ordinance allows speech or speakers favoring abortion  
26 greater latitude than the speech or speakers favoring alternatives to abortion.” Plaintiff’s  
27 Opp. at 25. Arguing that the Ordinance impinges on a fundamental right (speech), Plaintiff  
28 urges the Court to apply strict scrutiny. Plaintiff’s Mot. at 33-34. This argument also fails.



1 The Court has already found that the Ordinance is content- and viewpoint-neutral.  
2 Strict scrutiny is “inappropriate where a law regulating speech is content-neutral, even where  
3 the speech at issue was non-commercial.” Maldonado v. Morales, 556 F.3d 1037, 1048 (9th  
4 Cir. 2009). “At most” the Ordinance needs to survive an intermediate level of scrutiny. See  
5 id. The Ordinance is substantially related to an important government objective: the Court in  
6 Hill, 530 U.S. at 729, found that protecting access to healthcare is both substantial and  
7 legitimate. The Ordinance thus “easily passes the necessary scrutiny to overcome  
8 [Plaintiff’s] equal protection challenge.” See Maldonado, 556 F.3d at 1048. The First  
9 Circuit reached the same conclusion in McGuire I, 260 F.3d at 50, holding that “the Act  
10 passes muster under the Equal Protection Clause for the same reasons that it passes muster  
11 under the First Amendment.”

#### 12 **IV. CONCLUSION**

13 For the foregoing reasons, the Court GRANTS Defendant’s motion for summary  
14 judgment and DENIES Plaintiff’s motion for summary judgment.

15 **IT IS SO ORDERED.**

16  
17 Dated: August 4, 2009



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CHARLES R. BREYER  
UNITED STATES DISTRICT JUDGE