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
THE HONORABLE CHARLES BREYER
UNITED STATES DISTRICT JUDGE

BRIEF OF *AMICI CURIAE* AMERICAN COLLEGE OF OBSTETRICIANS AND GYNECOLOGISTS, AMERICAN WOMEN'S MEDICAL ASSOCIATION, NATIONAL ABORTION FEDERATION, PHYSICIANS FOR REPRODUCTIVE CHOICE AND HEALTH, ET AL., IN SUPPORT OF CITY OF OAKLAND

JANET CREPPS
JENNIFER MONDINO
CENTER FOR REPRODUCTIVE RIGHTS
120 Wall Street, 14th Floor
New York, NY 10005
(917) 637-3600

Attorneys for Amici Curiae

CORPORATE DISCLOSURE STATEMENT

Each of the *amici curiae* herein is either an individual or a not-for-profit organization. None has any parent corporation. None has any capital stock held by a publicly traded corporation.

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DESCRIPTION OF *AMICI CURIAE*

Amici curiae submit this brief because they believe that the issues raised in the instant case are of vital importance to the protection of the reproductive rights of women and the rights of reproductive health care providers whose work ensures that women are able to exercise their fundamental Constitutional and human rights. The *amici* believe that the Court's resolution of this case will have implications far beyond the interests of the appellant Mr. Hoye and, bearing that in mind, urge the Court to uphold the district court's judgment that Oakland Ordinance No. 12860 (the "Oakland ordinance" or the "Ordinance") does not violate the First Amendment, either on its face or as applied. The following organizations join this brief as *amici curiae*:

Amicus Curiae **Abortion Care Network ("ACN")** represents independent abortion providers across the country. ACN supports the provision of abortion services by creating educational and networking opportunities aimed at supporting the work of independent abortion providers and encouraging the training of the next generation of providers. Many of ACN's members, including their physicians, staff and patients, have been the target of anti-abortion protests, harassment, and violence.

Amicus Curiae **American College of Obstetricians and Gynecologists (the "College")** is a non-profit educational and professional organization founded in

1951 and is the leading professional association of physicians who specialize in the healthcare of women. The College has more than 53,000 members, including 5,272 in California, of which 1,483 are located in or around Oakland. The College's objectives are to foster and stimulate improvements in all aspects of health care of women; to establish and maintain the highest possible standards for education; to foster the highest standards of practice in its relationship to public welfare; to promote high ethical standards in practice; and to promote publications and encourage contributions to medical and scientific literature. The College recognizes that the issue of support for or opposition to abortion is a matter of profound moral conviction to its members. The College, therefore, respects the need and responsibility of its members to determine their individual positions on abortion based on personal values or beliefs. As an organization, the College opposes the harassment of abortion providers and patients.

Amicus Curiae **American Medical Women's Association** is a national organization of women physicians, surgeons, and physicians-in-training dedicated to promoting the unique needs in women's health. AMWA's members include physicians who provide reproductive health care, and some of those members practice at facilities that have been the target of anti-abortion protests.

Amicus Curiae **American Nurses Association ("ANA")** is the largest nursing organization in the United States. ANA is a national, nonprofit

professional organization representing the interests of the nation's 2.9 million registered nurses. ANA develops the Code of Ethics for Nurses, Nursing's Social Policy Statement (the profession's social contract with society) and the Scope and Standards of Nursing Practice. ANA advocates for patient safety, workplace rights, workplace and environmental health and safety, and the public health. ANA supports health care clients' right to privacy, and the right to make decisions about personal health care based on full information. ANA promotes the principle that recipients of health care services have the right to make fully informed decisions about those services without duress or coercion. The Oakland ordinance protects the right to seek health care services without fear of intimidation.

Amicus Curiae **Center for Reproductive Rights** ("CRR") is a legal advocacy organization dedicated to the advancement of reproductive rights under the U.S. Constitution and as fundamental human rights. CRR has developed a special degree of knowledge and expertise in the international human rights framework as well as comparative law standards and U.S. constitutional law. In 2009, CRR conducted a human rights fact finding investigation in the U.S. which focused on and documented the widespread harassment, intimidation, and other

violations of their rights that reproductive health care providers are routinely subjected to by those protesting abortion rights.[1]

Amicus Curiae **Medical Students for Choice** is an organization of nearly 10,000 medical students and residents seeking comprehensive medical education including abortion training. Some of MSFC members receive training at reproductive health care facilities that are targeted by anti-abortion protestors, and some of MFSC's members intend to provide abortion services in their practices upon completion of their training.

