

Appeal No. 25-2162

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

ROGER LOPEZ,
Plaintiff-Appellant,

v.

CITY OF SAN DIEGO,
Defendant-Appellee.

On Appeal from the United States District Court
for the Southern District of California
Case No. 3:24-cv-01557-LL-DDL

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INTRODUCTION

The City’s response confirms the ordinance cannot survive First Amendment scrutiny. On vagueness and overbreadth, the City ignores the most problematic provisions—including the “indication” clause that criminalizes speech based on a listener’s subjective signal, and the independent prohibition on “offensive” or “disturbing” noise without any reference to volume (contrary to the City’s argument). These errors amount to silent concessions that the law leaves speakers without fair notice and chills protected speech on the very public sidewalks the Constitution most zealously protects.

On content-based discrimination, the City fares no better. Its exemptions for clinic personnel are not neutral “scope of duty” carveouts but explicit licenses for favored speakers to engage in counseling, protesting, and even harassment—speech that pro-life citizens are forbidden from engaging in. By authorizing one side of a debate while criminalizing the other, the ordinance embodies the precise viewpoint-based distortion the First Amendment forbids.

The City’s tailoring defense collapses under its own admissions. It concedes the ordinance was “not reactionary” to any actual incidents,

offering only vague and uncorroborated complaints while ignoring the ample existing laws that already address obstruction and threats. That candid admission is fatal under either intermediate or strict scrutiny.

Finally, the City rests almost entirely on *Hill v. Colorado*. But *Hill* has been hollowed out, denounced as an anomaly, and never approvingly cited. Even if *Hill* retained force, San Diego’s ordinance goes far beyond it, layering vague and sweeping restrictions *Hill* never contemplated. The City’s silence on critical defects and reliance on obsolete precedent seal its fate. The ordinance is unconstitutional, and reversal is required.

ARGUMENT

I. Vagueness and Overbreadth

A. Vagueness.

The City fails to acknowledge the more “rigorous” vagueness test that governs speech restrictions and is designed to “ensure that ambiguity does not chill protected speech.” *F.C.C. v. Fox Television Stations, Inc.*, 567 U.S. 239, 253-54 (2012); *see also Vill. of Hoffman Ests. v. Flipside, Hoffman Ests., Inc.*, 455 U.S. 489, 497-500 (1982). It also simply ignores the most flawed provisions of its challenged ordinance, effectively conceding vagueness at this stage.

1. Harassment.

The City claims “harassment” is defined using “widely accepted statutory language” with a scienter requirement and an objective standard. Resp.Br.13. Not so. The definition makes it “harassment” to approach a person (even from more than eight feet) with “*intent to harass once the other person*” (not a “reasonable person”) has merely “*indicated*” he or she does not want to be “*approached or followed.*” § 52.1002 (emphasis added). The City’s brief never addresses this provision. And, critically, the ordinance declares that “harassment” *per se* “includes” such conduct while providing no objective standard for what counts as an “indication” or scienter before an “approach.” § 52.1002. *See also* Resp.Br. at 11 (conceding the definition lists “clear examples of prohibited conduct”).

The novel “indication” provision is nothing like the more traditional provisions upheld in *United States v. Osinger*, 753 F.3d 938, 943-45 (9th Cir. 2014), or *O’Brien v. Welty*, 818 F.3d 920, 930 (9th Cir. 2016). What signals an “indication” for one person may not for another—classic subjectivity that “subjects the right of [free speech] to an unascertainable standard.” *Coates v. City of Cincinnati*, 402 U.S. 611, 614 (1971). That problem is especially acute on public sidewalks, which “occupy a special

position in terms of First Amendment protection because of their historic role as sites for discussion and debate.” *McCullen v. Coakley*, 573 U.S. 464, 576 (2014) (internal quotes omitted). Accordingly, the “indication” provision is facially vague.¹

Carveouts deepen the uncertainty. The ordinance says harassment “does not include consensual conversations or displaying a sign from *more* than eight feet away,” yet also bans even *stationary* harassment. § 52.1002 (emphases added); § 52.1003(b)(2). Read together, these provisions imply that conversing or holding a sign *within* eight feet—even while standing still—might constitute harassment. *See id.* That indeterminacy chills quintessentially protected speech and cannot survive more “rigorous” vagueness standards for restrictions on speech. *Fox Television*, 567 U.S. at 253-54. Yet the City ignores the provisions and also never explains how its restriction on “harass[ment]” in § 52.1003(b)(1) is not redundant with § 52.1003(b)(2), leaving (b)(2) utterly inscrutable.

¹ Nor is it saved by the requirement that one must approach with the mere subjective “intent to harass,” which, short of *actual* harassment, is likewise subject to arbitrary enforcement given the difficulty of determining one’s internal intent as they engage in the prohibited “approach.”

Osinger and *Welty* are distinguishable for additional reasons. *Osinger* upheld conduct prohibitions “tethered to underlying criminal conduct *and not to speech*,” making it “difficult to imagine what constitutionally-protected speech would fall under these statutory prohibitions.” 753 F.3d at 944 (emphasis added). This ordinance, in contrast, expressly targets people “who wish to express themselves” on public ways outside healthcare facilities, places of worship, and schools, § 52.1001; potentially encompasses sidewalk counseling initiated from beyond eight feet, § 52.1002, *see also* 3-ER-340-41; and potentially penalizes “displaying a sign from” *within* eight feet, §§ 52.1002, 52.1003(b). For its part, *Welty* involved only harassment that “threatens or endangers” health or safety. 818 F.3d at 930. But here, harassment *per se* “includes” violating the “indication” clause, without any threat requirement. *Cf., e.g., Counterman v. Colorado*, 600 U.S. 66 (2023) (true threats are *per se* unprotected).

