

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

WALTER B. HOYE, II,
Plaintiff-Appellant,

vs.

CITY OF OAKLAND,
Defendant-Appellee.

No. 09-16753

D.C. No. 3:07-cv-06411-CRB
(Northern California)

=====

ON APPEAL FROM THE ENTRY OF FINAL JUDGMENT
IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF CALIFORNIA
HONORABLE CHARLES BREYER, PRESIDING

=====

Opening Brief of Plaintiff-Appellant Walter B. Hoye, II

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STATEMENT OF ISSUES

1. Is Oakland Municipal Code §8.52.030 (Ordinance #12860, §3) unconstitutional on its face?
2. Is Oakland Municipal Code §8.52.030(Ordinance #12860, §3) unconstitutional as applied?
3. Did the court err in granting the City of Oakland's motion for summary judgment and denying Hoye's motion?

STATEMENT OF JURISDICTION

This is an appeal from a final judgment that disposes of all parties' claims. The district court had jurisdiction in this matter under 28 U.S.C. §§1331, 1343, 2201, and 2202 and 42 U.S.C. §1983.

This court has jurisdiction over the action under 28 U.S.C. §1291, as this is an appeal from the district court's entry of summary judgment against Appellant on August 4, 2009.

STATEMENT OF ATTORNEYS' FEES AND COSTS

Pursuant to 42 U.S.C. §1988, Fed.R.Civ.P. Rule 54(d), and Fed. R. App. P. Rule 39, Plaintiff-Appellant will seek attorneys' fees and costs as prevailing parties.

STATEMENT OF THE CASE

On December 18, 2007, the City of Oakland (herein the “City”) enacted City of Oakland Municipal Code Chapter 8.50. The original ordinance imposed various restrictions on First Amendment activity near abortion clinics. One of the restrictions was a facially viewpoint-based restriction prohibiting speech for the purpose of persuading the listener not to access certain reproductive health care services.

On December 19, 2007, Plaintiff Walter Hoyer filed this action. Following a hearing on Hoyer’s application for Temporary Restraining Order, the City agreed not to enforce the original ordinance and to amend it. On February 5, 2008, the City passed an amended version of the ordinance (“Ordinance”), codified as Oakland Municipal Code §8.52.010 et seq. (due to §8.50 being in use).

On June 26, 2009, the parties’ cross motions for summary judgment were heard. On August 4, 2009, the court issued an order granting the City’s motion for summary judgment, denying Hoyer’s motion for summary judgment, and entering judgment for the City. (ER3.)

Notice of appeal was timely filed on August 11, 2009. (ER1.)

SUMMARY OF ARGUMENT

Although both the City and the lower court characterize the Ordinance at issue as being “nearly identical to” the so-called “bubble law” law upheld by the Supreme Court in *Hill v. Colorado*, 530 U.S. 703 (2000), the Ordinance differs from that law, both on its face and as applied, in several key respects.

The Ordinance applies only to speech activity outside abortion clinics, not at all medical facilities as did the statute at issue in *Hill*. Further, the City’s documented, authoritative interpretation of the Ordinance exempts approaching without consent for the purpose of speech that “facilitates access” to the clinic, including telling patients, e.g., not to listen to Hoyer, not to take his literature, and that they have a right to an abortion. The Ordinance also exempts panhandling and solicitation.

Pro-abortion activists at abortion clinics in Oakland, with the sanction of the City and immunity from the Ordinance, prevent communication between Hoyer and his intended audience by physically blocking him and drowning out his voice. This conduct, in conjunction with the Ordinance, prevents effective communication of his message to the intended audience. Further, unlike in *Hill*, the City interprets the Ordinance to ban stationary leafleting, i.e., standing in one place and handing out leaflets.

The City's interpretation of the Ordinance is ever-expanding, encompassing more and more speech activity not forbidden on the face of the Ordinance, rendering it unconstitutionally vague and violative of due process.

STATEMENT OF FACTS

A. PLAINTIFF'S ACTIVITIES

Appellant Walter Hoye is an individual who, for approximately the past three years, has gone regularly to the vicinity of the Family Planning Specialists abortion clinic in Oakland for the purpose of offering alternatives to women considering abortion. (ER752, ¶2.)

Hoye's goal is to engage a woman considering abortion in a thoughtful, one-on-one conversation concerning her individual situation. If a woman is interested in discussing with him the factors causing her to consider an abortion, Hoye will listen and offer alternatives depending upon her needs. (ER477, ¶¶2-3.)

Before passage of the amended Ordinance, Hoye would begin each encounter with an approach and an invitation to engage in conversation: "May I talk with you about alternatives to the clinic?" (ER384:1-12; ER388:2-13; ER478, ¶4; ER633:19-23.) If a woman declined the offer, or declined to respond at all, Hoye neither pressed the request nor tried to inhibit her passage into the clinic. (ER384:1-17; ER387:22-20; ER478, ¶4.) If a woman stopped to talk, Hoye would converse with

her, letting her comments and questions control the direction of the conversation. (ER384:18-386:17; ER478, ¶5.)

In Hoye's experience, some women are quite willing to speak to him about why they are at the clinic and their feelings about being there. Many women are very ambivalent about and even very negative toward having an abortion. On several occasions, just by beginning a conversation with a woman, Hoye has been able to learn what her needs are and offer her advice and referrals for further assistance. Several of these women have later thanked Hoye for being there to speak to them and offer assistance. (ER478-479, ¶¶6-7.)

After passage of the Ordinance, Hoye could no longer approach within 8 feet of women heading toward the clinic. He could no longer engage in the "common human interaction" of walking up to a person within conversational distance, introducing himself, and asking if she and he could talk for a few moments. (ER389:7-8; ER390:22-23:17; ER392:4-20.)

Not only does the inability to approach and introduce himself impair his ability to begin a conversation, but the brief period of time available to speak to women entering the clinic is insufficient to ask for consent to approach, receive consent, and then ask the person to engage in a conversation. (ER479-480, ¶¶11-12.) Many women are dropped off either immediately in front of the clinic or directly across the street. Others park across the street and walk directly across the

street toward the clinic entrance. A few park down the street and walk down the eight-foot wide sidewalk toward the clinic. On average, Hoye has only about 6-7 seconds in which to communicate with women approaching the clinic. (*Id.* at ¶13.)

B. ACTIVITY OF ABORTION PROPONENTS

Since approximately the spring of 1997, pro-abortion activists have also been present on the sidewalk outside the clinic whenever Hoye was present. Three of these activists – Barbara Hoke, Sandra Coleman, and Lucy Kasdin – testified in Alameda County Superior Court criminal proceedings against Hoye for violation of the Ordinance.¹ Certified copies of those transcripts were provided to the lower court. (ER558.) Ms. Hoke testified that she coordinates and trains activists, also known as “escorts,” for abortion clinic work throughout Oakland. (ER561:28-ER564:6.) She trained Ms. Coleman and Ms. Kasdin. (ER567:4-13; ER586:21-23; ER609:14-ER610:10.) Ms. Coleman and Ms. Kasdin both testified that they began serving as escorts in February or March of 2008, which was shortly after the Ordinance came into effect. (ER595:24- ER596:5; ER609:5-13.)

These activist escorts are not associated with any particular clinic. (ER561:28-ER562:3 and ER608:19-27.) They do not seek the permission of the clinic director to be present at the Family Planning Specialists clinic. (ER563:16-

19.) Their presence at the clinic is scheduled by other escorts, not the clinic. (ER565:19-22.) When they arrive at the clinic for a shift, they sit in their cars and wait for the pro-life demonstrators to arrive, at which point they get out of their cars and start approaching patients. (ER587:14-19.) No one from the clinic is present on the sidewalk supervising the escorts. (ER479.)

The activists (or “escorts”), including Kasdin, Coleman, and others trained by Hoke, are trained that the Ordinance permits them to approach within eight feet of patients and speak to them. (ER577:16-23.) They take advantage of the fact that the Ordinance (as interpreted by the City) permits them to approach well within eight feet of patients without consent. As soon as a woman appears to be heading toward the clinic, or getting out of a car in front of the clinic, the escorts will approach her, going right up to within a couple of feet of her and/or the car, and start talking to her. (ER480, ¶14; ER577:16-23; ER597:18-22, ER602:26-ER603:22; ER612:1-13.) These activist escorts tell women not to listen to Hoye, that he is only there to harass her, that she will only be safe with the escorts, and not to take his literature or information because it is inaccurate. (ER480, ¶14; ER569:26-ER570:8; ER396:14-ER397:25). Sometimes they will guide her by taking her hand or holding her arm. (ER479, ¶9.) They walk right next to the woman as she is going up to the clinic, and while doing so, either talk to her to distract attention from Hoye or

¹ These proceedings commenced six months after the instant lawsuit was filed.

simply make noise to drown out the Hoye's voice. (Hoye ER480, ¶14; ER393:25-ER395:15, ER402:12-ER403:11.)² They use their bodies to form barriers between Hoye and the patients, with the avowed purpose of preventing him from communicating with the patients. (ER398:24-ER400:6; ER619:27-ER620:6; ER628:2-6, ER629:4-11, ER631:6-12, ER632:19-ER633:3, ER636:13-25; ER487 (citing to video clips).)

The activists are trained to not allow the “demonstrators’ literature” into the clinic, but rather to “explain” to women that it is “inaccurate, that the literature is invasive of their privacy, and that it is intended to prevent them from exercising their right to reproductive healthcare services.” (ER569:26-ER570:8; ER571:27-ER572:16.)

