No. 09-16753

In the
United States Court of Appeals for the
Ninth Circuit

WALTER B. HOYE, II,

Plaintiff-Appellant,

v.

CITY OF OAKLAND,

Defendant-Appellee.

On Appeal from the United States District Court
for the Northern District of California

AMICUS BRIEF OF CALIFORNIA WOMEN'S LAW CENTER IN SUPPORT OF APPELLEE AND URGING AFFIRMANCE; JOINING IN THIS AMICUS BRIEF ARE THE BLACK WOMEN'S HEALTH PROJECT, THE CONNECTICUT WOMEN'S EDUCATION AND LEGAL FUND, THE FEMINIST MAJORITY FOUNDATION, EQUAL RIGHTS ADVOCATES, LEGAL MOMENTUM, LEGAL VOICE, THE CALIFORNIA NATIONAL ORGANIZATION FOR WOMEN, PHYSICIANS FOR SOCIAL RESPONSIBILITY-LOS ANGELES, THE SOUTHWEST WOMEN'S LAW CENTER, THE WOMEN'S LAW PROJECT, THE WOMEN'S LAW CENTER OF MARYLAND

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1, amicus California Women's Law Center states that it has no parent corporation, and no publically held corporation holds 10% or more of its stock.

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INTEREST OF AMICUS AND CONSENT TO FILE BRIEF

The California Women's Law Center (CWLC) is a statewide, nonprofit law and policy center specializing in the civil rights of women and girls. CWLC's issue priorities are violence against women, reproductive justice, gender discrimination, and women's health. For over 20 years, since its inception, CWLC has strongly advocated for a woman's ability to exercise her reproductive rights and authored numerous amicus briefs, articles, and legal education materials in furtherance of this basic and fundamental right.

CWLC's interest in this litigation is that the attack on Oakland Municipal Code § 8.52 ("the Ordinance"), if successful, will detrimentally affect women from exercising this very basic right.

CWLC files this brief to highlight the crucial protections the Ordinance provides to the health and safety of women by ensuring that they have safe and unencumbered access to reproductive health care facilities.

This brief is being filed with consent of the parties.

CWLC is joined in this brief by the following supporting Amici, each of whose statement of interest is set forth below:

California Black Women's Health Project

Founded in 1994, the California Black Women's Health Project (CABWHP) is the only statewide organization solely devoted to improving the health of Black

women and girls via policy, advocacy, education and outreach. CABWHP is a leading voice in the reproductive justice movement in California and nationally. We believe that Oakland Municipal Code Section 8.52 provides crucial protections to the health and safety of women by ensuring that they have safe unencumbered access to reproductive health care facilities.

The Connecticut Women's Education and Legal Fund

The Connecticut Women's Education and Legal Fund (CWEALF) is a non-profit women's rights organization dedicated to empowering women, girls and their families to achieve equal opportunities in their personal and professional lives. CWEALF defends the rights of individuals in the courts, educational institutions, workplaces and in their private lives. Since its founding in 1973, CWEALF has provided legal information and conducted public policy and advocacy to advance women's rights. Throughout our history, we have defended women's access to full reproductive health services.

The Feminist Majority Foundation

The Feminist Majority Foundation (FMF) is a national, non-profit organization founded in 1987 and dedicated to women's equality, reproductive health, and non-violence. Since 1989, FMF has run the largest national clinic access project of its kind in the U.S., leading efforts nationwide to keep women's health clinics open in the face of violence and intimidation. FMF and its leaders

have engaged in significant litigation on behalf of clinic access for over 25 years, and FMF supported the litigation team in the Supreme Court bubble zone case, *Madsen v. Women's Health Ctr., Inc*. FMF has a strong interest in the protection of staff and patients at women's health clinics and joins in this brief in support of women in the Oakland area who deserve to receive health services in safety and without interference and threats.

Equal Rights Advocates

Equal Rights Advocates (ERA) is a San Francisco-based women's rights organization whose mission is to protect and secure equal rights and economic opportunities for women and girls through litigation and advocacy. Founded in 1974, ERA has participated as amicus curiae in scores of cases involving the interpretation and application of procedural and substantive laws affecting women in the state and federal courts.

Legal Momentum

Legal Momentum (formerly NOW Legal Defense and Education Fund) has worked to advance women's rights for nearly forty years. Legal Momentum advocates in the courts and with federal, state, and local policymakers and other stakeholders to combat gender discrimination and secure women's equal rights. Legal Momentum supports efforts to protect safe access to reproductive health services, and has litigated numerous cases involving clinic violence including

Schenck v. Pro-Choice Network, 519 U.S. 357 (1997), and *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263 (1993), and intervened on behalf of doctors, women and clinics in many cases to defend the Freedom of Access to Clinic Entrances Act against constitutional challenges. Legal Momentum also has submitted amicus briefs on behalf of organizations that support women's equality in abortion cases including *Ayotte v. Planned Parenthood*, 126 S. Ct. 961 (2006), and *Stenberg v. Carhart*, 530 U.S. 914 (2000).

Legal Voice

Legal Voice, formerly known as the Northwest Women's Law Center, is a regional non-profit public interest organization that works to advance the legal rights of all women through public impact litigation, legislation and legal rights education. Since its founding in 1978, Legal Voice has been dedicated to protecting and expanding women's reproductive rights, and has long focused on the threats to women's access to safe and legal abortion. Toward that end, Legal Voice has participated as counsel and as amicus curiae in cases throughout the Northwest and the country to help ensure that women have the right to self-determination and bodily autonomy. Legal Voice obtained the first injunction in the country that protected all women's health clinics in a state, and effectively stopped blockades by bringing contempt actions against blockaders who refused to obey the court's injunction. Similarly, Legal Voice was a leader in successfully

defeating a Washington citizen initiative that would have banned certain abortion procedures. Legal Voice remains involved in legislative and litigation efforts that seek to protect women's reproductive rights, and serves as a regional expert and leading advocate for reproductive freedom.