The City’s “objective” standard based on alleged harm to a “reasonable person” does not save it. Resp.Br. at 10-11. Terms like “alarm” are standardless, invite arbitrary enforcement and fail to provide fair notice even when tied to a “reasonable person.” *Bell v. Keating*, 697 F.3d 445, 462-63 (7th Cir. 2012) (invalidating arrests for conduct that “seriously”

“alarms” or “annoys” absent a threat to public safety); *Vill. of Hoffman Ests v. Flipside, Hoffman Ests., Inc.*, 455 U.S. at 495 n.7 (terms with “no core” are vague).

Nor does scienter save the ordinance. *Contra* Resp.Br. at 15. Where a challenged law turns on harm to third parties, courts have required *specific* intent as to the proscribed result, not mere general intent to act. *See Robinson v. Township of Waterford*, 1989 WL 94569, at *1, *5 (6th Cir. 1989) (unpublished) (noting that restriction on actions “with intent to harass, annoy or alarm another person” are “saved” by “the specific intent requirement”) (citing *Screws v. United States*, 325 U.S. 91, 103 (1945)). The ordinance demands only *general* intent to commit the actus reus, without requiring specific intent to “seriously alarm.” *See* § 52.1002. That falls short of the requisite definiteness to avoid chilling protected speech under the more stringent vagueness standard applicable here. Accordingly, the City’s ban on “harassment” is unconstitutionally vague.

2. Noise.

The City’s noise restriction on “offensive noise” fails for similar reasons. It prohibits “disturbing” or “offensive” noise that causes “discomfort or annoyance to [a] reasonable person.” § 52.1004(a)(1). Thus,

“offensiveness” is not even purportedly determined by a “reasonable person” and so manifestly invites arbitrary or discriminatory enforcement. *See City of Chicago v. Morales*, 527 U.S. 41, 56 (1999). Further, what is “disturbing” or “offensive” to another obviously varies based on individual sensibilities. *See Coates*, 402 U.S. at 614 (subjective standards fail to provide fair notice); *see also Reno v. ACLU*, 521 U.S. 844, 874 (1997). Section 52.1004(a)(1) thus is facially vague.

The same is true of restricting offensive noise that causes “discomfort or annoyance to any reasonable person.” Reasonable people disagree about what causes discomfort or annoyance, and the ordinance lacks any specific-intent requirement aimed at those supposed harms. *See Robinson*, 1989 WL 94569, at *5. Further, even a specific-intent requirement would not supply requisite clarity given the “little instruction” on the *actus reus*—i.e., making disturbing or offensive noise. *Valenzuelo Gallardo v. Lynch*, 818 F.3d 808, 821 (9th Cir. 2016).

The City absurdly argues *Ward v Rock Against Racism* saves its noise restriction simply because the noise ordinance there purported to further the government’s *interest* in avoiding “unwelcome noise.” 491 U.S. 781, 786 (1989). The actual prohibition in *Ward* merely required

performers to use government sound-amplification equipment and a sound technician. *Id.* at 784. It did not broadly restrict “unwelcome noise,” which the City *admits* is a “subjective concept” reflected in its own restriction on “offensive noise.” Resp.Br. at 16.

Nor does the City’s “numeric decibel cap” fix things. The City falsely alleges that its noise restriction “*pairs* an objective reasonableness test with a numeric decibel cap, provid[ing] far greater clarity.” Resp.Br. at 16. But the decibel cap resides in a different subsection than “offensive noise,” and the subsections are separated by the disjunctive “or” rather than the conjunctive “and.” *See* § 52.1004(a)(1)-(3). “Offensive noise” therefore operates independently and “essentially outlaws speech—regardless of noise level—if a person of ordinary sensitiveness” would be “annoyed,” which “is not a proper basis on which to curtail protected speech.” *Harman v. City of Santa Cruz*, 261 F. Supp. 3d 1031, 1043 (N.D. Cal. 2017).

Grayned v. City of Rockford, 408 U.S. 104 (1972) meanwhile is inapposite. There, a state court had construed “tending to disturb the peace” to require “actual or imminent interference.” *Id.* at 111-12. No

comparable narrowing construction exists here to save the ordinance from its vagueness.

Accordingly, the challenged noise restrictions are patently vague.

B. Overbreadth.

The City faults Lopez for not sufficiently “weigh[ing]” constitutional and unconstitutional applications of the challenged provisions. Resp.Br. at 17-18 (citing *Project Veritas v. Schmidt*, 125 F.4th 929, 961 (9th Cir. 2025)(en banc)). But vagueness and overbreadth are “logically related.” *Kolender v. Lawson*, 461 U.S. 352, 358 n.8 (1983). The challenged provisions’ facial vagueness confirms that a “substantial number of [their] applications are unconstitutional.” *United States v. Stevens*, 559 U.S. 460, 472 (2010). Indeed, “[t]he vagueness of such a regulation raises special First Amendment concerns because of its obvious chilling effect on free speech.” *Reno*, 521 U.S. at 871-72.