According to these activists, anything someone such as Hoye communicates to a patient (including “God loves you and your baby, let us help”) is harmful, harassing, and intimidating, and for that reason his message should be prevented from reaching the patient. (ER568:8-18; ER569:9-15; ER576:1-12; ER580:6-17; ER159:2-14.) Their objective is to “love women into the clinic.” (ER578:27-

² Drowning out Plaintiff's voice, whether intentionally or not, is not difficult on a busy city street where he must stay at least 8 feet away from his listeners. As the clinic director and an activist escort testified, the sidewalk and street in front of the clinic is a noisy area where it is much more difficult to hear people speaking from several feet away than it is in a courtroom. (ER583:4-15; ER604:5-19.)

ER579:11.) The activists are trained that a single person simply holding a sign on the sidewalk in front of the clinic constitutes “harassment,” triggering a need for the activists to begin approaching patients. (ER576:1-12.)

Because the Ordinance prevents Hoye from approaching women within conversational distance and the activists prevents women from seeing or hearing him, Hoye has a sign reading, “Jesus loves you and your baby. Let us help.” (ER480, ¶15.) The activists respond by having some of their number stand with blank pieces of cardboard, thus blocking women from seeing Hoye’s sign. (Millen Decl., Ex. B (Trial Transcript), ER592:11-21; ER615:10-26; videos.) Their avowed purpose in doing so is to prevent women from reading the message on Hoye’s sign. (ER598:1-7,11-ER599:1,ER600:1-7, ER601:17-20, ER605:24-ER606:1; ER613:28-ER614:4, ER615:10-26, ER617:13-ER618:5; ER621:2-28; ER634:27-ER635:5, ER636:13-25; ER637:13-16. The activists were highly organized: While some of them focused on blocking his sign, others would approach the women and speak to them, as described above. (ER398:24-ER400:6; ER480, ¶15) Video footage from April 29 and May 13, 2008 (particularly the DVD with the several excerpts filed as Exhibit D to the Millen Declaration of 5/1/09 (Docket #93)), provides several examples of the escorts engaging in this conduct. Hoye has filed a motion for leave to file this video footage with this Court.

The activists are also trained that pro-life demonstrators may not approach within eight feet of them or clinic personnel as they are standing or moving about in front of the clinic. (ER573:26-ER575:2; ER616:6-19; ER401:4-19; ER481, ¶16.)

C. THE ORDINANCE: HISTORY, INTERPRETATION, AND ENFORCEMENT POLICY

In December 2007, the City enacted the first version of the ordinance. This version contained a provision prohibiting speech only if it attempted to “persuade [an] individual not to access such reproductive health services.” (ER494, ¶2(f).) It put no limitation on speech that attempted to persuade a person to use the services of the clinic. Hoye filed suit, and at the lower court’s strong suggestion during a temporary restraining order hearing, the City agreed to amend the Ordinance to omit this overtly viewpoint-based provision. The amended Ordinance also limited the definition of “reproductive health care services” to services “related to the termination of a pregnancy.” (ER5, §2(a).)

In order to determine the City’s official interpretation of and enforcement policy for the Ordinance, Hoye noticed the deposition of The City of Oakland on numerous topics, including the “Policies, procedures, and interpretations relating to enforcement” of the Ordinance. (ER405.) The City selected Capt. Anthony Toribio of the Oakland Police Department to testify on its behalf. (ER412:1-6.) Capt.

Toribio testified that he personally helped create a “Training Bulletin” in conjunction with the City Attorney’s Office. (ER413:15-ER414:8; ER65.) Capt. Toribio is highly placed in the department, having five lieutenants who report to him and reporting himself to the Deputy Chief of Field Operations. (ER462:20-ER463:7.) Police officers refer to the bulletin for guidance in interpreting and enforcing the Ordinance. (ER415:18-23).

Capt. Toribio’s testimony, along with the police training bulletin and training video concerning the Ordinance, established the following concerning City policy:

- 1) Escorts³ and demonstrators are **not** treated equally under the Ordinance (ER429:1-5), and the City has no enforcement policy as to escorts (ER430:47:9-13).
- 2) Under the Ordinance, speech which attempts to dissuade a woman from entering the clinic is treated differently that speech which encourages a woman to enter the clinic. (ER456:2-22.)
- 3) The City policy is not to enforce the Ordinance against escorts acting as escorts. (ER431:19-23.) Thus, an escort can approach a patient within 8 feet without consent and say “Don’t listen to the demonstrators,” and the City would not consider that a violation of the

³ According to the City's Enforcement Policy, an "escort" is someone that assists or facilitates a patient in going into the facility and then leaving the

Ordinance because that language is “used to help facilitate their entrance into the facility and maybe even their exit.” (ER433:5-25.)

- 4) However, if a person who is neither an escort nor clinic personnel approaches without consent within 8 feet of a someone seeking to enter the clinic and says, “Don’t listen to the escorts,” that would be a violation.⁴ (ER443:13-24.)
- 5) Under the City’s policy, it is not a violation of the Ordinance for a an escort to approach, without consent, within eight feet of a patient seeking to enter a facility and say, “Everything is going to be all right. Come with me.” (ER434:23-ER436:21.)
- 6) However, if a person approaches without consent within 8 feet of a person seeking to enter the clinic and says, “Please don’t go into the clinic,” that would be a violation. (ER448:10-ER450:6.)
- 7) It is not a violation of the Ordinance for an escort to approach, without consent, within eight feet of someone seeking to enter the clinic and say, “Don’t take those leaflets they’re going to try to hand you,” or

facility. (ER432:1-5.)

⁴ For purposes of the deposition, a “violation” means that, based on the facts presented, the City would say there was probable cause to arrest the person for violating the Ordinance. (ER416:12-23; ER417:10-19.)

“Those leaflets have inaccurate information in them,” or “It’s your right to have an abortion.” (ER436:22-ER437:24.)

- 8) However, if a person who is neither an escort nor clinic employee approaches without consent within 8 feet of someone seeking to enter the clinic and says “May I talk to you about alternatives to the clinic?” that would be a violation. (ER442:25-ER443:12.)
- 9) It does not appear to be a violation of the Ordinance for a person to approach without consent within 8 feet of person seeking entrance to the clinic and say, “Would you like to buy a flower?” (ER438:11-ER439:4.)
- 10) If a person who is neither an escort nor clinic employee approaches without consent within 8 feet of someone seeking to enter the clinic and says, “God bless you and your baby,” it is “possibly” a violation. (ER445:16-21.) If the speaker had previously been at the clinic demonstrating, then it would be a violation. If the person were someone who was just passing by on a bicycle, it might not be. (ER446:22-ER447:14.)
- 11) Under the City’s enforcement policy, the Ordinance applies equally when persons are leaving the clinic as when they are seeking to enter a

clinic. (ER421:1-14; ER424:19-23; ER65-ER66; ER381 at ¶¶5, 8 and 465 (Police Training video transcript).)

- 12) Under the City's enforcement policy, a person whose feet are stationary violates the Ordinance if he or she extends a hand out with a pamphlet toward a patient walking by. (ER458:6-14; ER465.)
- 13) Under the City's enforcement policy, the Ordinance prohibits approaching within eight feet of vehicles that merely pull up to the curb on the public street in front of the building housing the clinic. (ER451:7-21; ER457:13-18.)
- 14) Under the City's enforcement policy, the Ordinance prohibits approaching within 8 feet of an escort walking with a patient, even if the speaker's intent is solely to communicate with the patient. (ER420:10-24.)
- 15) Under the City's enforcement policy, holding a sign with a message is deemed an intent to display that sign to anyone who can see the sign. (ER424:15-18.)
- 16) Under the City's enforcement policy, it may be a violation of the ordinance to approach an escort who is simply standing in front of the clinic, for the purpose of speaking to that escort. (ER418:16-ER419:25; ER459:24-ER461:21.) Whether or not it is a violation depends on many

factors, such as whether the speaker is carrying leaflets, has a sign concerning abortion, and what the topics of conversation are. (*Id.*) Only by taking all those factors and other unnamed factors into consideration, will the officer, his supervisors, and possibly the City Attorney be able to “muddle through” to determine whether there was a violation. (*Id.*)⁵

- 17) The question of whether a pedestrian extending her hand to a leafleter who is proffering literature constitutes consent to approach and hand out the leaflet can only be answered by interviewing all witnesses, conducting a preliminary investigation, and possibly discussing the matter with the City Attorney to figure out what whether it is “within policy.” (ER425:19-ER427:20.)
- 18) The City differentiates between speech that is “directed in facilitating or making the patient feel safe or assuring them that, you know, they can come in” versus speech which is intended to “deter or make the patient feel timid or make them not do what they are there to do”. (ER454:19-25.)

⁵ Additionally, Sgt. David Elzey of the Oakland Police Department testified that the Ordinance prohibits approaching escorts within eight feet. (ER638:11-26; ER639:3-22.)

19) The Training Bulletin instructs officers who witness a violation of the Ordinance to detain the violator if possible, complete a preliminary investigation, and take appropriate enforcement action, i.e., issue a citation or, if the person is not eligible for citation, take the person into custody. Officers are further instructed to complete a crime report to document all complaints, including where there is insufficient evidence to make an arrest, so that the suspected violator can be sued. These reports are also sent to the F.B. I. Bay Area Counterterrorism Task Force. (ER68.)