The California National Organization For Women

The National Organization for Women ("NOW") is the largest organization of feminist activists in the United States. Since its founding in 1966, NOW's goal has been to take action to bring about equality for all women. NOW works to eliminate discrimination and harassment in the workplace, schools, the justice system, and all other sectors of society; secure abortion, birth control and reproductive rights for all women; end all forms of violence against women; eradicate racism, sexism and homophobia; and promote equality and justice in our society. The California National Organization For Women ("CANOW") is NOW's California chapter.

Physicians for Social Responsibility-Los Angeles

Physicians for Social Responsibility-Los Angeles ("PSR-LA") is a non-profit organization dedicated to reducing threats to public health related to nuclear weapons and environmental toxins. Representing over 4,000 physicians, health professionals, and concerned residents in Southern California, PSR-LA informs the medical community and policymakers about threats to community health, builds

coalitions with state-wide and national organizations, and strengthens local community organizations to engage in meaningful public health and environmental advocacy. PSR-LA shares a responsibility with other physicians, health advocates and policymakers to create solutions that improve the health of all Californians. We combine our commitment to science, public health, advocacy and social justice to accomplish this. PSR-LA strongly believes that all women have the right to reproductive freedom and choice. All women, no matter their social or economic circumstances, must have the right to safe and unencumbered access to reproductive health care facilities because without such access their health and safety are threatened.

The Southwest Women's Law Center

The Southwest Women's Law Center is a nonprofit women's legal advocacy organization based in Albuquerque, New Mexico. Its mission is to create the opportunity for women to realize their full economic and personal potential by eliminating gender discrimination, helping to lift women and their families out of poverty, and ensuring that women have control over their reproductive lives by obtaining access to comprehensive reproductive health services and information. The Southwest Women's Law Center has worked since its inception to eliminate barriers to reproductive health services.

The Women's Law Project

Founded in 1974, the Women's Law Project is a 501(c)(3) non-profit legal advocacy organization with offices in Philadelphia and Pittsburgh. The mission of the Law Project is to advance the legal, social and economic status of women and girls through direct legal representation, advocacy, public education, and individual legal counseling. The Law Project has expertise in legal issues concerning reproductive health care and has a substantial record of achievement in protecting access to reproductive health services. The Law Project represented women's health care providers in several notable reproductive rights cases, including *Planned Parenthood v. Casey*, 505 U.S. 833 (1992) (upholding core of Roe v. Wade), *Ferguson v. City of Charleston*, 532 U.S. 67 (2001) (challenging hospital-based police searches of pregnant women suspected of drug use); *Elizabeth Blackwell Health Center for Women v. Knoll*, 61 F.3d 170 (3d Cir. 1995), cert. denied, 516 U.S. 1093 (1996) (challenging state law requiring rape and incest survivors to make police reports and requiring women with life-threatening pregnancies to have condition certified by two physicians in order to be eligible for Medicaid-funded abortions); and *Roe v. Operation Rescue*, 54 F.3d 133 (3d Cir. 1995) (obtaining and enforcing injunctive relief against anti-abortion protesters). The Law Project has worked continually to protect women's health care providers from violent, obstructive, and physically confrontational protest activity. The Law

Project frequently consults with staff and volunteer escorts at women's health care facilities that are under siege by protesters. In response to a lengthy history of harassment, intimidation, and threatening protests at Pittsburgh women's clinics, in 2005 the Law Project was instrumental in the adoption of Pittsburgh's Medical Safety Zone Ordinance, which provides a 15-foot fixed buffer zone around clinic entrances. The Law Project joins this amicus brief because the limited protective zone established by the challenged Oakland ordinance is a reasonable regulation necessary to protect the health and safety of patients and medical staff and preserve access to health care that is constitutionally protected.

The Women's Law Center of Maryland

The Women's Law Center of Maryland, Inc. is a nonprofit, membership organization established in 1971 with a mission of improving and protecting the legal rights of women, particularly regarding family law, domestic violence, reproductive rights and employment law. Through its direct services, advocacy and educational efforts, the Women's Law Center of Maryland protects women's legal rights to insure their full access to opportunities and resources that promote their safety, health and financial well-being.

I. <u>SUMMARY OF THE ARGUMENT</u>

The Ordinance protects the health and safety of women seeking medical assistance from local reproductive health care facilities in the City of Oakland ("Oakland" or "the City") and the doctors and staff who work there. Access to Oakland's reproductive health care facilities (like access in so many other cities) was made tense and often dangerous by aggressive anti-abortion protests and confrontations. Clinic patients were forced to endure highly invasive, personal protests at close physical proximity. So too were clinic personnel. Even attempts by protestors at so-called "peaceful," one-on-one conversations with patients proved stressful and menacing because the patients neither wanted nor were prepared to be so intimately approached by complete strangers on their way to seek private, reproductive medical care. Intimate approaches by strangers are distressing and threatening in general but particularly so given the violent backdrop that unfortunately surrounds reproductive health care facilities in this country. These unwanted, close physical encounters were detrimental to the health and safety of patients and clinic personnel.

The Ordinance was enacted to address these problems and ensure safe access to reproductive health care facilities. It prohibits the use of force, threat of force, or physical obstruction to harass, intimidate, or interfere with anyone providing or

obtaining reproductive health services, and prohibits, within 100 feet of the entrance of a reproductive health care facility, individuals from knowingly approaching, within eight feet, another person without consent for the purpose of counseling, harassing, intimidating, or interfering with that person seeking reproductive health care services. Oakland Mun. Code § 8.52.

In essence, the Ordinance provides patients seeking reproductive medical care with a few feet of breathing space from protesters and their speech by requiring an eight-foot physical separation between protesters and their patient targets. The Ordinance does not restrict any speech or communication. Protesters' messages, signs, pictures, and other activities are readily communicated, just from a distance of eight feet. Given the harmful effects of unwanted, physical bombardment and intrusions on the physical and psychological health of patients and medical personnel, Oakland has a valid and significant interest in protecting its citizens by providing for safe and unencumbered access to reproductive health care services. The Ordinance is a reasonable regulation of the time, place, and manner of speech, which is narrowly tailored and necessary to protect the City's significant interest.