Accordingly, the City’s failure to recognize that its harassment and noise restrictions are unconstitutionally vague dooms its attempt to avoid Lopez’s overbreadth challenge, as well. *Accord Harman*, 261 F. Supp. 3d at 1044 (“Defendants do not meaningfully address Harman’s specific

overbreadth challenge to the term ‘physically annoying’). The district court should be reversed for this reason alone.

II. Content-Based Restriction on Speech.

A. Speaker-based discrimination.

The City baldly insists its exemption for clinic personnel from §52.1003’s prohibitions on “harassment” and unconsented sidewalk “counseling” “mirrors” an exemption *McCullen* upheld. *See* § 52.1003(f); Resp.Br. at 32-33. Not so. The City ignores that *McCullen* addressed a fixed buffer limiting merely *where* someone could stand rather than *what a person could say*, which is why the employee exemption there was content-neutral. *McCullen*, 573 U.S. at 479, 483. Here, the exemption applies not against a *fixed buffer zone* restricting where sidewalk counselors may *stand* but against a bubble zone that restricts “approach[ing]” to “pass a leaflet or handbill,” “display a sign,” or protest, educat[e], or counsel[],” § 52.1003(c), and against a restriction on *harassment*. § 52.1003(b). These restrictions turn on speaking, not location. *See Hill*, 530 U.S. at 713 (Colorado restriction “allows a protestor to stand still” anywhere within 100 feet of healthcare facilities “while a person moving toward or away from a health care facility walks past her”).

The City does not dispute the First Amendment’s bar on speaker-based discrimination. *See Rosenberger v. Rector and Visitors of Univ. of Virginia*, 515 U.S. 819, 828 (1995); *Moss v. U.S. Secret Service*, 572 F.3d 962, 970 (9th Cir. 2009). And although *Hill* characterized Colorado’s law as regulating “the places where some speech may occur,” *see* 530 U.S. at 719, the law undeniably *also* hinged on what people say (e.g., “displaying a sign” or “protest[ing], educat[ing], or counseling”). That is precisely what distinguishes *McCullen*: there, the petitioners could “violate the Act merely by standing in a buffer zone, whereas here violations are triggered by “educating,” “counseling,” etc. Further, even if the counseling carveout were not enough to make the ordinance speaker-based, the City does not dispute its provisions on “harassment” restrict what people can say. Yet the ordinance explicitly allows clinic personnel to engage in otherwise prohibited “harassment.” *See* § 52.1003(f)(2). That fact independently creates yet another content-based defect.

The City’s “scope of duties” defense of the ordinance also fails. *See* Resp.Br. at 32; § 52.1003(f)(2). It argues Lopez “alleges no facts showing escorts engage in advocacy within the buffer zone as part of their duties.” *Id.* at 33. On the contrary, construing the well-pled facts in the light most

favorable to Lopez at this 12(b)(6) stage, it is at least plausible that escorts' duties include "approaching" and "educating" patients or "harass[ing]" sidewalk counselors. *See, e.g.*, 3-ER-347 (abortion activists block Lopez's path and scream obscenities in his face); 3-ER-350 (ordinance permits escorts to "educate," "protest," etc., within the zone); 3-ER-340 (abortion advocates sometimes get physically violent). In contrast, *McCullen* found no record evidence that clinic personnel there were authorized to speak about abortion within the buffer zones after discovery and a bench trial. 573 U.S. at 483; *see also id.* at 475. No such discovery or trial has yet occurred here.

This Court should reverse and remand for discovery. The ordinance's speaker-based exemption is facially content-based—or, at minimum, plausibly so at this stage.

B. Listener reaction.

The City wrongly contends its restriction on "disturbing" or "offensive" noise that causes "annoyance" or "discomfort" to a reasonable person does not turn on listener reaction. Resp.Br. at 34-36. It concedes the noise ordinance reaches "expressive" activity but maintains that the targeted harm is only disruption to patients inside covered facilities. *Id.* at

35. But the actual prohibition goes further, prohibiting “offensive noise” that “annoys” or “discomforts” a reasonable person without “any reference to volume” and so “essentially outlaws speech.” *Harman*, 261 F. Supp. 3d at 1043. A speech regulation pegged to a listener’s offense is content-based under longstanding precedent, regardless of the City’s alleged “targeted harms.” See *McCullen*, 573 U.S. at 481.

The City points to Supreme Court precedent generally approving noise restrictions outside medical clinics. Resp.Br. at 35. But its primary authority, *Madsen v. Women’s Health Center, Inc.*, upheld an injunction prohibiting excessive noise based on volume and *without regard to listener reaction*. See 512 U.S. 753, 772 (1994). It has no application here.