D. ACTUAL ENFORCEMENT

Deputy City Attorney Vicki Laden conducted surveillance at the Family Planning Specialists clinic on April 29, 2008, during which time she observed both Hoye and the activists for over an hour.⁶ (ER471-472 (City's Responses to Request for Admissions Set Two, #34 and #39).) Ms. Laden provided a statement to the police alleging that Hoye had approached several women entering the clinic and offering to be a witness against Hoye. However, Ms. Laden's statement does not mention that escorts also were approaching patients and speaking to them, nor did

⁶ The video clips from 4/29/08 filed with the District Court show events on this day, and necessarily witnessed by Ms. Laden, including the activists' interference with Hoye's attempts to communicate with women entering the

she offer to be a witness against them. (ER287 (police report) and ER473 (Admissions), #42; ER482, ¶21) On May 13, 2008 Hoye was arrested and cited for violation of the Ordinance. (ER290-ER291.) He was charged with and convicted of two counts of violating section OMC 8.52.030(b), one each on April 29 and May 13.⁷ (ER481, ¶19.) At no time during the proceedings were the persons he was found guilty of illegally approaching ever identified or specified in any way, so that, to this day, he does not know at what point he illegally approached someone. (*Id.*)

On June 3, 2008, Virginia Hitchcock saw escorts approaching women heading toward the clinic, without the women's consent, and speaking to them. (ER485, ¶ 4-5.) She and a friend notified the police of their observations. The police officer who responded informed them that the escorts were not subject to the Ordinance, because they were "professionals." (*Id.* at ¶ 6-7.)

The City has not referred any escorts to the District Attorney's office for possible prosecution for violation of the Ordinance. No clinic escort has been arrested or prosecuted for violation of the Ordinance. (ER471-ER472, ##30-33.)

STANDARD OF REVIEW

A district court's grant or denial of summary judgment is reviewed de novo. *Leever v. Carson City*, 360 F.2d 1014, 1017 (9th Cir. 2004); *Posey v. Lake Pend*

clinic building.

⁷ The entire video footage of both 4/29/08 and 5/13/08 was filed with the

Oreille, 546 F.3d 1121, 1126 (9th Cir. 2008). Summary judgment is appropriate only when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. In reviewing a grant of summary judgment, the evidence of the nonmoving party is to be believed, and all justifiable inferences are to be drawn in his favor. (*Id.*)

ARGUMENT

I. THE ORDINANCE IS UNCONSTITUTIONAL ON ITS FACE.

A restriction on speech “is content-based if either the main purpose in enacting it was to suppress or exalt speech of a certain content, or it differentiates based on the content of the speech on its face.” *ACLU of Nevada v. Las Vegas*, 466 F.3d 784, 793 (9th Cir. 2006).⁸ If “a law enforcement officer must read” a communication (or hear the content of the message) to determine if an ordinance applies, this is “persuasive” evidence of an impermissible content-based purpose. *Id.* at 796 n.12.

In assessing the facial validity of an ordinance, courts “must consider the [government]’s authoritative constructions of the ordinance, including its own

District Court. (ER743, ¶3)

⁸ The fact that the Ordinance as originally passed specifically targeted speech intended to “persuade [an] individual not to access such reproductive health services” itself is compelling evidence of the City’s intent to “suppress . . . speech of a certain content.” (ER494, §2(f).)

implementation and interpretation of it.” *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 131 (1992). *See also Carey v. Brown*, 447 U.S. 455, 460-61 (1980) (striking down ban on residential picketing as content-based based on city’s interpretation of ordinance to exempt labor picketing); *Beaulieu v. City of Alabaster*, 454 F.3d 1219, 1233 (11th Cir. 2006) (striking sign ordinance as content-based based on city’s interpretation). Here, the authoritative construction of this Ordinance is found in the police training bulletin (ER65) and the City’s deposition, discovery responses, and briefs in this case.

A. The Ordinance Exempts Speech that “Facilitates Access” to Clinics.

The Ordinance prohibits unconsented approaches for the purpose of “harassing,” defined as “passing a leaflet or handbill, to display [sic] a sign to, or engage in oral protest, education, or counseling.” (ER61, ¶2(c).) While the Supreme Court in *Hill v. Colorado*, 530 U.S. 703 (2000) found that a provision restricting approaching “for the purpose of . . . engaging in oral protest, education, or counseling” was not content-based, the Court was not faced with the government’s authoritative interpretation of the law such as the City has provided here.

As detailed in the Statement of Facts, section C, *supra*, and repeatedly confirmed in the City’s briefing before the lower court (ER498:26-28; ER499:2-4,

12-20; ER789:22-24; ER790:22-24; ER791:n.4; ER823:9-11 and n. 2) the City interprets the Ordinance to permit activist escorts to approach patients without consent and say anything they believe appropriate to “facilitate” the patients’ access to the clinic, including such statements as “Don’t listen to the demonstrators,” “Their information is inaccurate,” and “It’s your right to have an abortion.”⁹ At the same time, approaching patients to encourage them to consider alternatives to the clinic is a violation of the Ordinance.

The district court agreed with the City that “allowing escorts to talk to patients for the limited purpose of facilitating access is consistent with the Ordinance’s purpose.” (ER13.) In the court’s view, only when escorts’ speech rises to the level of “pro-choice advocacy” (which the court narrowly defined as speech advising a woman about “what she could or should do once inside” the clinic, (ER18, n. 10)) are they in violation of the Ordinance. *Id.* Tellingly, the court did not consider escorts to be engaging in “pro-choice advocacy” in advising patients that Hoye is only there to harass them, that they will only be safe with the escorts, and

⁹ Capt. Toribio was not simply speaking as a highly ranked city employee but as the official litigation spokesman for the City. *U.S. v. Taylor*, 166 FRD 356, 361 (“The testimony elicited at the Rule 30(b)(6) deposition represents the knowledge of the corporation, not of the individual deponents. The designated witness is ‘speaking for the corporation,’ and this testimony must be distinguished from that of a ‘mere corporate employee’ whose deposition is not considered that of the corporation”)

not to take Hoye’s literature because it is inaccurate. (ER12.) All of this speech is, according to the court, merely “facilitating access.”¹⁰

“It is axiomatic that the government may not regulate speech based on its substantive content or the message it conveys. . . . Other principles follow from this precept. In the realm of private speech or expression, government regulation **may not favor one speaker over another.**” *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 828 (1995) (emphasis added).

The City’s justification for its interpretation creates further constitutional problems. Noting that the Ordinance prohibits unconsented approaches “for the purpose of” engaging in certain communicative activity, the City argues that, because the escorts approach for the purpose of facilitating access, not speaking, the Ordinance does not apply to their approaches at all. Thus, as interpreted by the City, escorts may approach patients without consent and say anything they want, without violating the Ordinance, because their speech is only “secondary” and “incidental” to their approach. (ER789:7-17; 791:13-14; 792:6-9)

¹⁰ Even the court’s own examples of permissible escort speech (e.g., “Would you like help getting into the clinic?”)_are far from neutral. In making such statements, the escort is making assertions about the supposed dangers or difficulties the woman faces from the pro-life speakers, so that she will be less willing to speak to them. In any event, even if allowing purportedly non-ideological “facilitating” speech could arguably be a viewpoint-neutral exception, it would nonetheless be an impermissible content-based exception.

This Court addressed a similarly “creative” restriction on speech in *Foti v. Menlo Park*, 146 F.3d 629 (9th Cir. 1998), when it considered a prohibition on signs on cars “parked in order to . . . attract the attention of the public . . .” This court noted two problems with the provision. First, it required an officer to decipher the subjective intent of the driver, entailing the evaluation of “a myriad of factors.” *Id.* at 638-39.¹¹ For that reason, the restriction “impermissibly delegates basic policy matters to police[] . . . for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application.” *Id.* at 639 (quoting *Grayned v. Rockford*, 408 U.S. 104, 108-09 (1972)). “With this range of factors to consider, there is the danger that a police officer might resort to enforcing the ordinance only against cars with signs whose messages the officer or the public dislikes,” *id.*, or, as is relevant in this case, messages the officer’s employer dislikes. *See also Berger v. Seattle*, 569 F.3d 1029, 1047-48 (9th Cir. 2009) (en banc) (myriad of factors for officer to consider in discerning intent lends itself to discriminatory enforcement).

In the same way, the Ordinance delegates to officers the job of discerning the intent of escorts in approaching patients. In fact, the City has preemptively ensured

¹¹ *Cf.* ER418:16-ER419:25; ER422:22-ER423:23; ER425:10-ER427:20; ER439:5-ER441:11; ER443:25-ER448:9 (the City repeatedly asserting that there are myriad factors, named and unnamed, for an officer to consider in deciding whether there is probable cause to arrest for a violation of the

that the Ordinance will only be enforced against messages it dislikes, by assuming as a matter of statutory interpretation that activist escorts do not have the requisite intent and thus are exempt from the Ordinance. (ER431:19-23; ER789:6-17; ER792:6-9.)

The second “fundamental” flaw this Court found with the *Foti* restriction was that it “turns the First Amendment on its head.” This Court explained, “It is well-established that the First Amendment affords the greatest protection to purposeful speech while allowing more regulation to incidental speech. . . . Government can assert no substantial interest in suppressing speech when the speaker intends to communicate but permitting the same speech if incidental to another activity.” *Foti*, 146 F.3d at 639. Similarly, the City here is providing greater protection to the escorts’ purportedly “incidental” speech than to Hoye’s purposeful speech. This is unconstitutional.

The Ordinance is indisputably content and viewpoint-based on its face.

B. The Ordinance on Its Face Differentiates Based on the Content of Speech.

The Ordinance is also content-based in that “it differentiates based on the content of the speech on its face.” *ACLU of Nevada*, 466 F.3d at 793. The Ordinance prohibits uninvited approaches for the purpose of “harassing,” which is

Ordinance).

unintuitively defined as approaching for the purpose of “passing a leaflet or handbill, to display [sic] a sign to, or engage in oral protest, education, or counseling.”

(ER61, ¶2(c).)

While the Court in *Hill* found that a provision restricting “protest, education, or counseling” was not content-based, that finding was based on a consideration of only two types of speech: 1) “protest, education, or counseling,” and 2) “pure social or random conversation.” *Hill*, 530 U.S. at 720. The Court repeatedly cited only “casual conversation” or “social, random, or other everyday communications” as the alternative to prohibited “protest, education, or counseling.” *Id.* at 721, 722.