II. ARGUMENT

A. The Ordinance Was Passed Against a Backdrop of Clinic Violence and Aggressive Anti-Abortion Protest Activities

1. Harassment and Obstruction of Oakland Clinic Access

The Ordinance's legislative history reveals the stark reality for people seeking access to reproductive health care facilities. Those who enter and exit reproductive health care facilities in Oakland are regularly met with aggressive, harassing, and intimidating invasions of their personal space. As articulated by the City, patients and staff at the Oakland clinics are routinely verbally abused and physically threatened. Opposition Brief of Appellee City of Oakland ("City Br.") at 3-5. Among other things, patients are yelled at, chased, and accused of murder. *Id.*

Appellant, himself, approached within two feet of patients to hand out fliers and harass them. *Id.* at 8. The record bears out that Appellant blocked patients on the sidewalk, compelling them to walk around him to access the health care facility. ER335 (Ali Decl., ¶20). Appellant characterizes these approaches as benign attempts to "engage in a friendly conversation" with women considering abortion. Appellant's Br. at 44; *see also id.* at 4. The context of such behavior, however, reveals its undeniably aggressive and intimidating nature.

Patients are terrified. City Br. at 5. It was common for patients to call the clinic after arriving there and inform personnel that they were scared to exit their

cars. *Id.* at 4. These patients would often cancel their appointment or reschedule them for several weeks later. ER195 (Barbic Decl., ¶26); ER255 (Comy Decl., ¶14); ER272 (Laden Decl., Exhibit ("Ex.") 4 at 4). In one instance – even after the Ordinance was enacted – a rape survivor who had an appointment to abort the pregnancy resulting from the rape was too afraid of the protestors to come to a clinic for her appointment. ER338-39 (Terry Decl., ¶¶13-14).

Oakland clinic doctors and staff also feel physically threatened by the protestors and worry for their safety. City Br. at 6-7. The anti-abortion protestors have published the names, photos, and phone numbers of clinic doctors to anti-abortion groups. ER197 (Barbic Decl., ¶47). Doctors have had the tires on their cars slashed. ER255 (Comy Decl., ¶18). One clinic doctor had the brake lines of his car sabotaged and lost the ability to brake while driving on the highway. *Id*. at ¶19. Doctors are so harassed that they park their cars in places that allow them to avoid using the public entrance to the clinic (an option not available to patients). City Br. at 6-7. The Ordinance is necessary because physicians "so fear for their safety that they wear bulletproof vests when entering and exiting the clinic." ER272 (Laden. Decl., Ex. 4 at 4). Indeed, the situation is so dire that for security, an FBI agent was assigned to one clinic and the doctors who worked there. ER255 (Comy Decl., ¶15). As one clinic executive director described, the anti-abortion protestors are "so aggressive and invasive, that the [clinic] was forced to stop

operating on Saturdays due to excessive protesting." ER254 (Comy Decl., ¶7).

2. History of Violence and Aggression at the Oakland Clinics

These acts of violence, intimidation and aggression are not isolated incidents. There is a long history of violence and dangerous protest at the Oakland clinics. In 1989, for example, anti-abortion protestor, James Charles Kopp, broke into Family Planning Specialists during business hours and chained himself to an ultrasound machine, screaming "mommy don't kill me." ER197 (Barbic Decl., ¶39). Nine years later he murdered a reproductive health care doctor in New York. City Br. at 5. In 2006, anti-abortion protestor, Fred D'Alesio stood in front of an Oakland clinic blasting an air horn while patients attempted to enter the clinic. *Id.* A court issued a stay away order against him because of this invasive conduct. ER197 (Barbic Decl., ¶40). Another protestor had a stay away order issued against him after he threw an unknown substance at clinic personnel. *Id.* at ¶43.

3. Systemic Anti-Abortion Violence

The protest activities in front of the Oakland clinics are part of a larger nationwide trend in increasingly violent anti-abortion protest. One need only consider the recent murder of abortion provider Dr. George Tiller to understand that the threat of violence and intimidation is real. *See* Robin Abcarian & Nicholas Riccardi, *Abortion Doctor George Tiller Is Killed; Suspect in Custody*, L.A. TIMES, June 1, 2009, *available at* http://articles.latimes.com/2009/jun/01/nation/na-tiller1.

Of the 274 clinics that responded to the National Clinic Violence Survey in 2008, approximately 49% reported experiencing protestors who employ intimidation tactics such as noise disturbances and approaching/blocking cars. FEMINIST MAJORITY FOUND., 2008 NATIONAL CLINIC VIOLENCE SURVEY 5 (2009), *available at* http://feminist.org/research/cvsurveys/clinic_survey2008.pdf ("FMF 2008 CLINIC VIOLENCE SURVEY"). Approximately 20% of these clinics experienced severe violence, such as blockades, invasions, bombings, arson, chemical attacks, stalking, physical violence, gunfire, bomb threats, death threats and arson threats. *Id*. at 2.

B. The Ordinance Protects Safe Access to Reproductive Health Care Services by Requiring an Eight-Foot Separation Between Protestors and Their Patient Targets

The City took appropriate action to respond to the violent and aggressive protests at Oakland reproductive health care clinics. The City enacted the Ordinance to protect the health and safety of its citizens – particularly the patients of these clinics – by requiring an eight-foot separation between protestors and their patient targets within 100 feet of the reproductive health care facilities. This minimal eight-foot separation serves the City's interest in protecting "safe and unimpeded access to reproductive health care services" which it believed was "critically and uniquely important to the public['s] health, safety, and welfare." ER59 (Ordinance); ER275 (Laden Decl., Ex. 4 at 7).

The detrimental effects of unwanted, forced physical proximity on the patients, doctors, and staffs of health care facilities is well established in the record, in jurisprudence, and in academic research. Such protests cause patients to suffer health problems at all stages of treatment. They also hinder the provision of quality health care and put clinic personnel at risk of harm.