Amicus Curiae **National Abortion Federation ("NAF")**, a non-profit organization founded in 1977, is the professional association of abortion providers in the U.S. and Canada. Its members include 400 nonprofit and private clinics, women's health centers, hospitals, and private physicians' offices. NAF members care for over half the women who choose abortion each year in the U. S., and NAF represents many members throughout California. NAF works closely with law enforcement to ensure the safety of its members.

Amicus Curiae **National Family Planning and Reproductive Health Association (NFPRHA)**, founded in 1971, is a non-profit membership organization established to assure access to voluntary, comprehensive and culturally sensitive family planning and reproductive health care services and to

[1] A copy of CRR's report, DEFENDING HUMAN RIGHTS: ABORTION PROVIDERS FACING THREATS, RESTRICTIONS, AND HARASSMENT, is attached hereto as Exhibit 1.

support reproductive freedom for all. The membership and board of NFPRHA consist of the legal grantees and delegates of the federal Title X family planning program, as well as community-based group and individual providers of family planning and reproductive health care in both the public service and the private sector. NFPRHA has 16 members in California, including health systems, university programs and individual providers, and the association represents reproductive health providers in the Oakland area. NFPRHA has an interest in this litigation because the Oakland ordinance at issue in this case impacts the clinical services offered by NFPRHA members and patients' access to these services.

Amicus Curiae **Physicians for Reproductive Choice and Health ("PRCH")**, founded in 1992, is a doctor-led national non-profit organization that advocates for evidence-based policies to improve access to comprehensive reproductive health care, including contraception and abortion. The active membership and board of PRCH consist of some of the nation's most renowned academic, research, and clinical physicians, including leaders in the field of obstetrics, gynecology, and abortion. PRCH has 864 physician members in California. Of these, 328 are located in the counties surrounding Oakland, California, and 37 members are practitioners in Oakland. PRCH has an immediate and substantial interest in this litigation because the Oakland ordinance at issue in this case directly impacts the clinical work and safety of PRCH's membership and

the access of patients to the reproductive health care services offered by PRCH's members.

INTRODUCTION

Even in the U.S., where safe, legal abortion services are generally available, women seeking to exercise their right to access abortion care and the doctors and staff working to provide such care face a range of different and substantial obstacles: among them, intimidation, harassment, and even physical violence, including murder, attempted murder, assault and battery, and stalking, perpetrated by anti-abortion protestors. In 2008, for example, 72 percent of 274 reproductive health clinics in the U.S. surveyed by the Feminist Majority Foundation reported being subjected to intimidation tactics, such as having anti-abortion protestors "routinely approach and block cars, take photos or videos of patients, and record license plates."[2] That same year, the National Abortion Federation, a professional association of abortion providers in the U.S. and Canada, compiled reports of 13 bomb threats, 8 clinic blockades, 19 incidents of stalking, 193 incidents of trespassing or vandalism, and 396 incidents of harassing phone calls or hate mail that occurred at reproductive health clinics during 2008.[3] These striking statistics notwithstanding, "the actual number of incidents for most categories most likely

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[2] CENTER FOR REPRODUCTIVE RIGHTS, DEFENDING HUMAN RIGHTS: ABORTION PROVIDERS FACING THREATS, RESTRICTIONS, AND HARASSMENT 25 (2009) ("CRR HUMAN RIGHTS REPORT") (attached hereto as Exhibit 1) (citing FEMINIST MAJORITY FOUNDATION, 2008 NATIONAL CLINIC VIOLENCE SURVEY 6 (2009) *available at* http://feminist.org/research/cvsurveys/clinic_survey2008.pdf (last visited Oct. 27, 2009))).