Hill, therefore, does not endorse the proposition that a law is content neutral if it allows other categories of speech that, unlike “casual conversation,” pose the same – or greater – “nuisance, the persistent importuning, the following, the dogging, and the implied threat of physical touching” as an approach from someone seeking to educate or counsel the person. *Id.* at 724. Examples of these other types of speech include panhandling, solicitation, and vending.

None of these other types of speech is restricted by Oakland’s Ordinance, but all have been recognized as forms of annoying, disturbing speech that municipalities can restrict. The Supreme Court has deemed it “common sense” that solicitation is a more intrusive and disruptive activity than mere distribution of literature:

As residents of metropolitan areas know from daily experiences, confrontation by a person asking for money disrupts passage and is more intrusive and intimidating than an encounter with a person giving out information. One need not ponder the contents of a leaflet or pamphlet in order mechanically to take it out of someone's hand, but one must listen, comprehend, decide, and act in order to respond to a solicitation.

U.S. v. Kokinda, 497 U.S. 720, 734 (1990) (plurality op.) (emphasis added). Thus, the Ordinance “lends itself to invidious use [because] there is a significant number of communications, raising the same problem that the statute was enacted to solve, that fall outside the statute’s scope, while others fall inside.” *Id.*

A panhandler may aggressively approach a woman entering the clinic and demand money, but a sidewalk counselor may not politely approach her with an offer of assistance. Someone may run up to a car approaching a clinic and start washing the windows and ask for payment, but a sidewalk counselor may not simply approach the car to offer the driver a free pamphlet. A peddler may approach and say, “Would you like to buy a flower?” but Plaintiff may not approach and say, “Would you like some information?” (ER438:11-ER439:4.)

In each case of an uninvited approach, “[i]n order to enforce the regulation, an officer must necessarily examine the content of the message conveyed.” *Forsyth County, Ga. v. Nationalist Movement*, 505 U.S. 123 (1992) The fact that an officer must listen to the message and determine whether it is a permitted solicitation of funds or offer to sell a product or service, as opposed to impermissible “protest,

education, or counseling,” renders the Ordinance impermissibly content-based. *Id.* at 135 (“regulations which permit the government to discriminate on the basis of the content of the message cannot be tolerated under the First Amendment”); *Foti*, 146 F.3d at 636 (ordinance is content-based because “officer must read a sign’s message to determine if the sign is exempted from the ordinance”); *S.O.C. v. County of Clark*, 152 F.3d 1136, 1145 (9th Cir. 1998) (same, for handbill).

The content-based nature of the Ordinance is exacerbated by the fact that, while “protest, education, and counseling” are restricted, vending is not. The statute thus not only is content-based, but imposes greater restrictions on noncommercial speech than on commercial speech. This in and of itself is violative of the First Amendment. *Desert Outdoor Advertising, Inc. v. Moreno Valley*, 103 F.3d 814, 819-20 (9th Cir. 1996) (ordinance is invalid if it favors commercial speech over noncommercial speech); *Nat’l Advertising Co. v. City of Orange*, 861 F.2d 246, 248 (9th Cir. 1988) (same).

C. The Ordinance is viewpoint-based because it applies solely to speech outside abortion clinics.

The desire to suppress “speech of a certain content” is manifest in the fact that the ordinance, even as amended, applies only to speech activity directed at persons entering abortion clinics. This is significantly different from the statute in

Hill, which applied to all medical facilities. (*Hill*, 530 U.S. at 707 n. 1.) The *Hill* plaintiffs argued that the statute was overbroad in that it applied to “too many people at too many places, rather than just the patients at the facilities where confrontational speech had occurred.” *Id.* at 730. The *Hill* Court responded, “Here, the comprehensiveness of the statute is a virtue, not a vice, because it is evidence against there being a discriminatory governmental motive.” *Id.* at 731.

Conversely, the Oakland ordinance is not broadly applicable and is therefore not presumptively neutral like the *Hill* ordinance. Evidence of a discriminatory governmental motive, so lacking in *Hill*, is overwhelming here. When first passed, the Ordinance explicitly only banned speech intended to “persuade” women not to have abortions. The Ordinance restricts picketing, leafleting, and speaking solely on public sidewalks in front of abortion clinics. Even with the deletion of the overt viewpoint discrimination in the original ordinance, the City interprets the amended Ordinance to exempt speakers who are encouraging women to enter abortion clinics.

Both the City and the lower court rely on the First Circuit’s decision in *McGuire v. Reilly*, 260 F.3d 36 (1st Cir. 2001), upholding a speech restrictive law that applied only outside reproductive health care facilities. However, the holding in *McGuire* was premised on a misuse of the Supreme Court’s “secondary effects” doctrine, a doctrine employed by the Court exclusively in the context of sexually

oriented businesses. *See Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986). *McGuire* repeatedly invoked the alleged “deleterious secondary effects” of anti-abortion protests as a “content-neutral” justification for singling out anti-abortion speech for regulation. *McGuire*, 260 F.3d at 44-46.

The Supreme Court has explicitly disapproved both prongs of the City’s – and *McGuire*’s – reasoning. First, “listeners’ reactions to speech are not the type of ‘secondary effects’ we referred to in *Renton*.” *Boos*, 485 U.S. at 320 (striking down restriction on picketing in front of foreign embassies). “The emotive impact of speech on its audience is not a ‘secondary effect.’” *Id.* at 321. *See also Center for Bio-Ethical Reform v. Los Angeles*, 533 F.3d 780, 789 (9th Cir. 2008) (quoting *Boos*); *Crawford v. Lungren*, 96 F.3d 380, 385 (9th Cir. 1996) (holding that psychological damage to minors exposed to harmful material was not “secondary effect” of speech). Thus, the argument that restrictions singling out anti-abortion speech are justified because of the emotional vulnerability of women considering abortion is constitutionally untenable.

Second, the Supreme Court has rejected the attempt to justify content-based speech restrictions based on generalizations about categories of speech:

Similarly, we reject the city’s argument that, although it permits peaceful labor picketing, it may prohibit all nonlabor picketing because, as a class, nonlabor picketing is more prone to produce violence than labor picketing. Predictions about imminent

disruption from picketing involve judgments appropriately made on an individualized basis, not by means of broad classifications, especially those based on subject matter. **Freedom of expression, and its intersection with the guarantee of equal protection, would rest on a soft foundation indeed if government could distinguish among picketers on such a wholesale and categorical basis.**

Police Department of Chicago v. Mosley, 408 U.S. 92, 100-101 (1972) (emphasis added).

A restriction may be content-neutral if it is “**justified** without reference to the content of the regulated speech.” *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (original emphasis). There is nothing content or viewpoint-neutral about a restriction on speech that is directed at particular locations defined by the activity that occurs there, and **justified** by means of a “broad classification” as to the level of disruptiveness of those who protest such activities.¹² Such an ordinance is as blatantly viewpoint-based as if the Ordinance said on its face that it only applied to anti-abortion speech activity.

¹² By contrast, consider an ordinance prohibiting speech activity within 15 feet of the entrance to abortion clinics, which the City justified because emergency medical personnel were frequently summoned to abortion clinics and needed immediate access to the entrances. Such a law, while vulnerable for overbreadth and lack of narrow tailoring, would, unlike the Ordinance at issue, be justified without reference to the content of the regulated speech.

II. THE ORDINANCE IS CONTENT- AND VIEWPOINT-BASED AS APPLIED.

As explained above, the City detailed its official interpretation of the Ordinance in its Rule 30(b)(6) deposition, and that interpretation establishes the facial unconstitutionality of the Ordinance. In addition, that interpretation also underpins Hoye's as-applied challenge.

Moreover, the City's interpretation was seen in practice on April 29, 2008, when the City, in the person of Supervising Deputy City Attorney Vicki Laden (counsel in this action), observed activists approaching women without consent but did not enforce the Ordinance against them. On June 3, 2008, officers of the Oakland Police Department were notified of activists approaching women and speaking to them, but specifically declined to take action. (Statement of Facts, Section D.)

III. THE ORDINANCE DOES NOT MEET THE TEST FOR NARROW TAILORING

A. On its Face, the Ordinance Is Not Narrowly Tailored To Serve the Asserted Governmental Interest.

A content-neutral regulation of speech is constitutional only if it is narrowly tailored to serve a significant government interest and leaves open ample alternative channels of communication. **The government has the burden of establishing**

each of these elements. *Bay Area Peace Navy v. U.S.*, 914 F.2d 1224, 1227 (9th Cir. 1990). A public entity must offer evidence to support its justification for a restriction on speech. *Kuba v. I-A Agr. Ass'n*, 387 F.3d 850, 859, 862 (9th Cir. 2004). Restrictions that disregard far less restrictive and more precise means to advance the asserted government interest are not narrowly tailored. *City of Cincinnati v. Discovery Network, Inc.* 507 U.S. 410, 417 n.13 (1993); *Project 80's Inc. v. City of Pocatello*, 942 F.2d 635, 638 (9th Cir. 1991),

The stated interest the City seeks to serve through the Ordinance is access to reproductive health care services. This interest is asserted in the Ordinance itself, the Title of which is “Access to Reproductive Health Care Facilities Ordinance,” and the Purpose of which repeatedly invokes the state’s interest in the right to access. (ER60 (“[E]very person . . . has . . . the right to seek and obtain all health care services permitted under the laws of this state. Central to this right is the need to secure access to all reproductive health care services. Access to these services is a matter of critical importance not only to the individual but to the health and welfare of all residents . . .”).) It also has been repeatedly stated by the City in this litigation. (*See, e.g.*, Defendant’s Motion to Dismiss, ER39 at 3:25; Defendant’s Reply in Support of Motion to Dismiss, ER40 at 11:10-12 ; 12:18-20.)