1. **Medical Facilities Are Unique Environments that Warrant Special Protections**

Oakland was well within its right to regulate access to its reproductive health care facilities. As the record discussed above makes crystal clear, forced close physical proximity constitutes a form of "bombardment" that is extremely difficult to escape. *See supra* pp. 11-14. Patients cannot avoid such unwanted contact with protestors by circumventing the forum outside medical facilities; they must pass through that forum if they are to receive care from licensed providers. *See Hill v. Colorado*, 530 U.S. 703, 718 (2000) ("[O]ur cases have repeatedly recognized the interests of unwilling listeners in situations where 'the degree of captivity makes it impractical for the unwilling viewer or auditor to avoid exposure.'" (citation omitted).

As this court recognized in *Menotti v. City of Seattle*, 409 F.3d 1113 (9th Cir. 2005), "[t]he Supreme Court has declared 'it is a traditional exercise of the States' police powers to protect the health and safety of their citizens.'" *Id*. at 1131

(*quoting Hill*, 530 U.S. at 715). This is particularly true for patients seeking access to health care facilities. *Kuba v. 1-A Agric. Ass'n*, 387 F.3d 850, 858 n.9 (9th Cir. 2004) ("[A]n interest in controlling the flow of traffic at a performance venue is less weighty than, and thus may not justify as restrictive speech restrictions as, for example, securing access to hospitals."). Indeed, the District Court, following the Supreme Court's treatment of a nearly identical regulation in *Hill*, recognized that the government's power to protect the health and safety of its citizens "may justify a special focus on unimpeded access to health care facilities and the avoidance of potential trauma to patients associated with confrontational protests." ER19 (8/4/09 Memorandum and Order on Cross-Motions for Summary Judgment at 17 (*quoting Hill*, 530 U.S. at 715)).

Through the passage of the Ordinance, Oakland recognized the importance of protecting the use and function of its reproductive health care facilities. A safe, comfortable physical environment is paramount to the provision of quality medical care. Lisa M. Keder, *Best Practices in Surgical Abortion*, 189 AM. J. OBSTETRICS & GYNECOLOGY 418, 419 (2003) ("Keder").[1] Indeed, it is well recognized in First Amendment jurisprudence that medical facilities are unique environments:

> Hospitals, after all, are not factories or mines or assembly plants. They are hospitals, where human ailments are

[1] CWLC will provide copies of all journal articles and books cited in its Amicus Brief at the Court or Appellant's counsel's request.

> treated, where patients and relatives alike often are under emotional strain and worry, where pleasing and comforting patients are principal facets of the day's activity, and where the patient and his family . . . need a restful, uncluttered, relaxing, and helpful atmosphere.

Madsen v. Women's Health Ctr., Inc., 512 U.S. 753, 772 (1994) (citations omitted). As Justice Souter recognized in his concurring opinion in *Hill*, "[n]o one disputes the substantiality of the government's interest in protecting people already tense or distressed in anticipation of medical attention (whether an abortion or some other procedure) from the unwanted intrusion of close personal importunity by strangers." 530 U.S. at 737 (Souter, J., concurring).

Unwelcomed invasions of personal space may be especially intrusive for women and girls seeking access to reproductive health care services. *See, e.g.*, *McGuire v. Reilly*, 260 F.3d 36, 44 (1st Cir. 2001) (finding "solid evidence that abortion protesters are particularly aggressive and patients particularly vulnerable as they enter or leave [reproductive health care facilities]"). Many such patients are particularly vulnerable to physical and emotional stress because of the sensitive nature of the medical care they seek to receive. *See* Nancy Adler et al., *Psychological Factors in Abortion*, 47 AM. PSYCHOLOGIST 1194, 1197 (1992) . This is especially true for those dealing with unwanted pregnancy and those (particularly minors) who lack experience with pelvic exams and medical procedures generally. Uta Landy, *Abortion Counseling -- A New Component of*

Medical Care, 13 CLINICS IN OBSTETRICS & GYNAECOLOGY 33, 38 (1986).

2. <u>Unwanted Invasions of Personal Space Are Intimidating and Medically Dangerous While a Patient Is Seeking Access to Reproductive Health Care Services</u>

Aggressive, harassing, and intimidating confrontations that invade patients' zones of personal space when accessing reproductive health care facilities adversely affect patients' physical, psychological and physiological health, and hinder the safe provision of medical care.

a. <u>Unwanted Invasions of Personal Space Increase Stress and Trigger Distinct Physiological Reactions</u>

A zone of personal space is essential to sustain privacy and to provide a buffer against physical or psychological threat. "We [] know from laboratory and field studies that involuntary physical proximity to another individual elevates physiological stress." Gary W. Evans & Richard E. Wener, *Crowding and Personal Space Invasion on the Train: Please Don't Make Me Sit in the Middle*, 27 J. ENVTL. PSYCHOL. 90, 91 (2007) (invasion of personal space creates "discomfort" in people). "Public behavior is different than personal, private or professional behavior. An approach in [public], if you don't know the person, is normally interpreted as a threat. A rapid approach within personal distances by a stranger [is] usually . . . interpreted [only] as a hostile act." Warren M. Hern, *Proxemics: The Application of Theory to Conflict Arising from Antiabortion Demonstrations,*

12 POPULATION & ENV'T: J. INTERDISC. STUD. 379, 383 (1991) ("Hern") (brackets in original) *quoting* Hearing on Motion for Preliminary Injunction, *Buchanan v. Jorgensen*, No. 87-Z-213 (D. Colo. 1987) (testimony of Dr. Edward T. Hall, Professor Emeritus of Anthropology, Northwestern University).