[3] CRR HUMAN RIGHTS REPORT, *supra* note 2, at 25 (citing NATIONAL ABORTION FEDERATION, NAF VIOLENCE AND DISRUPTION STATISTICS (April 2009), *available at* http://www.prochoice.org/pubs_research/publications/downloads/about_abortion/violence_stats.pdf (last visited Oct. 28, 2009)).

goes underreported."[4] The threat of violence to abortion providers in the U.S. is, unfortunately, severe and persistent: in May of 2009, Dr. George Tiller, a physician who provided abortions in Kansas, was shot and killed by an anti-abortion extremist.

In recognition of the need to balance the legitimate interest of protecting the rights and health of women with the right to freedom of expression, many states and localities—such as the City of Oakland—have enacted laws that place reasonable limitations on protest activity targeted at abortion providers, their staff, and their patients. These limited restrictions on the freedom of expression are necessary to ensure that women are able to exercise their fundamental rights and that reproductive health care providers are able to do their work without fear of intimidation and violence. Such restrictions have been consistently upheld as reasonable and necessary restrictions on the right to freedom of speech.

Bearing in mind the history of harassment, intimidation, and violence at reproductive health care facilities in the U.S., and the weight of the jurisprudence from U.S. courts, foreign courts, and international human rights bodies upholding laws like the ordinance at issue here, this Court should affirm the judgment of the district court and conclude that the Oakland Ordinance does not violate the First Amendment, either on its face or as applied.

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[4] CRR HUMAN RIGHTS REPORT, *supra* note 2, at 25.

ARGUMENT

I. U.S. Courts Have Upheld Restrictions on Protest Activity Outside of Reproductive Health Care Clinics as Consistent with the First Amendment.

The U.S. Supreme Court and other federal courts have repeatedly upheld legal restrictions on protest activity outside of reproductive health care facilities as consistent with the First Amendment. *See Hill v. Colorado*, 530 U.S. 703, 708 (2000) (holding that Colorado law creating buffer zone around reproductive health care clinics and established bubble zones around persons within that buffer zone was content neutral and did not violate the First Amendment); *Schenck v. Pro-Choice Network of Western N.Y.*, 519 U.S. 357 (1997) (injunction that created a fixed buffer zone around an abortion clinic did not violate the First Amendment because it was narrowly tailored to serve the government interests in ensuring public safety and order and protecting women's reproductive rights and burdened no more speech than necessary); *Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753 (1994) (injunction that established a buffer zone around an abortion clinic did not violate the First Amendment, as it was content neutral and burdened no more speech than was necessary to serve significant government interests); *McCullen v. Coakley*, 571 F.3d 167 (1st Cir. 2009), *petition for cert. filed*, 78 U.S.L.W. 3321 (U.S. Nov. 13, 2009) (No. 09-592) (upholding as consistent with the First Amendment a statute creating fixed buffer zone around reproductive health care facilities); *McGuire v. Reilly*, 386 F.3d 45 (1st Cir. 2004) (upholding statute

establishing buffer zones around health care facilities performing abortions as constitutional on its face and as applied).

In determining whether a restriction on abortion-related protest activity violates the First Amendment, the Supreme Court has applied a "time, place, and manner analysis;" under that test, a law is constitutional if it is: (1) content neutral, (2) narrowly tailored to serve a significant government interest, and (3) leaves open ample alternative channels for communication of the information. *Schenck*, 519 U.S. at 369; *Madsen*, 512 U.S. at 764 n.2.[5] A restriction is content neutral if it is not aimed at the speaker's particular message or viewpoint, but rather at the speaker's method of conveying that message or viewpoint. *See Ward v. Rock*