While access to health care may be an important governmental interest, neither the Supreme Court nor the Ninth Circuit has found that this interest justifies

the type of restriction which the City (and Colorado) have imposed on free speech. The *Hill* Court based its holding on a **different** interest that the Colorado statute was narrowly tailored to serve, namely, the state's interest in protecting the right to be free from unwanted communication. *Hill*, 530 U.S. at 716. The Court never found that safeguarding access to health care justified a restriction on approaches.

Indeed, the Supreme Court has held that the interest in protecting access to an abortion clinic **did not** justify a restriction on unconsented approaches. In *Madsen v. Women's Health Center*, 512 U.S. 753 (1994), the Supreme Court struck down an injunctive provision prohibiting physically approaching persons seeking services at an abortion clinic unless "such person indicates a desire to communicate." The Court invalidated the provision, holding that it "burdens more speech than necessary to prevent intimidation and to ensure access to the clinic." *Id.* at 774.

The City cannot meet its burden of proving that the Ordinance is narrowly tailored to serve its asserted interest of protecting access to reproductive health care facilities. Numerous statutes are already in place protecting women seeking access to abortion facilities, both generally and specifically. *See, e.g.*, 18 U.S.C. §241 (Freedom of Access to Clinic Entrances Act); California Penal Code. §§ 422, 602.1, 602.11. Indeed, section 3(a) and 3(c) of the Ordinance itself contain provisions protecting access. These laws amply protect the City's interest in access.

Nor can the City suddenly discover that it has a new interest justifying the Ordinance that it has never advanced to date: “We have been unable to find any case where a court has taken judicial notice of an unstated and unexplained legislative purpose for an ordinance that restricts speech.” *National Advertising Co. v. Town of Babylon*, 900 F.2d 551, 55-56 (2d Cir. 1990).

Simply put, this case is not *Hill* and the Ordinance is facially unconstitutional because the asserted government interest does not justify these restrictions.

B. The Ordinance, As Applied, Is Not Narrowly Tailored To Serve A Legitimate Governmental Interest

1. The Ordinance Is Not Narrowly Tailored To Restrict *Unwanted Approaches*

As noted above, it is too late for the City to assert new interests the Ordinance might serve, such as protecting the right of women seeking abortion services to be free from unwanted communication. *Id.* at 716. Even if it could, however, that right, or “interest,” identified by the majority in *Hill* as sufficient to uphold the Colorado ordinance on its face, should not extend to the restrictions on speech imposed by the Ordinance as applied by the City. It should not extend to preventing a speaker from approaching a woman before the woman has indicated that the communication is unwanted and that she does not wish to be approached.

The majority in *Hill* referred repeatedly to the right of “unwilling listeners” to be free of “unwanted communication.” *Hill*, 530 U.S. at 708, 714, 716, 718, 721, 723, and 727. In support of these references, the Court quoted the dissent of Justice Brandeis in *Olmstead v. United States*, 277 U.S. 438, 478 (1928):

We are a social people, and the accosting by one of another in an inoffensive way and an offer by one to communicate and discuss information with a view to influencing the other’s action, **are not regarded as aggression or a violation of that other’s rights. If, however, the offer is declined**, as it may rightfully be, then persistence, importunity, following and dogging become unjustifiable annoyance and obstruction which is likely soon to savor of intimidation.

Hill, 530 U.S. at 717 (emphasis added).

The *Hill* Court continued, “None of our decisions has minimized the enduring importance of ‘the right to be free’ from persistent ‘importunity, following and dogging’ **after an offer to communicate has been declined.**” *Id.* at 718 (emphasis added).

Thus, the Court understood the right at issue to be the right to be free of an unwanted approach and communication **after an offer to communicate has been declined.**

The Court again emphasized this point in its discussion of whether the statute was narrowly tailored: “Once again, it is worth reiterating that only attempts to address unwilling listeners are affected.” *Id.* at 727. Yet again, in its conclusion,

the Court stressed: “This statute simply **empowers** private citizens entering a health care facility with the ability **to prevent** a speaker, who is within eight feet and advancing, from communicating a message they do not wish to hear.” *Id.* at 734 (emphasis added). In other words, it is up to the person entering the clinic to exercise their “ability” and prevent the approach by declining the speaker’s offer to communicate. The Court did not understand the statute to prohibit the speaker from approaching in the absence of the person taking some action to prevent the approach.

However, the City treats as a violation any approach that is made without the prior affirmative consent of the approached person. (ER428:8-15.) Thus, the Ordinance curtails speech before an offer has been declined. Indeed, it operates to prevent an understandable offer from even being made. A few seconds is an insufficient time to play a game of “Mother, May I?” before approaching alongside a moving person to offer a leaflet or begin a conversation. Thus the Ordinance, as applied, is not narrowly tailored to protect women seeking abortion services from “conduct which violates their rights.” An uninvited (as opposed to unwanted) approach is not “a violation of that other’s rights.”

The proper balancing of interests between speakers and audience, as the *Hill* Court recognized, was to allow speakers to proffer their communication and restrict offensive speech activity only if such offer is declined. The City’s application of

§3(b) to uninvited, as opposed to unwanted, approaches is not narrowly tailored to serve any legitimate governmental interest.

2. The Ordinance Is Not Narrowly Tailored to Prohibit *Unconsented Approaches*

Even assuming *arguendo* that the City has a legitimate interest in prohibiting unconsented approaches, the Ordinance, as applied, is not simply a prohibition on unconsented approaches, but on all approaches. With or without the interference of the activist escorts, the manner in which patients approach the clinic and the layout of the sidewalk and street surrounding the clinic preclude the possibility of asking and receiving consent to approach in virtually all cases.

When patients are dropped off, there is usually only about six or seven seconds after they have left the car before they are at the door of the building. This amount of time is simply inadequate for Plaintiff to convey, in an understandable tone and at an understandable speed, a request to approach, including the reason why he wishes to approach, and then for the person to respond and consent to his approach. (ER480, ¶¶12-13.)

When a woman approaches down the sidewalk, Plaintiff has three choices. He could run ahead of her, trying to keep 8 feet ahead, shouting his offer over his shoulder. Or he could walk alongside, in the street, which will necessitate walking in the street around any parked cars. Or he can follow along behind, shouting his

offer from the rear-while the women cannot see his proffered leaflets without turning around. None of these are effective ways to reach his intended audience; indeed, they are unusual and off-putting methods of communication which are anything but inviting for an average person on the street.

One of the activist escorts, Sandra Coleman, testified that, when approaching women to ask if they would like to be escorted, she would approach “close enough to talk to them in a normal voice without-without yelling.” She explained that this distance was “maybe a couple of feet, or if they were in the car, you know, just near the car,” i.e., “just outside the car” so that she could “speak in through the window or the door if they opened it.” She acknowledged that it would be awkward if she had to shout to ask them if they needed help. (ER603:7-25.)

Ms. Coleman was right – people wanting to have a casual conversation don’t shout at people on the street, and her experience corresponds with Hoye’s. To initiate a conversation offering assistance, one doesn’t stand eight or more feet away. While the Ordinance has no effect on the escort’s pro-choice communication (due to the City’s non-enforcement policy against them), as applied to Hoye the Ordinance effectively prohibits the obtaining of consent and thus works as a prohibition on all approaches.

IV. THE ORDINANCE DOES NOT LEAVE OPEN AMPLE ALTERNATIVE CHANNELS OF COMMUNICATION

A. As Interpreted and Applied by the City, the Ordinance Does Not Leave Open Ample Alternative Channels of Communication.

The Supreme Court in *Hill*, in ruling on the **facial** challenge to the Colorado statute, found that the statute left open ample alternative channels of communication because “[s]igns, pictures, and voice itself can cross an 8-foot gap with ease.” *Hill*, 530 U.S. at 729. “The 8-foot separation between the speaker and the audience should not have any adverse impact on the readers’ ability to read signs displayed by demonstrators.” *Id.* at 727. As to leafleting, “demonstrators with leaflets might easily stand on the sidewalk at entrances (without blocking the entrance) and, without physically approaching those who are entering the clinic, peacefully hand them leaflets as they pass by.” *Id.* at 729-30.

Unfortunately, none of these alternatives is available to Hoye, for three reasons: 1) interference by activist escorts; 2) the City’s enforcement policy prohibiting stationary speakers from handing out information; and 3) the City’s enforcement policy regarding “approaches” in the direction of activist escorts.

1. Interference by pro-abortion activists negates all alternatives to approaching patients.

Since the passage of the Ordinance, pro-abortion activists have exploited the fact that Hoye is unable to approach patients without consent. (Statement of Facts, section B.) Thus, he cannot stand near the path of oncoming patients and offer them literature because the activists stand right in front of him, blocking him. When Hoye tries to speak to the patients, these activists talk loudly or make nonsense noise like “LALALALA” to drown out his voice. Thus, when at the required distance of eight feet, he is completely unable to communicate a request to approach, much less his actual message or his proffer of literature. When Hoye made a sign to convey his offer of assistance (“God loves you and your baby. Let us help”), the activists responded by holding up blank signs in front of his sign “to prevent [women] from seeing his sign” and to “prevent women from reading the message on his sign.” As the Statement of Facts, section B, thoroughly documents, blocking Hoye’s message, whether it is communicated by speech, signs, or literature, is an integral part of their function as escorts, to “protect” women from supposedly “harmful,” “intimidating,” “confrontational,” and “emotionally traumatizing” messages such as Hoye’s offer of help.

Far from being a factor unanticipated by the City in enacting the Ordinance, the presence of escorts on the sidewalks is specifically provided for in the

Ordinance. (ER61, §2(g).) The City has also endorsed the activists' tactic of covering up Hoye's sign. In an e-mail to the clinic director, Supervising Deputy City Attorney Vicki Laden (who is litigation counsel for the City in this action) said the "advocates'" tactic of covering Hoye's sign was "creative and seemed to be effective." (ER476.)