In the United States, the necessary amount of personal space to maintain a sense of security and safety when encountering strangers in public is a minimum of eight feet. *See* Deborah A. Ellis & Yolanda S. Wu, *Of Buffer Zones and Broken Bones: Balancing Access to Abortion and Anti-Abortion Protestors' First Amendment Rights in* Schenck v. Pro-Choice Network, 62 BROOK. L. REV. 547, 581-82 (1996); Hern at 383 (discussing the seminal work on personal space theory by anthropologist Dr. Edward Hall, who determined that the accepted social distance between speakers in intimate relationships is up to 18 inches, while expected distance between complete strangers in public varied from 12 feet or more); *see also* Catherine Beaulieu, *Intercultural Study of Personal Space: A Case Study*, 34 J. APPLIED SOC. PSYCHOL. 794, 795 (2004) (also noting Hall's social distance theory and personal distance between strangers in public as over 12 feet). Violations of these expected norms are interpreted as threats, are considered hostile acts, produce psychophysiologic reactions, and reduce communication. Hern at 385, 380 (finding closer unwanted knowing invasions of personal space by strangers trigger "adrenergic 'fight or flight' reaction such as pallor, shaking,

sweating, papillary dilation, palpitations, hyperventilation, and urinary retention.”); IRWIN ALTMAN, THE ENVIRONMENT AND SOCIAL BEHAVIOR: PRIVACY, PERSONAL SPACE, TERRITORY, CROWDING 93 (1975) (“reactions to intrusion are typically negative. . . . discomfort, physiological arousal, flight reactions, and a variety of nonverbal behaviors occur, all designed to reestablish acceptable distances.”); s*ee also* Denise Polit & Marianne LaFrance, *Sex Differences in Reaction to Spatial Invasion*, 102 J. SOC. PSYCHOL. 59, 60 (1977) (study found that women were quicker to flee than men in spatial invasion paradigms).

“A close interpersonal distance in a context which is negatively toned will exacerbate the stress already experienced.” Hern at 384 *quoting* Hearing on Motion for Preliminary Injunction, *Buchanan v. Jorgensen*, No. 87-Z-213 (D. Colo. 1987) (testimony of Dr. Marianne LaFrance). Indeed, individuals crave even more distance or personal space in stressful or threatening circumstances. Michael A. Dosey & Murray Meisels, *Personal Space and Self-Protection*, 11 J. PERSONALITY & SOC. PSYCHOL. 93, 96-97 (1969); *see also* Gary W. Evans & Roger B. Howard, *Personal Space*, 80 PSYCHOL. BULL. 334, 341 (1973) (“Persons under stress exhibit greater personal-space zones.”); Vladimir J. Konečni et al., *Effects of a Violation of Personal Space on Escape and Helping Responses*, 11 J. EXPERIMENTAL SOC. PSYCHOL. 288, 289, 298 (1975) (personal space invasions by strangers are more discomforting and stressful than others).

Courts are well aware that "physical confrontations with protesters moments before receiving medical treatment, including surgical procedures, subject[s] patients to heightened stress and anxiety." *Planned Parenthood Shasta-Diablo, Inc. v. Williams*, 10 Cal. 4th 1009, 1023 (1995); *Operation Rescue-Nat'l v. Planned Parenthood of Houston & Se. Tex., Inc.*, 975 S.W.2d 546, 551 (Tex. 1998) ("patients would enter clinics visibly shaken, crying, nervous"); *Pro-Choice Network v. Project Rescue,* 799 F. Supp. 1417, 1427 (W.D.N.Y. 1992), *aff'd in part, rev'd in part sub nom. Pro-Choice Network v. Schenk*, 67 F.3d 359 (2nd Cir. 1994), *aff'd in part, rev'd in part* 519 U.S. 357 (1997) (women targeted during demonstrations "usually enter the medical facilities visibly shaken and severely distressed").

Studies reveal that patients suffer from psychological stress, including sweating, palpitations, anger, crying, or hyperventilation after being subjected to anti-abortion demonstrators; the more intimate and aggressive the contact the women have with the anti-abortion demonstrators, the more upset they become. *See, e.g.*, Brenda Major et al., AM. PSYCHOL. ASS'N, REPORT OF THE APA TASK FORCE ON MENTAL HEALTH AND ABORTION 84 (2008) *available at* http://www.apa.org/pi/women/programs/abortion/mental-health.pdf ("REPORT OF THE APA TASK FORCE ON MENTAL HEALTH AND ABORTION (2008)") (citing Catherine Cozzarelli & Brenda Major, *The Effects of Antiabortion Demonstrations*

and Pro-Choice Escorts on Women's Psychological Responses to Abortion, 13 J. SOC. CLINICAL PSYCHOL. 404 (1994) and Catherine Cozzarelli et al., *Women's Experiences of and Reactions to Antiabortion Picketing*, 22 BASIC AND APPLIED SOC. PSYCHOL. 265 (2000) ("Cozzarelli"), which found that the greater the number of picketers, the more aggressive the picketing that women encountered when entering an abortion clinic, and the more the women reported feeling upset by the demonstrators, the more depression they reported right after their abortion).

The record in this case reflects analogous symptoms of distress. Oakland clinic personnel notice a marked increase in the anxiety levels of women with appointments on days where protesters are present. City Br. at 5-6. According to an executive director of an Oakland clinic, "[t]he protestors severely damage a patient's emotional state. I have seen patients arrive at the clinic extremely upset. I would describe patients as 'visibly anxious' and 'inconsolable.' Their faces are red and tear-streaked from crying." ER195 (Barbic Decl., ¶22). She further states that, "I have seen a patient in hysterics, collapsed on the floor, crying uncontrollably for thirty minutes because of the protestors." *Id.* at ¶24

An eight-foot zone of separation between protestors and their patient targets is a minimal safeguard to mollify patient distress. Tellingly, patients' anxiety levels decrease when the protestors stay eight feet away. City Br. at 14.

b. **Patients Are Exposed to Serious Health Risks When Subjected to Unwanted Personal Space Invasions**

Patients are subject to serious medical risks when they suffer the physiological harms caused by unwanted forced physical proximity. There are surgical risks stemming from heightened stress. Pre-operative stress also leads to post-operative complications and adversely affects patient well-being. Finally, exposure to unwanted invasions of personal space causes some women to delay seeking reproductive health care services to avoid confrontations with protestors. Delayed procedures may be more painful and risky.