[5] Courts have used a substantially similar "time, place, and manner" analysis to determine the constitutionality of injunctions, statutes, or ordinances that restrict protest activity at reproductive health care facilities. *Schenck*, 519 U.S. at 369 (noting that district court had applied our standard time, place, and manner analysis" to determine constitutionality of injunction that created a fixed buffer zone around abortion clinic) (internal citations omitted); *Hill*, 530 U.S. at 710-11. However, the U.S. Supreme Court has applied a somewhat more stringent test in reviewing injunctions than ordinances or laws, reasoning that a judicial decree presents a "greater risks of censorship and discriminatory application than do general ordinances.'" *Id.* at 713. Accordingly, in addition to making a determination that an ordinance is content neutral and leaves open ample alternative channels of communication, *Madsen*, 512 U.S at 764 n. 2, the Supreme Court has reviewed injunctions to determine "whether they burden more speech than necessary to serve a significant government interest." *Id.* at 774; *see also Schenck*, 519 U.S. at 374. Notably, the Supreme Court has repeatedly found that injunctions imposing restrictions similar to the Oakland ordinance are supported by government interests—namely, "ensuring public safety and order, promoting the free flow of traffic on streets and sidewalks, protecting property rights, and protecting a woman's freedom to seek pregnancy-related services"—and these are "certainly significant enough to justify an appropriately tailored injunction to secure unimpeded access to clinics." *Schenck*, 519 U.S. at 376 (noting that the ordinances reviewed in *Schenck* and *Madsen* were supported by similar facts and government interests). Thus, even under the modified scrutiny that has been applied to ordinances restricting protest activity at abortion clinics, restrictions such as the one imposed by the Oakland ordinance have been upheld as consistent with the First Amendment. *Id.* at 380 (upholding the fixed buffer zones around the clinic's doorways, driveways and driveway entrances); *Madsen*, 512 U.S. at 776 (upholding the fixed buffer zone around the clinic entrances and driveway).

Against Racism, 491 U.S. 781, 791 (1989) (holding that to be considered content neutral, the government must not have "adopted a regulation of speech because of disagreement with the message it conveys.").

In *Hill v. Colorado,* the Supreme Court considered, and upheld, a Colorado law that regulated speech-related activity in the vicinity of health care facilities. 530 U.S. 703 (2000). Specifically, the Colorado law created a 100-foot buffer zone around health care facilities, and made it unlawful to approach within eight feet of another person, without that person's consent, within that buffer zone. *Id*. at 707. The Court determined that the law was content neutral because it did not regulate what speakers could say, but only where certain speech could occur. *Id*. at 719. As with the Oakland ordinance, the Colorado law at issue in *Hill* was adopted after the Legislature decided it was necessary to curtail aggressive and abusive abortion-related protest activity aimed at abortion clinics. *Id*. at 709-10. As a result, the Court found that the law "was not adopted because of disagreement with the message" of the speech being regulated; rather it was adopted to further the state's interests in protecting women's access to legal medical services and the privacy rights of women and health care providers, interests which were unrelated to the content of the protestor's speech. *Id*. at 719 (internal citations omitted).

Having determined that the law was content neutral, the Court also found that there was no dispute as to the legitimacy and significance of the government interests in protecting "the health and safety of its citizens." *Id*. at 715. The Court

then found that the law was narrowly tailored to serve these legitimate interests and left open ample alternative channels for communication because it merely created a "buffer zone" and did not "foreclose any means of communication." *Id*. at 725-26.

Notably, the Court considered the fact that the regulations applied to health care facilities as critical to its determination that the law did not burden more speech than was necessary. *Id*. at 728. The Court pointed out that persons seeking medical services are often in "particularly vulnerable physical and emotional conditions," that governments have a legitimate interest in protecting such persons from unwanted encounters and confrontations, and that governments may do so by enacting certain restrictions on the speakers' ability to approach.[6] *Id*. at 729. As a result, the Court determined that Colorado had demonstrated the need to protect those seeking access to reproductive health clinics based on the history of protest activity and that the buffer zone was a valid way of protecting such access. *Id*. at 726-30. Accordingly, the Court held that the law did not violate the First Amendment.

Since the *Hill* decision, other federal courts—including, of course, the District Court for the Northern District of California—have followed the same approach in upholding restrictions on protest activity at reproductive health care facilities against First Amendment challenges. *Hoye v. Oakland*, 642 F.Supp. 1029

[6] It should be noted that the protestors challenging the Colorado law engaged only peaceful protest activity, but nevertheless the Court determined that the law was narrowly tailored to serve the legitimate interest of protecting persons seeking and providing legal medical services from intimidation and harassment. *Hill*, 530 U.S. at 710.