In *Hill*, the Supreme Court acknowledged that "[s]pecial problems that may arise" impeding the speaker's efforts to communicate "may be worked out as the statute is applied." *Hill*, 530 U.S. at 730. The escorts' organized, documented, and systematic interference creates a "special problem" with the application of the Ordinance. The City has evinced no intent to "work out" this problem; it has instead sanctioned and immunized the escorts' interference. This "problem" renders the Ordinance unconstitutional as applied here.

2. The City's prohibition on stationary speakers
handing out literature precludes alternative
means of distributing literature.

The City's enforcement policy precludes speakers such as Hoye from availing themselves of the "stationary speaker" option for leafleting provided in the *Hill* decision. The Court in *Hill* conceded that the statute's burden on leafleting was troubling, but noted that "demonstrators with leaflets might easily stand on the sidewalk at entrances . . . and, without physically approaching those who are

entering the clinic, peacefully hand them leaflets as they pass by.” *Hill*, 530 U.S. at 730. However, under the City’s enforcement policy, extending a hand with a leaflet is itself a prohibited “approach” for purpose of the Ordinance. So, if Hoye does exactly what the Supreme Court in *Hill* said was the “ample alternative” method of leafleting, that is a violation of the Ordinance.

“Handing out leaflets in the advocacy of a politically controversial viewpoint” is “the essence of First Amendment expression.” *McIntyre v. Ohio Election Commission*, 514 U.S. 530, 547 (1995). The Ordinance, as applied, places a virtual straightjacket on leafleters, closing off this most cherished avenue of communication.

3. The City’s prohibition on approaching activists widens the communication gap.

Under the City’s enforcement policy, it is a violation of the Ordinance to approach within eight feet of an activist escort, without the escort’s consent, while the escort is walking with a patient, even when the intent is to communicate with the patient, not the escort. The City’s enforcement policy also presumes that anyone holding a sign intends to display that sign to anyone who can see the sign.

(Statement of Facts, section C, #14, 15.) These applications of the Ordinance allow the activists to expand considerably the no-approach zone around a woman beyond the eight feet mandated by the Ordinance itself. By positioning themselves between

Hoye and a woman entering the clinic, the activists can not only obstruct communication; they can also force Hoye to remain several feet further back from the woman, beyond the eight feet, to the point where seeking and obtaining the woman's consent to approach, let alone any comprehensible communication, is completely unrealistic.

More importantly, this enforcement policy grants a veto power to escorts. Even if a woman communicates to Hoye, by words or gestures, that he has her consent to approach, the presence of an unconsenting escort near the woman means that Hoye will violate the Ordinance if he approaches.

Thus, none of the statute-saving "ample alternatives" which the Court in *Hill* said were available – speaking, displaying a sign, offering literature to passersby without approaching, getting consent – are available to Hoye under the Ordinance. He cannot approach the women without consent, and the activists make it impossible to ask or receive consent. He cannot convey his message from 8 feet away, because the activists drown out his voice and block his sign and arm outstretched with literature. He cannot stand near the path of oncoming patients and hand literature because the activists stand right in front of him, and even if they did not, extending his hand with a leaflet would be a violation of the ordinance.

"If an ordinance effectively prevents a speaker from reaching his intended audience, it fails to leave open ample alternative channels of communication."

Edwards v. City of Coeur d'Alene, 262 F.3d 856, 866 (9th Cir. 2001) (striking down prohibition on use of sticks for holding signs in parades). The Ordinance has the effect of preventing Hoye from reaching his intended audience, and thus fails to leave open ample alternative channels of communication and is an unconstitutional restriction on speech.

B. On its Face and As Applied, the Ordinance Does Not Leave Open Ample Alternative Channels of Communication for Hoye to Reach his Intended Audience with his Message.

When Hoye is conducting his speech activity at the Family Planning Specialists clinic, he has a very specific audience in mind: women imminently considering abortion at the clinic.

Hoye also has a very specific message. It is not a declarative statement (e.g., “Abortion stops a beating heart” or “There are alternatives to abortion”). It is not a warning (e.g. “You may regret doing this”). It is not an admonition (e.g. “You shouldn’t do this”). It is not a plea (e.g. “Please don’t do this.”)

Hoye’s message is an invitation: “May I talk with you about alternatives to the clinic?” He is requesting permission to engage in a dialogue with a woman who is considering obtaining an abortion. She may reject the invitation and go on her way. If she accepts, then “I listen. . . . And I normally let what they say sort of

drive the conversation, so for the most part I'm listening to what they have to say. . . [S]ometimes they'll ask me can I help, how can I help, what are the alternatives to the clinic. Sometimes they want to know what I can do for them right then and there, and I help 'em, you know, as best as I can." (ER384:1-ER385:1.)

In Hoye's experience, it is virtually impossible to start up a conversation with someone from eight feet away as the person is walking down the sidewalk. It violates the usual norms of human interaction. It is simply abnormal and impolite to attempt to begin a conversation at that distance. (ER479, ¶11.)

Because of the precise nature of the message in question – an invitation to engage in a conversation with someone who is leaning towards a particular course of conduct – there is no substitute or “ample alternative” to approaching such a person in order to strike up a conversation. Some messages can be conveyed just as readily by signs as by voice. Some messages can be conveyed as effectively, or even more effectively, in writing and pictures. But an invitation and request to engage in a friendly conversation can only realistically be conveyed by approaching the person, introducing oneself, and asking person-to-person if they would like to talk for a moment. This is a simple human reality.

For Mr. Hoye's message to reach his intended audience, the Ordinance provides no ample alternatives. This is particularly true given the City's approval of (indeed, partnership with) activist escorts who make sure that none of the meager

communications allowed by the Ordinance will reach the eyes or ears of the audience.

V. THE AMENDED ORDINANCE, AS INTERPRETED,
APPLIED, AND ENFORCED BY THE CITY, IS
UNCONSTITUTIONALLY VAGUE.

As evidenced in the Training Bulletin, the training video, the testimony of the City, and actual practice, the Ordinance can be and has been interpreted to prohibit conduct that is nowhere mentioned on the face of the ordinance. Various terms are left undefined and up to the discretion of the enforcing officer. Each of these factors separately and certainly all together establish that the Ordinance is unconstitutionally vague.

"[W]here a vague statute abuts upon sensitive areas of basic First Amendment freedoms, it operates to inhibit the exercise of those freedoms," because "[u]ncertain meanings inevitably lead citizens to steer far wider of the unlawful zone than if the boundaries of the forbidden areas were clearly marked." *Grayned*, 408 U.S. at 109 (internal quotation marks, citations and ellipsis omitted). Therefore, laws that regulate or restrict speech must satisfy "a more stringent vagueness test." *Village of Hoffman Estates v. Flipside, Hoffman Estates*, 455 U.S. 489, 499 (1982) (footnote omitted).

As interpreted and applied by the City as set forth in Statement Facts, Section C, the Ordinance is vague in at least six respects. By expanding the reach of the Ordinance beyond what is on its face, the City has created traps for the unwary, to the detriment of due process rights.

A. Entrance/Exit

Section 3(b) of the Ordinance provides “it shall be unlawful to willfully and knowingly approach within eight (8) feet of any person **seeking to enter such facility**, or any occupied motor vehicle seeking entry, without the consent, etc.” (ER61, §3(b).) However, the Training Bulletin states and the City confirmed that the Ordinance is interpreted to prohibit these unconsented approaches of any person seeking either to enter **or exit** the facility. (ER421:1-14; ER424:19-23; ER65-ER66; ER381 at ¶¶5, 8 and 465 (Police Training video transcript).)

B. Vehicles “seeking entry”

The Ordinance prohibits the unconsented approach of “any occupied motor vehicle seeking entry” to a reproductive health care facility. Capt. Toribio testified, however, that the Ordinance prohibits not just unconsented approaches of vehicles entering a parking lot or other private property of the facility, but also prohibits approaches within eight feet of vehicles that merely pull up to the curb on the public street in front of the curb. (ER451:7-21; ER457:13–18.)

If the “vehicle seeking entry” need not be actually seeking entry to the clinic’s property, then how far out does the prohibition extend? The full hundred feet from the entrance? And if a “vehicle seeking entry” includes a car that has pulled up to the curb, how long is it considered to be “seeking entry” versus being simply parked at the curb? The answer is simply an *ad hoc* determination made by the officer at the scene.

C. Approach

The Ordinance makes it unlawful to “approach within eight (8) feet” of persons under certain circumstances. “Approach” is not defined in the Ordinance, but the Training Bulletin defines “approach” as “come near or nearer to.” As interpreted and applied by the City, however, “approach” includes standing still and extending one’s arm with a leaflet. (ER458:6-14; ER465.)

Not only does this interpretation and application of “approach” violate the First Amendment, as discussed above, but it also renders the Ordinance unconstitutionally vague. Such an interpretation, far from being a natural one, is actually counter to the common understanding of the term. This is clearly illustrated by the *Hill* decision, in which the Court assumed that standing still and handing out leaflets to passing patients was not restricted by the Colorado statute regulating

approaches. So strong was the presumption that this interpretation was correct that it in fact saved the ordinance from facial invalidity. *Hill*, 530 U.S. at 727, 729-30.

D. Approach an escort with a patient

Section 3(b) prohibits approaching without consent any person seeking to enter a facility, for the purpose of some communications “with such person.” As interpreted and applied by the City however, the Ordinance prohibits approaching within 8 feet of an activist escort walking with a patient, even if the speaker’s intent is solely to communicate with the patient. (ER420:10-24; ER638:11-26; ER639:3-17.)