(1) **Preoperative Stress Increases Surgical Risk**

If a patient is forced to encounter unwanted physical proximity, she could likely experience serious complications from her medical procedures that would be extremely unlikely under other circumstances. Oakland clinic personnel note that stress and aggravation caused by protestors can elevate patients' blood pressure, a dangerous physiological precedent to surgery performed under general anesthesia. City Br. at 6. The patients who are not subjected to forced proximity communications do not exhibit the same elevated blood pressure and anxiety. ER306 (Quan Decl., ¶14).

The medical risks to patients who are challenged by forced proximity communications is not new to the courts. As the Supreme Court recognized in

Hill, “emotional confrontations may adversely affect a patient's medical care” by subjecting women to potential physical and emotional harm. 530 U.S. at 710. Other courts have also linked unwanted “in-your-face” demonstrations outside health care facilities to adverse health effects, such as increased surgical risks and increased levels of sedation. *See, e.g.*, *United States v. Scott*, 958 F. Supp. 761, 767 (D. Conn. 1997) (finding that “[s]houting, pushing, blocking and otherwise interfering with a patient's access to [a health care facility] can increase the patient's stress level, and thereby increase the risks of a subsequent abortion procedure”); *see also Operation Rescue-Nat’l,* 975 S.W.2d at 551 (recognizing that patients exhibiting signs of heightened anxiety often require sedation).

Empirical medical and social science studies support these conclusions. A patient may already be experiencing stress when she comes in for pre-natal care, birth control, pregnancy tests, elective abortion services, genetic disorder abortion services, pelvic exams, or other counseling. The unwanted, close physical encounter with demonstrators can significantly exacerbate stress and negative affect in women. *See, e.g.*, Cozzarelli at 273-74. This increase in stress and negativity can have dangerous medical consequences. For example, patients who undergo abortions and other medical procedures under elevated levels of stress experience a higher degree of pain and are likely to have a more difficult procedure. *See* Dorit Pud & Amnon Amit, *Anxiety as a Predictor of Pain*

Magnitude Following Termination of First-Trimester Pregnancy, 6 PAIN MED. 143, 146 (2005) ("[A]nxiety levels seem to be the main factor influencing pain perception following the termination of a first-trimester pregnancy."). Stress related symptoms such as urinary retention make it difficult or impossible to perform a pelvic examination and determine uterine size or the presence of any co-existing pelvic pathology, both of which are essential in the preoperative evaluation. Hern at 380-81.

Moreover, "[r]aised anxiety has important clinical implications as it has been demonstrated to have an adverse impact upon anesthetic requirements, postoperative recovery, as well as increasing the likelihood of postoperative nausea and vomiting. Numerous studies have demonstrated a positive correlation between anxiety and pain with less anxious patients experiencing less pain." Eloise Carr et al., *Patterns and Frequency of Anxiety in Women Undergoing Gynaecological Surgery*, 15 J. CLINICAL NURSING 341, 342 (2006) (citations omitted); Keder at 420-21. "[A] person's pre-operative emotional, cognitive and cardiovascular state influences the induction of anesthesia, operative problems and short-term recovery . . . High levels of heart rate and blood pressure immediately prior to the induction of anesthesia is a clinically undesirable state… ." Janice Abbott & Paul Abbott, *Psychological and Cardiovascular Predictors of Anaesthesia Induction, Operative and Post-Operative Complications in Minor Gynaecological Surgery*, 34 BRIT. J.

CLINICAL PSYCHOL. 613, 621 (1995). Multiple studies have found that "the majority of the deaths from legal abortions between 1983 and 1987 were associated with general anesthesia during the first trimester, a time usually associated with lowest overall risk." Herschel W. Lawson et al., *Obstetrics: Abortion Mortality, United States, 1972 through 1987*, 171 AM. J. OBSTETRICS & GYNECOLOGY 1365, 1371 (1994); Fritz-Ulrich Meyer, *Haemodynamic Changes Under Emotional Stress Following a Minor Surgical Procedure Under Local Anesthesia*, 16 INT'L J. ORAL & MAXILLOFACIAL SURGERY 688, 688 (1987) (noting that, in cases of "[u]nexplained cardiovascular reactions and fatalities" associated with local anesthesia, "[i]mportant factors are fear, anxiety and stress.").

(2) **Postoperative Care Is Compromised by Preoperative Stress**

Emotional distress caused by forced physical proximity also influences a patient's ability to absorb information from the health care provider about the abortion procedure, post-abortion care, and mental health. *See* Glenda C. Polk-Walker, *Counseling Implications in a Client's Choice of Anesthesia During a First or Repeat Abortion*, 28 NURSING F. 22, 23 (1993). Indeed, "high preoperative fear or stress is predictive of a variety of poorer outcomes, including greater pain, longer hospital stays, more postoperative complications, and poorer treatment compliance." Janice K. Kiecolt-Glaser et al., *Psychological Influences on Surgical*

Recovery: Perspectives From Psychoneuroimmunology, 53 AM. PSYCHOL. 1209, 1214 (1998). Studies also show that being blocked by anti-abortion protestors elevates immediate post-abortion depression levels. *See* Cozzarelli at 274.

(3) **Delay in Obtaining Reproductive Health Care Services Because of Unwanted, Invasive, Confrontations with Protestors Causes Great Physical Harm**

Delay is a significant risk for women who are scared away by forced proximity encounters with demonstrators. The record demonstrates that many patients are deterred from entering the clinic because of anti-abortion protestors. Patients have been seen driving up to the clinic and then turning around after seeing protestors. ER334-35 (Ali Decl., ¶13). Patients frequently call the clinic to try to reschedule an appointment when they see protestors outside because they fear for their safety.[2] ER195 (Barbic Decl., ¶26); ER338 (Terry Decl., ¶9); *see also* ER305 (Quan Decl., ¶9). As one clinic's executive director noted, "when confronted by protestors, some clinic patients leave, only to return several weeks later, after they have entered the second trimester. These patients must then undergo a more complicated procedure. Clearly, the actions of the protestors directly affect the health and medical safety of patients." ER272 (Laden Decl., Ex. 4 at 4).