Accordingly, the City’s restriction on “offensive” or “disturbing” noise that “causes discomfort or annoyance,” regardless of volume, plainly restricts speech based on content.²

² The City also points to this Court’s decision in *Project Veritas* recognizing that government may sometimes evaluate restricted content so long as it remains “neutral with respect to the message that individual speakers express[.]” 125 F.4th at 949. But nothing in *Project Veritas* rejects the longstanding recognition that restrictions based on listener reaction (including the listener’s perception that the message is “offensive” or “discomforting”) are not content-neutral. See *McCullen*, 573 U.S. at 481; *Texas v. Johnson*, 491 U.S. 397, 414 (1989) (“[G]overnment may not

C. Underlying viewpoint discrimination.

The City does not contest the ordinance was motivated by viewpoint animus, only that “illicit legislative motive” alone is not a basis to invalidate a statute. *United States v. O’Brien*, 391 U.S. 367 (1968). True, but irrelevant. Even a “facially content neutral” statute “will be considered content-based” if adopted “because of disagreement with the message [the speech] conveys.” *Reed v. Town of Gilbert*, 576 U.S. 155, 164 (2015) (cleaned up). This Court has recognized that evidence of viewpoint-based animus can confirm a statute’s facial discrimination. *See Animal Legal Def. Fund v. Wasden*, 878 F.3d 1184, 1198 (9th Cir. 2018) (undue breadth “gives rise to suspicion” of “impermissible purpose,” and courts “do not ignore” evidence of animus by “a vocal number of supporters”); *see also Brown v. Kemp*, 86 F.4th 745, 783 n.8 (7th Cir. 2023) (improper motive elevates possibility of viewpoint discrimination “to a certainty”); *R.A.V. v. City of St. Paul*, 505 U.S. 377, 394 (1992) (same). Not even “general judicial reluctance to plumb the legislative psyche” requires a court to stop its ears to a “record that establishes with unmistakable clarity the

prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.”).

actual motives of the legislator.” *Krueger v. City of Pensacola*, 759 F.2d 851, 855-56 (11th Cir. 1985).

Here, evidence abounds of viewpoint animus toward pro-life speech after *Dobbs*. See Pl.Op.Br. at 48; 3-ER-344-45; 54-56; 57. And the ordinance expressly authorizes *abortion clinic* personnel to “educate” and “counsel” and to engage in otherwise prohibited “harassment.” See § 52.1003(f)(2). Further, the City admits it enacted the layered restrictions without evidence of new incidents that might justify them—purporting merely to have “updat[ed] its ordinance” to somehow match precedent using unprecedented means. The combination strongly supports a “suspicion” and inference that the ordinance was enacted specifically to burden pro-life *speech* and thus requires strict scrutiny. See *Wasden*, 878 F.3d at 1198.

The City argues *Hill* generally authorizes restrictions adopted because of pro-life protests. Resp.Br. at 33-34. That’s simplistic and wrong: *Hill* merely allows a government to respond to “the *conduct* of partisans on one side of the debate” so long as it is *not* motivated by disagreement with that side’s viewpoint. 530 U.S. at 724 (emphasis added); Pl.Op.Br. at 47-48. In admitting the ordinance was “not reactionary” to any conduct

whatsoever, Resp.Br. at 25, the City inadvertently speaks the quiet part out loud: the ordinance was motivated by viewpoint animus and political outrage, not public safety. *See* Pl.Op.Br. at 48; 3-ER-344-45; 54-56; 57.

Reversal is also required for this reason alone.

D. Strict scrutiny.

Because the abovementioned restrictions are content-based, the City must prove they are narrowly tailored to a compelling government interest. *Reed*, 576 U.S. at 171. It does not even try, effectively waiving any strict-scrutiny defense on appeal. *See generally* Resp.Br.; *cf.* Pl.Op.Br. at 58-66 (applying strict scrutiny). Further, the challenged restrictions *a fortiori* fail strict scrutiny given their inability to satisfy even intermediate scrutiny, *see* Pl.Op.Br. at 27-44, as discussed more below.

III. Not Narrowly Tailored to Significant Interests

A. The ordinance is insufficiently tailored to actual problems.

Even under intermediate scrutiny, the City must show the ordinance “directly advances [its] interest to a material degree,” meaning “the harms it recites are real” and the speech restriction “will *significantly* alleviate those harms.” *Junior Sports Mags., Inc. v. Bonta*, 80 F.4th 1109, 1117 (9th Cir. 2023) (cleaned up). The City shoots itself in

the foot trying to do so. First it baldly references alleged “aggressive demonstration activities” outside covered facilities that supposedly have occurred at some undisclosed time. Resp.Br. at 19 (citing 3-ER-371). But then it admits the ordinance “is not reactionary.” Resp.Br. at 25. The necessary inference is there are no concrete, *current* problems not already adequately being addressed by other laws. *See* Pl.Op.Br. at 62-65.

The City points to uncorroborated and vague complaints from (assuredly disinterested) Planned Parenthood of the Pacific Southwest, Resp.Br. at 19, about “feeling intimidated, harassed, or threatened by protest activity,” 3-ER-371. But even assuming those complaints have any basis in fact, the City does not have a legitimate interest in restricting expression just because it offends or disturbs someone. *Texas v. Johnson*, 491 U.S. 397, 414 (1989). And even assuming that the concern the same City that pillories pro-lifers in open public meetings purports to have for demonstrator safety is real, Resp.Br. at 19, that safety is not materially advanced either by prohibiting mere sidewalk “counseling,” amorphously defined “harassment,” and “offensive noise—especially since other laws already prohibit obstruction. *E.g.*, 18 U.S.C. § 248(a).