E. Approach an escort standing in front of the clinic

Section 3(b) prohibits approaching without consent within eight feet of a person “seeking to enter” a health care facility. However, as interpreted and applied by the City, it appears to be a violation of the ordinance to approach an activist who is simply standing in front of the clinic, for the purpose of speaking to that escort. (ER418:16-ER419:25; ER459:24-ER461:21; ER638:11-26; ER639:3-17.)

In dismissing Hoye’s vagueness challenge, the lower court purported to address the question of Hoye approaching escorts. (ER25-ER26.) Unfortunately its discussion failed to shed light on the matter, as it engaged in the same equivocation

the City employs in discussing the issue, namely, using the term “harassing” without clarifying whether the intended meaning is the ordinary meaning or the counterintuitive definition found in the Ordinance. It does no good to say that Hoye may approach escorts as long as he does not “harass” them, when the Ordinance defines harassing as merely approaching someone while holding a sign intended to be viewed by another person.

The lower court also stated that any abuse in enforcement is better addressed if and when a pattern of unlawful favoritism appears. *Id.* Aside from the fact that the issue of approaching escorts has nothing to do with favoritism, the lower court apparently expects Mr. Hoye to be willing to be repeatedly incarcerated, for up to a year at a time, just to provide a record of how the City enforces the Ordinance.

F. Consent

The City’s enforcement policy as to what constitutes consent is also so vague as to violate due process. Although the City concedes that consent need not be expressed verbally, the question of whether a pedestrian extending her hand to a leafleter who is proffering literature constitutes consent involves interviewing all witnesses, conducting a preliminary investigation, and possibly discussing the matter with the City Attorney. The City could not even answer whether an extended hand

would be one of the **indicia** of consent. (ER425:19-ER426:2.) (Statement of Facts, Section C, Bullet #17).)

The average demonstrator will obviously not have instantaneous access to the City Attorney to be able to determine in each instance whether approaching a patient who has extended her hand to receive literature is a violation of the ordinance. Once again, the ordinance violates due process by its vagueness and lack of direction to those seeking to exercise their First Amendment rights without running afoul of the law.

This is not pettifoggery. These are not implausible scenarios or “hypertechnical theories as to what the [ordinance] covers.” Cf. *Hill*, 530 U.S. at 733. On the contrary, most of the situations presented above happen every time Hoye is at the clinic. (ER481, ¶18.) However, the City repeatedly objected to questions, both in written discovery and in the City’s deposition, asking about applications of the Ordinance to these situations, claiming each was an incomplete hypothetical and called for speculation. (ER168-ER191; ER418:16-ER419:25; ER422:22-ER423:23; ER425:10-ER427:20; ER439:5-ER441:11; ER443:25-ER448:9)¹³ These objections and the City’s repeated representation that factors too

¹³ Some of the factors listed included whether or not the person was wearing or carrying a sign that says something about abortion, carrying or handing out leaflets, what he was doing before, what he was doing afterwards, and has he done this in the past. (ER419:1-5; ER440:5-8). According to Capt. Toribio

numerous to list would have to be considered in determining whether particular conduct violated the statute only serves to underscore the vagueness of the statute.

If these commonplace situations require resort to a full investigation into factors not mentioned in the ordinance, as well as consultation with supervisors, commanders, and the City Attorney to determine if a violation has taken place, the average person has no way of knowing the boundaries of prohibited conduct. He or she will of necessity “steer far wider of the unlawful zone than if the boundaries of the forbidden areas were clearly marked.” *Grayned*, 408 U.S. at 109.

It makes a substantial difference to Mr. Hoye, as he stands for hours on the sidewalk outside an abortion clinic, what the precise rules of engagement are for patients entering, patients leaving, patient companions who come outside for a smoke, activists who are standing around, activists who are walking with patients, cars pulling up or parked in front of the clinic. The uncertainty created by the disparity between what the law says on its face and how it is interpreted and applied by the City violates Mr. Hoye’s due process and free speech rights.

these factors might turn activity such as merely approaching and speaking to an escort who is simply standing in front of the clinic into a violation of the ordinance.

VI. THE ORDINANCE DENIES EQUAL PROTECTION

Equal protection of the law is guaranteed under Article I, §7, of the California Constitution. Under this provision, where a law makes distinctions “involving ‘suspect classifications’ **or touching on ‘fundamental interests’**”, the “rational relationship” test gives way to a “more stringent test,” in which “the state bears the burden of establishing not only that it has a compelling interest which justifies the law but that the distinctions drawn by the law are necessary to further its purpose.” *Kasler v. Lockyer*, 23 Cal.4th 472, 480 (2000) (emphasis added).

Freedom of speech is a fundamental interest under the California Constitution. *DeGrassi v. Cook*, 29 Cal.4th 333, 343 (2002) (“the free speech clause [of the California Constitution] reflects an important and fundamental interest”). Thus, laws restricting the exercise of free speech on the basis of classifications must be justified by a compelling interest and be necessary to further its purpose.

In the instant case, the City forthrightly admits that, in enforcing the speech restrictions of the Ordinance, it treats pro-abortion speakers differently from pro-life speakers. The City does not enforce the Ordinance against activist escorts. The Ordinance also singles out persons approaching abortion clinics as a class to be

specially isolated from speech, and correspondingly burdens the speech activity of those who wish to communicate with them.

The City has not asserted and cannot prove any compelling interest to justify these classifications, and has not shown and cannot show that these classifications are necessary to serve any asserted interest.

Even under a rational basis standard, the Ordinance violates both the federal and state equal protection guarantees. There is no rational basis for singling out persons entering abortion clinics or the people who wish to communicate with them for disfavored treatment. Nor is there any rational basis for according preferential treatment to one set of private, ideologically motivated speakers over another.

VII. THE LOWER COURT ERRED IN GRANTING SUMMARY JUDGMENT TO THE CITY.

A. The Lower Court Erroneously Refused to Consider Admissible Evidence.

The District Court declined to take judicial notice of highly relevant trial testimony of the clinic escorts, security guard, and clinic director at Hoye's criminal trial on the grounds that the testimony did not fall under the "former testimony" exception of Federal Rule of Evidence 804(b)(1). (ER14:18-23.) In so doing, the court erred in three ways.

First, the City did not object to this evidence, either by an evidentiary objection or opposition to the request for judicial notice.¹⁴ “Defects in evidence submitted in opposition to a motion for summary judgment are waived absent a motion to strike or other objection.” *FDIC v. New Hampshire Ins. Co.*, 953 F.2d 478, 485-6 (9th Cir. 1991) (quotation marks omitted).

Second, in the context of a summary judgment motion, prior sworn testimony is admissible evidence. “It is well settled that a certified transcript of a judicial proceeding may be considered on motion for summary judgment.” *Kelley v. Price — Macemon*, 992 F.2d 1408, 1415 n. 12 (5th Cir. 1994); *Langston v. Johnson*, 478 F.2d 915, 917 n.17 (D.C. Cir. 1973); *see also U.S. v. O’Connell*, 890 F.2d 563, 567 (1st Cir. 1989). (“there is no sensible rationale which would preclude reliance on sworn testimony faithfully recorded”).

Third, the Supreme Court in *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986), held that the nonmoving party in a summary judgment motion need not produce evidence “in a form that would be admissible at trial to avoid summary judgment.” The relevant consideration is whether the evidence “raises a genuine

¹⁴ The City originally objected to the criminal trial and pre-trial transcript attached to the Declaration of Michael Millen on the grounds that the former was uncertified and that they both should have been filed as part of a Request for Judicial Notice. (ER538.) These purported errors were rectified by the timely filing of a supplemental Request for Judicial Notice with certified copies of the transcripts attached. ER558, ER626, ER641, ER712. The City raised no

issue of material fact.” Testimony given under oath, directly contradicting both the same witnesses’ affidavits and the City’s contentions, indisputably meets that standard.

Thus, reversal of this court’s decision is effectively mandated by the lower court’s failure to consider relevant evidence, including evidence that clinics escorts are trained to tell patients not to take Hoye’s literature because it is inaccurate, that escorts make a practice of deliberately preventing communication between Hoye and patients, and that clinic personnel give false testimony about the activity of pro-life demonstrators.

B. This Court Erred In Rejecting Hoye’s Claim that the Ordinance is Viewpoint-Based As Applied.

1. The court ignored the evidence that escorts, with the sanction of the City, engage in more than simply “facilitating” speech.

As discussed above, the lower court erroneously refused to consider the trial testimony of clinic escort coordinator Barbara Hoke who described the speech escorts use to dissuade women from taking literature from the pro-lifer speakers. The court also noted that Hoye “asserts that the escorts ‘tell women not to listen to

further objection to the admission of the transcripts.

Plaintiff, that he is only there to harass her, that she will only be safe with the escorts, and not to take his literature . . . because it is inaccurate.’” (ER12.)

The support for Hoye’s assertion, as set forth in his Motion, was not only Ms. Hoke’s trial testimony, but also Mr. Hoye’s own deposition testimony and declaration. Yet the court ignored the existence of this other evidence. (ER14.)

The court apparently ignored this evidence because it did not consider any of this speech to be “pro-choice advocacy” as opposed to speech “facilitating access.” Thus, according to the lower court, escorts may approach patients and tell them to ignore Hoye and that he only wants to harass them (ER479, ¶9; ER480, ¶14), because that speech is merely “facilitating” the patients’ access to the clinic. Hoye, however, may not approach patients and tell them that the escorts are wrong and that he’d like to help them, because that would be “protest, education, or counseling.” The exception for speech “facilitating access” is thus a blatantly viewpoint-based distinction.