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[2] Since the Ordinance was passed, the clinic has not received phone calls from patients who cannot access the clinic because of the protestors. City Br. at 14.

These observations of the clinic executive director find support in empirical studies. Research reveals that "[g]estational age at the time of abortion [is] the strongest risk factor for abortion-related mortality… The lowest rates were among women who had their abortions in the first trimester of pregnancy, particularly within the first 8 weeks of pregnancy." Linda A. Bartlett et al., *Risk Factors for Legal Induced Abortion-Related Mortality in the United States*, 103 OBSTETRICS & GYNECOLOGY 729, 731 (2004) ("Bartlett"). The risk of death from legally induced abortions increases exponentially by 38% for each additional week of gestation. *Id*. Indeed, "*any* delay increases the risk of complications to a pregnant woman who wishes an abortion." Willard Cates et al., *The Effect of Delay and Method Choice on the Risk of Abortion Morbidity*, 9 FAM. PLAN. PERSP. 266, 268 (1977) (emphasis in original). "Because access to abortions even 1 week earlier reduces the risk of death disproportionately as gestational age increases, addressing this risk factor by further reducing the gestational age at which women have abortions may help to further reduce the risk of death." Bartlett at 735.

c. **<u>The Ordinance Protects Clinic Personnel</u>**

Unwanted invasions of personal space outside reproductive health care facilities also affect the provision of reproductive health care services. As the recent murder of physician George Tiller demonstrates, doctors and clinic staff have become the most visible targets of extreme acts of anti-abortion violence.

Anti-abortion extremists have placed doctors' names on wanted posters and have made physicians who perform abortions the subjects of "justifiable homicide" petitions. *Planned Parenthood of the Columbia/Willamette, Inc. v. Am. Coalition of Life Activists*, 41 F. Supp. 2d 1130, 1134 (D. Or. 1999), *aff'd in part*, 290 F.3d 1058 (9th Cir. 2002). In 2008, approximately 20% of all clinics experienced severe violence, defined as blockades, invasions, bombings, arson, chemical attacks, stalking, physical violence, gunfire, bomb threats, death threats, and arson threats. FMF 2008 CLINIC VIOLENCE SURVEY at 2. Nearly half of all clinics (49%) experience protestors who employ intimidation tactics such as noise disturbances and approaching/blocking cars. *Id*. at 5.

The Oakland clinics are not immune from such tactics. *See supra* pp. 11-13. Because no doctor should have to practice medicine under such conditions, many are choosing to stop providing reproductive health care services, such as abortions, entirely. "Studies of clinic personnel have found that employee levels of distress are highly correlated with protest activities at the clinics, with the highest levels of distress typically being reported by those who work at clinics experiencing the most protest activities." Brief of the American College of Obstetricians and Gynecologists and the American Medical Association for State of Colorado as *Amicus Curiae* Supporting Respondents at 13, *Hill*, 530 U.S. 703 *citing* Halvorson Boyd, *Surviving a Holy War: How Health Care Workers in U.S. Abortion*

Facilities Are Coping With Antiabortion Harassment, 72 (1990).

Not surprisingly, clinics experiencing high levels of violence, harassment, and intimidation had a substantially larger percentage of staff resign. In 2008, 32% of clinics experiencing high levels of violence lost physicians or staff members. FMF 2008 CLINIC VIOLENCE SURVEY at 6. Similarly, harassment and intimidation discourage younger physicians from entering the field, thereby further reducing the availability of reproductive health care services. David A. Grimes, *Clinicians Who Provide Abortions: The Thinning Ranks*, 80 OBSTETRICS & GYNECOLOGY 719, 721 (1992).

As it is, access to abortion services rests on the existence of a relatively small number of facilities willing and able to provide this specific type of health care. Clearly, harassment directed against reproductive health care facilities threatens the very availability of abortion services, as well as non-abortion reproductive health care services, for women who need them. Indeed, 11% of nonhospital providers have reported that physician shortages and other staffing problems reduce their ability to provide abortion services. Stanley K. Henshaw, *Factors Hindering Access to Abortion Services*, 27 FAM. PLAN. PERSP. 54, 59 (1995).

In addition, as is the case with the Oakland clinic that had to shut its doors on Saturdays, clinic closures (especially intermittent and weekend closures) make accessing reproductive health care services much more stressful and more difficult for women than is necessary.

C. The Ordinance Is Constitutional Because it Regulates Proximity Not Speech, Permits Escorts to Assist Embattled Patients, and Permits All Communication at a Normal Conversational Distance

The City of Oakland cogently explains in its Brief that the Ordinance is content- and viewpoint- neutral and narrowly tailored to serve the significant government interest in protecting safe access to reproductive health care. Without reiterating those arguments, we highlight the following points. The Ordinance restricts forced physical proximity, not speech, and is thus content- and viewpoint-neutral. Further, the presence of escorts does not render the Ordinance content- or viewpoint- based. With regard to the narrow tailoring, the eight-foot scope of the bubble zone is entirely reasonable.

1. The Ordinance Restricts Physical Proximity Not Speech

The Ordinance merely allows safe entry and exit from health care facilities by regulating the amount of space a protestor or demonstrator must maintain between himself and his target when the woman does not wish to permit a closer physical encounter.

Demonstrators and protestors are permitted to say whatever they please so long as they do not, within 100 feet of an entrance to a health care facility, come within eight feet of an individual who does not welcome the close physical proximity. Individuals are otherwise permitted to picket, chant, pray, yell, scream, sing, and participate in any manner of speech imaginable, including leafleting. Leafletters may stand anywhere on the health care facility property – even within inches of the entrance – offering literature and pamphlets to anyone who wants it.

The only proscribed conduct within the 100-foot zone is "willfully and knowingly approach[ing]" a specifically targeted person more closely than eight feet when such proximity is not welcomed by the target. Oakland Mun. Code § 8.52.030(B). The time and place at issue – just before seeking medical care − are when the patients are most vulnerable, thus making the restrictions essential in this situation.