The City tries to minimize a recent district court holding sharply criticizing the ordinance as founded on “little more than mere conjecture, hypotheticals, and vague allusions to practical experience” about public safety needs near schools. *Don Blythe v. City of San Diego*, No. 3:24-cv-2211, 2025 WL 1570528, at *11 (S.D. Cal. 2025) (cleaned up). The City notes the district court made this finding in allowing only the plaintiff’s as-applied challenge to proceed. Resp.Br. at 22. But the district court’s *logic* equally undermines the *facial* validity of the ordinance, not least because its as-applied analysis relied on authority enjoining a challenged law both as applied *and on its face*. See *Blythe*, 2025 WL 1570528, at *12 (citing *Duncan v. Becerra*, 265 F. Supp. 3d 1106, 1121 (S.D. Cal. 2017)); see also *Duncan*, 265 F. Supp. 3d at 1112, 1139-40.

Besides, lack of narrow tailoring is a *facial* defect: “if a statute is not narrowly tailored, it cannot be constitutionally applied to *anyone*.” *Sisters for Life, Inc. v. Louisville-Jefferson Cnty.*, 56 F.4th 400, 407 (6th Cir. 2022). In *McCullen*, for example, the Supreme Court reversed the First Circuit’s rejection of both an as-applied and facial challenge on narrow tailoring grounds, see 573 U.S. at 475, 498, and stressed that “[f]or a problem shown to arise only once a week in one city at one clinic, creating

35-foot buffer zones at every clinic across the Commonwealth is hardly a narrowly tailored solution,” *id.* at 494. Put differently, the law in *McCullen* was insufficiently tailored *on its face*.

The same defect is present here. The ordinance relies on vague allegations of aggressive demonstration activities sometime in the past rather than requisite “real” harms in the present the new multilayered speech restrictions could “significantly” alleviate. *Junior Sports Mags.*, 80 F.4th at 1117. *Blythe* correctly assessed that the ordinance is based on mere speculative harm. This Court should hold so too and reverse. But if the Court concludes Lopez’s narrow tailoring challenge is viable only as-applied, he respectfully requests remand with leave to file an amended complaint raising an as-applied challenge.

B. Broad coverage.

For similar reasons, the ordinance’s application to public rights-of-way outside all healthcare facilities, schools, and places of worship facially burdens far more speech than necessary. The City contends the facial narrow tailoring analyses of *McCullen* and *Sisters for Life* are inapposite because the ordinance here does not impose “blanket prohibitions” on being in particular zones. Resp.Br. at 21-22. But that argument

ignores how the ordinance’s vague, overbroad, and content-based restrictions on “harassment” and “offensive noise,” layered atop an eight-foot bubble zone, chill speech. As Second Circuit Chief Judge Livingston has observed, treating “de minimis,” incidental contact with others on a public sidewalk as obstruction “*in effect converts these statutes into ‘buffer zone’ equivalents.*” *New York v. Griep*, 991 F.3d 81, 143-44 (2d Cir. 2021) (Livingston, C.J., dissenting) (emphasis added), *reh’g granted and decision vacated by People v. Griep*, 997 F.3d 1258 (Mem) (2d Cir. 2021), and *New York by James v. Griep*, 11 F.4th 174 (2d Cir. 2021).

So too here. Multitiered restrictions on pro-life speech—criminal exposure for a wrongful “approach” or crippling civil liability for “offensive noise”—create a de facto buffer zone by scaring pro-lifers into silence. *See Grayned*, 408 U.S. at 109 (“Uncertain meanings inevitably lead citizens to steer far wider of the unlawful zone.”) (cleaned up). Accordingly, *Sisters for Life* and *McCullen* are on point.

The City’s reliance on *Hill*’s statement that the broad “coverage” of the law at issue there was “of no constitutional significance” is misplaced. Resp.Br. at 22. *Hill* did not address an eight-foot bubble zone *plus* vague “harassment” and “offensive noise” prohibitions. Narrow tailoring here is

thus controlled not by *Hill* but by *McCullen*, which recognized that the broad coverage of the buffer zone law there failed intermediate scrutiny for lack of narrow tailoring. 573 U.S. at 493. So, too, here.

The City tries to sideline discussion of schools and places of worship as irrelevant on the theory that Lopez challenges its application only to healthcare facilities. Resp.Br. at 22. That view misreads the law. Because the City “may not burden substantially more speech than is necessary to further [its] order and access interests” and has not shown “*all* medical facilities [let alone schools and places of worship] need this kind of regulation, the ordinance lacks any tailoring, to say nothing of narrow tailoring.” *Sisters for Life*, 56 F.4th at 405 (quoting *McCullen*, 573 U.S. at 486). The ordinance’s breadth again betrays its facial lack of narrow tailoring.

C. Cumulative burden.

The City’s contention that the challenged provisions do not impose an unconstitutional *cumulative* burden also fails. It says the harassment provision adds no “new speech burden” because it merely “codifies” the government *interest* behind the bubble zone upheld in *Hill*. But interests are not laws. Adding a separate prohibition atop an eight-foot bubble zone *necessarily* increases the legal burden, and the “approach,”

harassment, and offensive noise provisions that mar the ordinance have no analogue in *Hill*. Cf. §§ 52.1002, 52.1003(b)(2), 52.1004(a)(1).