(N.D. Cal. 2009); *McCullen*, 571 F.3d at 167; *McGuire v. Reilly*, 386 F.3d 45 (1st Cir. 2004). Given the substantial similarity between the Oakland ordinance and other restrictions on abortion-related protest the Court should affirm the district court's judgment that the Oakland ordinance is consistent with the First Amendment.

II. The Oakland Ordinance Does Not, On Its Face, Violate the First Amendment.

Under the "time, place, and manner" test, the Court must uphold the Oakland ordinance as constitutional if the ordinance is: (1) content neutral, (2) narrowly tailored to serve a significant government interest, and (3) leaves open ample alternative channels for communication of the information. *Schenck*, 519 U.S. at 369; *Madsen*, 512 U.S. at 764 n.2. The Oakland ordinance easily satisfies all three factors, and therefore this Court should affirm the district court's judgment that the ordinance does not, on its face, violate the First Amendment.

To begin with, the Oakland ordinance is content neutral: it is aimed at the precise location of protest activity rather than at a particular message or viewpoint.[7] It is well settled that a restriction on *where* protest activity may occur at reproductive health care facilities is conduct neutral. *See, e.g., Hill*, 530 U.S. at 719 (Colorado's statute was "not a regulation of speech" but "a regulation of the

[7] Section 3(B) of the Oakland ordinance states, in relevant part: "Within 100 feet of the entrance of a reproductive health care facility, it shall be unlawful to willingly and knowingly approach within eight (8) feet of any person seeking to enter such a facility, or any occupied motor vehicle seeking entry, without the consent of such person or vehicle occupant."

places where some speech may occur."). Moreover, as the district court explained, both the Oakland ordinance and the Colorado law upheld in *Hill*—restrictions which the district court correctly describes as "nearly identical"—apply "equally to all demonstrators, regardless of viewpoint, and the statutory language makes no reference to the content of the speech." *Hoye*, 642 F.Supp.2d at 3-4 (citing *Hill v. Colorado*, 530 U.S. 703, 719 (2000)). Contrary to Appellant's suggestions otherwise, allegations of a biased legislative motive for a challenged legal restriction do not establish that the restriction impermissibly restricts a particular viewpoint. *Hill*, 530 U.S. at 724 ("[T]he contention that a statute is 'viewpoint based' simply because its enactment was motivated by the conduct of the partisans on one side of a debate is without support."); *Menotti v. City of Seattle*, 409 F.3d 1113, 1138 (9th Cir. 2005) (restriction was not content-based because it "predominantly affected protestors with anti-WTO views"). Thus, as the district court concluded, the Oakland ordinance "is content- and viewpoint-neutral on its face," and clearly satisfies the first element of the "time, place, and manner" test. *Hoye*, 642 F.Supp.2d at 6.

Second, the Oakland ordinance is narrowly tailored to serve a significant government interest. The Supreme Court and numerous federal courts that have reviewed legal restrictions on anti-abortion protest activity have unequivocally found that the government has a strong interest in protecting the health and safety

of women seeking abortion services and the physicians and staff who work to ensure women's access to such services, as well as in protecting women's right to access reproductive health care. *See, e.g., Hill*, 530 U.S. at 715, 719; *Madsen*, 512 U.S. at 767-768. The City of Oakland has specifically and clearly established its interest in protecting the safety of women seeking reproductive health care services and women's right to access reproductive health care, not only through its enactment of the Oakland ordinance,[8] but also through the adoption of a resolution declaring the city's support for the local implementation of the United Nations Convention on the Elimination of All Forms of Discrimination against Women (CEDAW). That resolution expressly states that:

> The City of Oakland shall undertake an annual review of its safety plans for clinics that offer reproductive services, to be done with clinic staff *to ensure safe and unobstructed access to reproductive services*. . .