The court dealt with the City’s testimony that the Ordinance permits escorts to approach women without consent and say, “It’s your right to have an abortion,” by the expedient of declaring that the City “was wrong” when it stated official city policy is to give such speech a free pass. ER18. While the lower court certainly had the power to enjoin the City from interpreting its own ordinance in an unconstitutional manner, it serves no purpose to tell the City that it is “wrong” and

then enter judgment in its favor. The lower court effectively acknowledged that the City's policy is unconstitutional but chose to avoid its duty to grant monetary and injunctive relief and strike down the Ordinance.

The lower court further found fault with the City's deposition on the grounds that the question posed was objected to as being an incomplete hypothetical.¹⁵ The transcript admits to no such irregularity as it shows that the answer was quite narrowly directed to the particular circumstance of an unconsented approach by an escort of a patient seeking to enter the reproductive health care facility. (ER437:9-24.)

Moreover, the City not only understood that the question related to a statement being made in the context of an unconsented approach of a patient seeking to enter an abortion clinic, but it has twice explained why an escort saying, "It's your right to have an abortion" should be considered to be "facilitating patient access" to the clinic. (ER791 at n. 5; ER826 at n. 2.)

The court, nonetheless, held that the unequivocal statements of the City concerning its interpretation of and enforcement policy governing the Ordinance are irrelevant without evidence that the police were "targeting" pro-lifers or that there was a "pattern" of selective enforcement. (ER16-ER18.) Under this reasoning,

¹⁵ Plaintiff's Response to the City's Objections of Evidence as to its deposition testimony can be found at ER783.

there would be no point to conducting discovery to elicit from a government entity what its enforcement policy is; only the actual police response could be considered as evidence of the City's policy.

In so holding, the lower court let the tail wag the dog. The ultimate issue is whether or not the enforcement policy is unconstitutional. This can be proved either by pervasive and ongoing practices or simply by an official statement of policy.

In most cases, unconstitutionality will have to be proved through showing a pattern of selective enforcement or unlawful favoritism; it is undoubtedly the rare case when a government will admit to unconstitutionally interpreting and enforcing a law. **This** is one of those rare cases. Where a city has clearly stated that it enforces a criminal statute against some individuals, and not against others, based on the viewpoint of their speech, it must be taken at its word. It is not necessary for Hoye to make a thorough record that the police are actually following the policy promulgated by their superiors and the City itself. *Brown v. City of Pittsburgh*, 2009 U.S. App. LEXIS 23979, *86, n. 37; No. 08-1819, slip op. at 69, n. 37 (3d Cir. Oct. 10, 2009) (proof of pattern of selective enforcement not necessary where there is “direct evidence of an explicit policy to implement a facially neutral law in an unconstitutionally discriminatory way”.)

Such a record would necessitate Hoye and his companions not only making reports to the police of escort conduct, but also simultaneously violating the

Ordinance to show that it continues to be enforced against them. The City does not have a “flexible” enforcement policy as did the Boston police in *McGuire v. Reilly*, 386 F.3d 45, 53 (1st Cir. 2004) (multiple warnings before arrest). Thus, every putative violation is subject to prosecution. (ER67-ER78.) The District Attorney will seek the maximum penalty of a year in jail for each violation, no matter how technical or minor. (ER721, ¶6.) Thus, in order to show the “pattern of unlawful favoritism” required by the lower court, Hoye and his companions would have to be willing to accept incarceration for months or years, just to prove that the City’s policy is what it forthrightly says it is.

C. The Lower Court Did Not Follow the Standard for Weighing Evidence on a Motion for Summary Judgment.

The lower court correctly iterated the rules of construction for summary judgment motions, i.e., that reasonable doubts as to the existence of genuine issues of fact should be resolved against the moving party, and all inferences from the evidence must be viewed in the light most favorable to the nonmoving party. ER7. However, from beginning to end, in matters large and small, the court extrapolated, interpolated, inferred, contradicted, misstated, and ignored evidence, invariably to the detriment of Hoye and to the benefit of the City.

Two areas merit special mention: the “evidence of historical access problems,” and the conduct of the escorts.

1. The Record was Devoid of Evidence of “historical access problems” establishing the need for the Ordinance

This court stated, “While Plaintiff disputes some of the individual historical facts the City presented in support of passage of the Ordinance, there is no genuine issue of material fact as to whether there was, on the whole, sufficient evidence of historical access problems.” (ER7, n.3.)

First, the City’s declarants declined to provide any details as to when or how often the alleged protester misconduct occurred, i.e., how “historical” this historical conduct was. The lower court should not have inferred that this alleged misconduct was frequent and ongoing. Conversely, Hoye provided ample evidence, including testimony from the City’s own declarants, that in the years immediately preceding passage of the Ordinance, the only pro-life protesters in Oakland were Hoye and his companions. (ER725:22-ER726:9; ER728:5-22; ER729:3-23; ER314, ¶9; ER767, ¶2-ER768, ¶3; ER763, ¶2-ER764, ¶3.; ER642:14-17.) Hoye and his companions all provided declarations disputing that they created “access problems” or otherwise engaged in the type of misconduct described by the City’s declarants. (ER752-ER754, ¶¶4-13; ER768-ER769, ¶¶8-12; ER764-ER765, ¶¶5-11; ER758-ER759,

¶¶4-13.) Captain Toribio himself, in whose command area three of the four Oakland abortion clinics are located, testified that, prior to implementation of the Ordinance, there were “infrequent events” involving police response to protests at abortion clinics in Oakland, “infrequent” being defined as fewer than one a year. (ER723:2–ER724:8; ER728:5-22.)

Second, the only evidence regarding the adequacy of existing law to address the alleged problems was in Hoye’s favor, i.e., that twice in the past protesters had been prosecuted and had stay-away orders issued against them. (ER351, ER354.) The City presented **no** evidence that law enforcement was unable to, refused to, or was even reluctant to enforce the existing laws against protester misconduct.

The first example of “significant barriers to patient access” cited by the lower court illustrates the need for evidence of the law enforcement response in order to complete the picture. The court cited an allegation about a clinic blockade involving three hundreds persons. ER4. It is absurd to suggest that the police could not and did not address this situation, for want of a law imposing a speech-restrictive no-approach zone.¹⁶

“[T]he First Amendment demands that municipalities provide ‘tangible evidence’ that speech-restrictive regulations are ‘necessary’ to advance the

¹⁶ The other evidence of “barriers” cited by the court was from two declarants whose testimony under oath at Hoye’s criminal trial was shown to be false by

proffered interest in public safety.” *Edwards v. City of Coeur d’Alene*, 262 F. 3d 856, 863 (9th Cir. 2001 (citing *Bay Area Peace Navy v. U.S.*, 914 F.2d 1224, 1227 (9th Cir. 1990. Here the City provided not a shred of “tangible evidence” that existing laws were insufficient to cure the supposed ills. Yet the lower court adopted the City’s unsupported conclusion that “existing federal and state laws do not adequately protect the rights of those seeking or providing reproductive health care services.” ER20.

Had the court drawn all inferences in favor of the nonmoving party, it could not have found sufficient evidence that there were “historical access problems” justifying the Ordinance.

2. The record did not support the court’s
characterization of escort misconduct as
“sporadic.”

In contrast to the court’s assumption that misconduct by pro-life protesters was ongoing, frequent, and recent, the court took a more indulgent view of the escorts blocking Hoye and others. The court stated, “This practice appears to have been sporadic,” citing a few minutes of video footage on one day, photographs from one date in March 2009 when 40 demonstrators gathered across the street from the clinic (ER320, ER322), and one phrase from the supplemental declaration of Mrs. Hitchcock (ER758), taken out of context. (ER15.) Preferring to believe the

the surveillance video. (ER 772-ER775; *see also* 4/29 and 5/13 videos.)

conduct happened only on the two days for which Hoye offered videotape, the court ignored the declarations from Hoye and others describing in great detail the systematic blocking by the escorts, as well as the escorts' own statements indicating that this was their established practice and purpose.

In other words, the court assumed pro-life misconduct was occurring somewhere, by someone, unless Hoye could affirmatively establish that it was not. Simultaneously the court assumed that pro-abortion escort misconduct was **not** occurring any time other than when Hoye had documentary evidence proving it. In the case of pro-life misconduct, the weight of the evidence only accumulated; it was never diminished by the passage of time or the infrequency of occurrence. In the case of pro-abortion misconduct, the record of recent misconduct was easily purged by the mere suggestion that the misconduct had not been uniform and continuous to the present time.

The lower court's approach was the antithesis of viewing the evidence in the light most favorable to the nonmoving party.

CONCLUSION

The trial court's order granting summary judgment to the City should be reversed, and the lower court should be directed to grant Hoye's motion for summary judgment.

STATEMENT OF NO RELATED CASES

Appellant knows of no related cases.

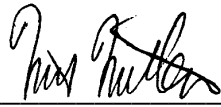
STATEMENT OF COMPLIANCE

(Fed. R. App. P. 32 (a)(7)(C) and Ninth Circuit Rule 32-1)

This brief is proportionately spaced, has a typeface of 14 points or more and contains 13,946 words.

Respectfully Submitted,

Dated: November 16, 2009

By:  _____

MICHAEL MILLEN
ATTORNEY FOR APPELLANT

Certificate of Service

The undersigned hereby certifies that he is a member in good standing of the bar of this court, not a party to this action, and is employed at 119 Calle Marguerita #100, Los Gatos, CA 95032.

The foregoing Opening Brief of Plaintiff-Appellant Walter Hoye was served this date by placing a copy in the United States mail, with first class postage-prepaid thereon, addressed to:

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(1 copy of opening brief)

The APPELLANT'S EXCERPTS OF RECORD was served this date by placing one or more copies in the care of Federal Express in proper packaging, courier fees having been pre-arranged, for delivery to:

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I declare under penalty of perjury under the laws of the United States and the State of California that the foregoing is true and correct.

Dated: November 16, 2009

By: 
MICHAEL MILLEN