Brown v. City of Pittsburgh, 586 F.3d 263 (3d Cir. 2009) thus is on point. Overlapping an eight-foot bubble zone and a 15-foot fixed buffer effectively prohibited leafletting near clinic entrances—even while standing still—thus burdening substantially more speech than necessary. *See id.* at 278-79. The same is true here: vaguely defined “harassment” even while standing still and undefined “offensive noise” stacked atop the ban on unconsented counseling creates a de facto buffer. Such “astonishing breadth—and slipperiness” is more than enough to chill a reasonable person into “just keeping his mouth shut.” *Speech First, Inc. v. Cartwright*, 32 F.4th 1110, 1121 (11th Cir. 2022).

Lopez has done exactly that. He once counseled twice weekly without fear, about one-third to one-half of passersby accepting his leaflets. *See* 3-ER-340, 41. But now he freezes in fear whenever a passerby comes within eight feet of him. *See id.* The combined effect of the challenged provisions “impose serious burdens” on his speech, *McCullen*, 573 U.S. at 487, even though he “remain[s] free to hold signs” and converse “within sight and hearing of [his] intended audience,” Resp.Br. at 30. The City

seems to entirely miss the point: close, personal engagement is *the* method of sidewalk counseling, and the “alternative” of frantically miming or shouting from a distance is worse than saying nothing at all. See *McCullen*, 573 U.S. at 489 (it is “no answer to say” a sidewalk counselor “can still be ‘seen and heard’ by women within the buffer zones” because it “is easier to ignore a strained voice or a waving hand than a direct greeting or an outstretched arm”).

Accordingly, the cumulative burden of the challenged provisions also fails narrow tailoring.

IV. *Hill* Does Not Control This Case

A. *Hill* is a zombie precedent.

The City is right about one thing: only the Supreme Court can overrule its precedents. See Resp.Br.at 28 (citing *Agostini v. Felton*, 521 U.S. 203 (1997)). But *Agostini* itself instructs lower courts not to robotically apply dated holdings that are clearly irreconcilable with later doctrinal developments; instead, courts must apply earlier cases “in light of [the Supreme Court’s] more recent cases.” 521 U.S. at 237-39.

Agostini was tapping into a settled doctrine that some precedents become “zombies”—decisions whose reasoning has been hollowed out and

whose holdings have been “overruled in the court of history” even before an express overruling. The classic example is *Korematsu v. United States*, 323 U.S. 214 (1944), *abrogated by Trump v. Hawaii*, 585 U.S. 667 (2018). There (as here) government argued it needed to suppress constitutional rights to prevent dangers to public safety. The Court buckled but soon rued the decision and mothballed it alongside other monstrous decisions such as *Dred Scott*. It never after World War II approvingly cited the case for its central holding, instead confessing its error. But it also had never expressly overruled *Korematsu* before the NAACP asked it in an amicus brief to do so in a 2018 immigration case. *See* Br. of NAACP as Amicus Curiae in Support of Respondents, *Trump v. Hawaii* (No. 17-965), at *26-27 (Mar. 30, 2018).

Trump v. Hawaii did so, shocked anyone could consider *Korematsu* still good law even though it had never expressly been overruled. The Court made “express what is already obvious”: *Korematsu* had—like close to thirty other decisions restricting constitutional rights that had never been expressly been overruled—long ago been impliedly overruled in the court of history. *Cf. Dobbs v. Jackson Women’s Health Org.*, 597 U.S. at 417-22 (Breyer, Sotomayor, and Kagan, JJ., dissenting) (collecting the

impliedly overruled cases); *see generally* Daniel B. Rice, *Repugnant Precedents and the Court of History*, 121 Mich. L. Rev. 577 (2023).

More recent decisions have formalized when a case gathering dust has turned into a zombie and cannot reasonably be assumed to still be good law “even as to an identical case.” *Ramos v. Louisiana*, 590 U.S. 83, 104 (2020). Taken together, those cases set three necessary conditions: the Court has (1) undercut the case’s reasoning; (2) confessed that it was an error or anomaly; and (3) never offset that shade by approvingly citing its central holding. *See id.*; *Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507, 538-39 (2022); *Janus v. AFSCME*, 585 U.S. 878 (2018).

Hill easily satisfies those three criteria. First, the Supreme Court has repudiated two premises necessary to *Hill*’s outcome—that legislative purpose convert a facially content-based speech restriction into a content-neutral one, and that government may suppress speech to spare listeners from feeling offended. *Compare* 530 U.S. at 718-19 & n.25, *with Reed*, 576 U.S. at 163-64; *see also Fellowship of Christian Athletes v. San Jose Unified Sch. Dist. Bd. of Educ.*, 82 F.4th 664, 686 n.8 (9th Cir. 2023) (en banc). Second, the Court in *Dobbs* denounced *Hill* as an anomaly that had “distorted First Amendment doctrines.” *Id.* at 287 & n.65. Third, the

Court has sometimes cited *Hill* just like it sometimes cites *Plessy*, but like *Plessy* never approvingly.

Accordingly, *Hill* is a zombie precedent, and the City is walking dead into a trap by making an “unreasonable” assumption that *Hill* would still control this case even if the challenged ordinance were as identical to Colorado’s statute as the City says. *Ramos*, 590 U.S. at 104. That unreasonableness is only exacerbated by several important differences between the two supposedly identical laws, each of which independently renders the ordinance unconstitutional under *Hill*’s own reasoning.