Oakland, Cal., City Council Res. 79,126 (2005) (emphasis added). Thus it is clear that protecting women's right to access abortion care and their safety at reproductive health care facilities is a significant and legitimate government interest as well as an interest identified as important to the City of Oakland. Furthermore, the restrictions imposed by the Oakland ordinance are narrowly tailored to advance those interests because—as with the virtually identical law at

[8] As the district court noted in its opinion, the City of Oakland's goal in adopting the Ordinance was "to balance the rights of free speech and expression with the rights of privacy and unimpeded access to health care." *Hoye*, 642 F.Supp.2d at 1032-1033. The Court also noted that the City of Oakland "was concerned not only with women's access to the clinics, but also with the trauma and physical distress that demonstrators could cause to patients." *Id.* at 1032.

issue in *Hill v. Colorado*—it merely creates a "buffer zone" and does not "foreclose any means of communication." *Hill*, 530 U.S. at 725-726. The Oakland ordinance, therefore, also satisfies the second element of the "time, place, and manner" test.

Third, the Oakland ordinance leaves open ample alternative channels for communication. Again, as with the law upheld in *Hill*, the Oakland ordinance only restricts communication within certain, set boundaries around reproductive health care facilities and their patients; nothing in the Ordinance prevents persons from engaging in communication *outside* of the buffer zones established by the Ordinance. *Hill*, 530 U.S. at 725-726. As the First Circuit court noted in its explanation of why a challenged Massachusetts law—which is substantially similar to the Oakland ordinance—left open ample alternative channels of communication:

> To begin, the 2007 Act places no burdens at all on the plaintiffs' activities outside the 35-foot buffer zone. They can speak, gesticulate, wear screen-printed T-shirts display signs, use loudspeakers, and engage in the whole gamut of lawful expressive activities. Those messages may be seen and heard by individuals entering, departing, or within the buffer zone.

McCullen, 571 F.3d at 180. The Oakland ordinance provides protestors with the same range of expressive options. Moreover, the limitations imposed by the Oakland ordinance on communication *within* the "buffer zones" are entirely reasonable and necessary to achieve the government's interests; as discussed above, nearly identical restrictions have been upheld as constitutional by the

Supreme Court and numerous federal courts.

Appellant's personal preferences as to the most convenient or persuasive method of communication are irrelevant to a determination of whether the Oakland ordinance comports with the First Amendment. *Menotti*, 409 at 1138 ("[T]he First Amendment does not guarantee the right to communicate one's views . . . in any manner that might be desired."); *McCullen*, 571 F.3d at 180 ("[The Constitution neither recognizes nor gives special protection to any particular conversational distance . . . [T]here is no constitutional guarantee of any particular form or mode of expression."). Rather, in order to satisfy the First Amendment, the Ordinance need only allow for *adequate* alternate channels of communication; and the Oakland ordinance does so. *Id.* at 180 ("The correct inquiry is whether, in light of the totality of circumstances, a time-place-manner regulation burdens substantially more speech than necessary and, concomitantly, whether such a regulation leaves open adequate alternate channels of communication."). For example, despite the creation of a "bubble zone" around persons entering reproductive health care clinics, a protestor still can hold out a leaflet to a patient entering a reproductive health care clinic so long as his or her outstretched hand is at least eight feet away from the patient; that eight-foot distance is short enough that the patient would be aware of the protestor's offer and could, if she wished to do so, voluntarily

approach the protestor to accept the offered leaflet.[9] Thus, the Ordinance leaves open ample alternate channels for communication, and clearly satisfies the third requirement of the test for "time, place, and manner" restrictions. Based on the foregoing, the Oakland ordinance does not, on its face, violate the First Amendment.

III. The Oakland Ordinance Does Not Violate the First Amendment, as Applied to Appellant.

Just as the Oakland ordinance does not violate the First Amendment on its face, it also does not violate the First Amendment as applied to Appellant. It mostly suffices to state that the *amici* concur with the district court's analysis of the application of the Oakland ordinance to Appellant and urge the Court to uphold the district court's rejection of Appellant's as-applied challenge.[10] However, the *amici* wish to emphasize two points relating to that claim. One, the First Amendment is concerned with State action and not the actions of private parties.