As the Supreme Court determined in *Hill,* Government entities may regulate the forced, unwelcomed physical proximity of individuals specifically targeted by a protestor or demonstrator. *Hill*, 530 U.S. 703 (2000). The Ordinance does just so by enforcing an eight foot bubble of protection around those seeking to access reproductive health care facilities. So long as they respect the eight-foot restriction, protestors are free to say or display anything they want. For this reason, the cases cited by Appellant for the proposition that the Court should reject

restrictions on speech that are based on the emotive impact of speech on its audience, are inapt. *See* Appellant's Brief at 28 (citing *Boos v. Barry*, 485 U.S. 312, 320 (1988); *Center for Bio-Ethical Reform, Inc. v. Los Angeles*, 533 F.3d 780, 789 (9th Cir. 2008); *Crawford v. Lungren*, 96 F.3d 380, 385 (9th Cir. 1996)). In contrast to the proximity regulation here – *Boos*, *Center for Bio-Ethical Reform* and *Crawford* – all address the government's attempt to restrict speech. The regulation at issue here does not concern the emotive impact of speech on vulnerable women. It concerns the medical harm that patients suffer when forced to endure close, physical proximity to strangers, regardless of the speech content. *Cf. Boos*, 485 U.S. at 321 (finding that prevention of harm to "the dignity of foreign diplomatic personnel by shielding them from speech that is critical of their governments" was not a secondary effect but that "interference with ingress or egress" was) (emphasis added).

2. The Use of Escorts Does Not Render the Ordinance Content- or Viewpoint-Based

Volunteer escorts help patients enter reproductive health care facilities safely and, to the extent possible, without being harassed or threatened by protesters.[3]

[3] According to the REPORT OF THE APA TASK FORCE ON MENTAL HEALTH AND ABORTION (2008), one of the studies in the report found that the presence of escorts outside of a clinic helped mitigate the post-abortion upset and depression that many women suffer when they are confronted by antiabortion picketers and demonstrators as they enter a clinic.

City Br. at 6. Escorts only come to the clinics when protestors are present. *Id.* They wear orange vests, which are provided by the various clinics. *Id.* Patients are informed when they make their appointments who the escorts are, how to identify them, and why they will be approaching. ER338 (Terry Decl., ¶11); ER305 (Quan Decl., ¶8). When an escort sees a patient that appears to need assistance entering the facility, the escort announces his or her name, states that he or she is a clinic escort, asks permission to approach the patient, and assists her to the entrance of the facility. City Br. at 6.

Escort assistance is not thrust upon patients against their will. To the contrary, it is up to the patient to accept the assistance of the escorts. Appellant, therefore, mischaracterizes the escorts' role under the Ordinance by arguing that it permits "activist" escorts to approach patients without consent and engage in pro-choice speech, thereby rendering the Ordinance content- or viewpoint-based. *See* Appellant's Brief at 11-15, 19-23. The actual role of the escorts, in contrast, is to serve the basic objective of the Ordinance − to ensure safe access to reproductive health care services.

In *McGuire v. Reilly*, 260 F.3d 36 (1st Cir. 2001), the First Circuit Court of Appeals addressed a statute regulation that exempted health care clinic agents and employees from its floating six-foot buffer zone around reproductive health care facilities. The plaintiff there argued that the exemption for agents and employees

constituted impermissible viewpoint-based discrimination because clinic employees were allowed within the floating buffer zone in order to express pro-choice views, while the plaintiffs' pro-life views were suppressed. *Id.* at 45. The Court noted that the "secondary effects that the Act was designed to ameliorate include securing public safety in and around [reproductive health care facilities], preventing traffic congestion, and balancing free speech with the need to maintain a salutary atmosphere for those seeking access to medical services" and because there was no evidence that agents and employees caused such problems, "excluding those individuals does not undermine the legitimacy of the Act." *McGuire*, 260 F.3d at 46; *see also Hill*, 530 U.S. at 709-10 ("[I]t was a common practice to provide escorts for persons entering and leaving the clinics both to ensure their access and to provide protection from aggressive counselors."). Indeed, three years later, the First Circuit held that escorts telling patients they do not have to listen to protesters, escorts drowning out protesters, and escorts taking anti-abortion leaflets from patients is not pro-choice advocacy. *McGuire v. Reilly*, 386 F.3d 45, 64-65 (1st Cir. 2004).

The same is true here. The Ordinance was passed to protect safe access to health care facilities, including a patient's right to be free from unwelcome, forced, close physical proximity. When a patient's personal space is violated by protestors (even non-violent protestors) who are strangers to the patient and who use forced

proximity tactics to harass, threaten, counsel, or even just talk to a patient about her personal circumstances, the patient is more likely to have increased and elevated physiological stress and face greater medical danger and longer recovery time. Because patients expect to see helpful escorts, their approach is non-threatening and is not accompanied by negative effects. The use of escorts to assist patients in gaining safe access to the health care facilities furthers the purpose of the Ordinance. It does not undermine the purpose of the Ordinance, nor does it render the Ordinance content- or viewpoint-based.

3. Eight Feet Is a Normal Conversational Distance for Public Communications Between Strangers

By regulating only unwanted targeted physical intrusions within eight feet of patients while permitting all speech, even unwelcome speech, the Ordinance is narrowly tailored to the issue the City sought to address - protecting safe access to reproductive health care services. Despite Appellant's claim that being required to stay eight feet away from target patients "just wouldn't seem natural" and "would seem impolite," (City Br. at 12-13), eight feet *is* a normal conversational distance between strangers in public. *See supra* pp. 18-20; *U.S. v. Scott*, 187 F.3d 282, 288 (2d Cir. 1999) (eight feet is a "normal conversational distance" for public communications between strangers). What is impolite (not to mention threatening and harmful) is to violate these expected social norms, as appellant does, by

coming within two feet of patients. City Br. at 8. The Ordinance is narrowly tailored to prevent such actions.

III. CONCLUSION

The Oakland Ordinance serves the significant governmental interest of protecting safe access to reproductive health care services. It is content and viewpoint neutral, narrowly tailored and leaves open ample alternative means of communications.

Dated: February 23, 2010

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