B. If *Hill* is not a zombie, its reasoning compels, not fore-closes, relief.

Even if *Hill* were still good law, precedent on precedent requires courts to treat unlike cases differently when they differ in analytically important ways from like cases. *See* Frederick Schauer, *Precedent*, 39 Stan. L. Rev. 571, 576-601 (1987).

Here, an ordinance the City claims is materially indistinguishable from the Colorado statute upheld in *Hill* in fact barely resembles it. Although the City and the abortion activists it worked with to draft the ordinance were careful to *include* a Colorado-style eight-foot bubble zone in it, they then piled on additional speech restrictions that were completely

absent in *Hill* and appear to have no analogue anywhere in America. Three of those differences are serious enough that any one of them alone would mean *Hill* does not foreclose relief in this case.

1. Dissimilarity #1: Evidence of public danger

To justify a speech restriction on public safety grounds, the City must have at least *some* evidence a public safety danger actually exists. The City reads *Hill* to dispense with that requirement. *See* Resp.Br. at 27. It does not. For more than half a century and in widely divergent First Amendment contexts, the Supreme Court has held governments’ feet to the fire to show that “the harms it recites are real” and that the speech restrictions in put in place will materially reduce them. *Junior Sports Mags.*, 80 F.4th at 1117; *see, e.g., Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 664 (1994); *Tinker v. Des Moines*, 393 U.S. 503, 508 (1969).

Hill did not carve out an evidentiary free pass, and the City tellingly can point to nothing in the opinion to support a view that it did. To the contrary, the Court’s grilling of Colorado during oral argument and tailoring analysis presupposed a concrete record of confrontations and clinic access problems—and even *then* turned on the fit between the means and demonstrated harms. *See* 530 U.S. at 725-28. By contrast, as

mentioned above, San Diego concedes its ordinance was “not reactionary” to any present-day harms. And its answering brief, like its filings before the district court never tie vague generalizations about considerable and mounting harm to any credible evidence of such harm. *See* Resp.Br.19 (citing 3-ER-371); *cf. McCullen*, 573 U.S. at 494.

Hence, *Hill* does not control the outcome of this case unless (1) the City does not need to provide any evidence of a present-day, local public safety risk (it does) or (2) today’s risk profile outside the ordinance’s covered facilities is virtually identical to that in early-1990s Colorado (record evidence demonstrates it is not). This difference alone therefore defeats the City’s reliance on *Hill*.

2. Dissimilarity #2: Rush to suppress speech

Even if the City were right (it is not) that a government needs no evidence of danger to justify silencing speech in the name of public safety, *Hill* still would not control the outcome of this case. Colorado adopted its bubble zone statute only after *years* of unsuccessfully trying narrower interventions amid sustained statewide unrest. San Diego, in contrast, immediately imposed sweeping speech limits without examining even one alternative—and not as a sledgehammer solution to a crisis but as a

scalpel to excise pro-life speech from the public square. *See* Resp.Br. at 25.

The difference in approaches is analytically important because the Supreme Court protects sidewalk speech from being restricted absent an unavoidable need to do so. *See Hoyer v. City of Oakland*, 653 F.3d 835, 839 (9th Cir. 2011). “If the First Amendment means anything,” it reminds governments susceptible to shooting first and asking questions later in the face of perceived danger, “it means that regulating speech must be the last—not first—resort.” *Thompson v. W. States Med. Ctr.*, 535 U.S. 357, 373 (2002). Thus, if a less restrictive alternative would serve the Government’s purpose, the legislature must use” it. *United States v. Playboy Entm’t Grp., Inc.*, 529 U.S. 803, 813, 815-17 (2000); *accord McCullen*, 573 U.S. at 494-97); *accord McCullen*, 573 U.S. at 494-97.

San Diego’s argument that no “staged or escalating measures” are required misreads even the cases it relies on. *See* Resp.Br. at 29. The City vaguely points at *Madsen* and *Schenck* in their entirety, but in both cases the Supreme Court upheld speech-restrictive measures in an analogous context of abortion war unrest only against the backdrop of failed less-restrictive efforts. *See Schenck v. Pro-Choice Network of W. N.Y.*, 519 U.S.

357 (1997); *Madsen*, 512 U.S. 753.

Every sister court of appeals agrees. *Cutting v. City of Portland*, 802 F.3d 79, 91-92 (1st Cir. 2015); *Centro de la Comunidad Hispana de Locust Valley v. Town of Oyster Bay*, 868 F.3d 104, 115-18 (2d Cir. 2017); *Bruni v. City of Pittsburgh*, 941 F.3d 73 (3d Cir. 2019); *Billups v. City of Charleston*, 961 F.3d 673 (4th Cir. 2020); *Hines v. Pardue*, 117 F.4th 769 (5th Cir. 2024); *Sisters for Life, Inc. v. Louisville-Jefferson Cnty.*, 56 F.4th 400 (6th Cir. 2022); *Price v. City of Chicago*, 915 F.3d 1107, 1118-19 (7th Cir. 2019); *Miller v. Ziegler*, 109 F.4th 1045, 1052-53 (8th Cir. 2024); *McCraw v. City of Okla. City*, 973 F.3d 1057 (10th Cir. 2020); *Otto v. City of Boca Raton*, 981 F.3d 854 (11th Cir. 2020); *Pursuing Am.'s Greatness v. FEC*, 831 F.3d 500 (D.C. Cir. 2016).

This Court, if anything, has endorsed a more maximalist view of how much governments must explore alternatives than sister circuits have. *See, e.g., Wasden*, 878 F.3d 1184; *Cuviello v. City of Vallejo*, 944 F.3d 816 (9th Cir. 2019). Even when sitting en banc earlier this year in *Project Veritas*, this Court asked the state whether it could have achieved its end promoted by a notice requirement by any narrower tools reasonably at its disposal. *See* 125 F.4th 929.

In short, *Hill*'s own tailoring logic presupposes incrementalism. San Diego's rush to speech restrictions—without evidence of danger and without first trying narrower tools—is a material difference between its ordinance and Colorado's statute upheld in *Hill*. That difference, too, even standing alone means *Hill* forecloses nothing in this case.

3. Dissimilarity #3: Far greater speech suppression not tailored to a known need at *any* covered facility.

The City appears to argue any speech restriction with an eight-foot bubble zone automatically passes muster because local conditions never matter in bubble zone tailoring analysis. *See* Resp.Br. at 29-30. The only support it offers is (1) that Colorado applied its bubble statewide “without requiring site-by-site adjustments” despite what the City surmises were differences in local conditions and (2) an out-of-circuit case whose reasoning is unpersuasive because it conflicts with *McCullen* and that, in any event, cannot be reconciled with this Court's holding in *Hoye*. Resp.Br. at 30 (citing *Price v. City of Chicago*, 915 F.3d 1107 (7th Cir. 2019)).

Hill's logic precludes it from being read as such a blank check, particularly if read in tandem with the Court's other landmark buffer and bubble zone decisions. *See Madsen*, 512 U.S. at 774; *Schenck*, 519 U.S. at 377. Rather than approve a generic blueprint for bubble zones, *Hill*

outlined workable design principles that, accurately assessed, can protect public safety given local conditions at minimal cost to speech rights when the combined effect of all overlapping restrictions are accounted for. The north star of that analysis: keep bubble zones as small as possible so that normal conversations are possible. *See Hill* Oral Arg. Trans. at 10-14, 47; *Hill*, 530 U.S. at 726-27.

The City's attempts to evade that design principle by invoking *Hoye* fall prey to the logical fallacy of assuming the truth of an converse: the actual location condition in *Hoye* was a sufficient, but not necessary, condition of unconstitutionality, and nothing in *Hoye* even hints that this Court meant as much.

More fundamentally, the City seems to confuse ceilings with floors. Against the backdrop of *Madsen* and *Schenck* and as later illuminated in *McCullen*, *Hill* clearly meant to signpost the *maximum* or near-maximum degree to which a government can silence sidewalk speech at a given public safety risk level. But San Diego misinterprets *Hill* as setting a floor, such that *any* eight-foot bubble zone anywhere anytime is automatically constitutional. The City can point to nothing in *Hill* that

actually supports its view, nothing does, and this is yet another reason *Hill* does not control the outcome of this case even in the abstract.

That conclusion is strengthened by the fact that San Diego has a wealth of more narrowly tailored remedies in preexisting law that have worked so well at preventing public danger outside covered facilities that there has been no blockade of an abortion clinic in San Diego since 1996 and no known report of even one person in recent years being harassed by a pro-lifer outside one of San Diego's abortion clinics. 3-ER-353-56.

Less restrictive alternatives indeed abound. City police have broad authority to break up crowds gathered on city sidewalks. *See* San Diego Mun. Code § 82.29. It is a crime under state law to obstruct an abortion clinic, Cal. Pen. Code § 423.2(a) & (c); *id.* § 423.3(a)-(b) & (d)-(e), and the U.S. Department of Justice long has vigorously prosecuted those who do. *See* 18 U.S.C. § 248(a)-(b); 3-ER-330-33. Trespass, unlawful assembly, refusing to follow a police officer's command, and even just being part of a "boisterous" crowd all subject a person to criminal liability in California. *See* Cal. Pen. Code §§ 407, 409, 416(a), 602(o). So are harassment, stalking, or interfering with a woman's reproductive right under the state constitution. *See id.* §§ 422(a); 422.6(a); 423.2(c); 646.9(a); *see also* Cal.

Const. § 1.1. Unlike the government in *Hill*, the City has not actually attempted to use such lesser restrictive means here.

V. Preliminary Injunction Is Warranted

The City offers just four lines of counterargument to the detailed legal analysis in the opening brief for why Lopez should be granted a preliminary injunction under the normal *Winter* factors. Pl.Op.Br. at 68-69; see *Winter v. Nat'l Res. Def. Council, Inc.*, 555 U.S. 7 (2008). Waiving all other arguments, the City posits only that “Appellants’ claimed likelihood of success depends on overturning decades-old Supreme Court precedent.” Resp.Br. at 46. As detailed above, no part of that statement can withstand the slightest scrutiny. The injunction should issue.

CONCLUSION

For the foregoing reasons, this Court should reverse the district court’s dismissal order and remand with instructions to grant Lopez’s motion for preliminary injunction, or otherwise reverse and remand for further proceedings.

Respectfully submitted,

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