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[9] Thus, contrary to the arguments made by the American Center for Law and Justice in its *amicus* brief, the Oakland ordinance does *not* operate as an outright ban on leafleting. Rather, the Ordinance merely imposes reasonable and necessary restrictions on *where* leafleting may occur, while leaving open adequate alternative means of leafleting, and thus is consistent with the First Amendment. *See Schenck*, 519 U.S. at 378 ("Leafleting and commenting on matters of public concern are classic forms of speech that lie at the heart of the First Amendment, and speech in public areas is at its most protected on public sidewalks, a prototypical example of a traditional public forum. On the other hand, we have before us a record that shows physically abusive conduct, harassment of the police that hampered law enforcement, and the tendency of even peaceful conversations to devolve into aggressive and sometimes violence conduct. In some situations, a record of abusive conduct makes a prohibition on classic speech in limited parts of a public sidewalk permissible."); *McCullen*, 571 F.3d at 180; *Hill*, 530 U.S. at 719.

[10] For the sake of brevity and out of respect for the advisory committee notes to FED. R. APP. P. 29-1, the *amici* have sought to avoid repeating arguments made in the Opposition Brief of Appellee City of Oakland.

McGuire, 386 F.3d at 60 ("The First Amendment is concerned with government interference, not private jousting in the marketplace."). To that end, Appellant would have needed to demonstrate discriminatory enforcement of the Ordinance by the Oakland police in order to prevail in his as-applied challenge;[11] as recognized by the district court, he has failed to do so.[12] *Hoye*, 642 F.Supp.2d at 1042.

Second, it is consistent both with the letter and spirit of the Oakland ordinance and with the decisions of federal courts for the Oakland ordinance not to be enforced against patient escorts who are not engaging in protest activity. The Oakland ordinance explicitly includes "volunteers who, with the consent of the reproductive health care facility, assist in conducting patients of such facility safely into the facility" in its definition of providers of "reproductive health services."

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[11] Contrary to Appellant's allegations that local police have demonstrated bias *against* anti-abortion protestors, the findings of the CRR human rights fact-finding investigation indicate that, for a variety of reasons, including personal bias, lack of knowledge or understanding of the relevant law, and fear of retaliatory litigation by anti-abortion protestors, local law enforcement frequently fails to protect reproductive health care providers from unlawful protest activity. CRR HUMAN RIGHTS REPORT, *supra* note 2, at 34 (documenting inadequate police response to illegal protest activity in Texas, Mississippi, Alabama, Pennsylvania, North Dakota, and Missouri).

[12] Although the Court need not defer to the district court's findings of fact in a review of the district court's grant of summary judgment, *Nolan v. Heald College*, 551 F.3d 1148, 1153 (9th Cir. 2009), the Court should consider the district court's thorough analysis of the factual record and history supporting the Oakland ordinance as persuasive authority. *Madsen*, 512 U.S. at 769-770 ("some deference must be given to the state court's familiarity with the facts and the background of the dispute between the parties even our heightened review"); *Schenck*, 519 U.S. at 381 ("Although one might quibble about whether 15 feet is too great or too small a distance if the goal is to ensure access, we defer to the District Court's reasonable assessment of the number of feet necessary to keep the entrances clear."). Accordingly, the Court should agree with the district court that Appellant has failed to establish that the Oakland police engaged in discriminatory enforcement of the Oakland ordinance.

Oakland, Cal., City Council Res. 79,126, § 2(G) (2005). Thus, as explained by the district court, simply facilitating patient access does not violate the Ordinance. *Hoye*, 642 F.Supp.2d at 1038 (facilitating patient access does not fall within the Ordinance's definitions of prohibited conduct); Oakland, Cal., City Council Res. 79,126, §§ 2(C)-(E) (2005) (defining "counseling", "harassing," and "interfering"). Moreover, insofar as the purpose of the Ordinance is to "protect those who seek access to constitutionally protected reproductive health care services from conduct which violates their rights," it follows that the Ordinance should not be enforced against patient escorts who are working to achieve that same objective.[13] In addition, U.S. federal courts have repeatedly distinguished the activity of escorts and the staff of reproductive health care facilities—whose mission is to ensure that women are able to exercise their right to access reproductive health care—from the harassing, intimidating, and potentially violent protest activity targeted by laws, like the Oakland ordinance, that establish buffer zones around reproductive health care facilities. *Hill*, 530 U.S. at 725; *McCullen*, 571 F.3d at 178 (inclusion of an exception for "persons associated with [reproductive health care facilities]" from

[13] Physicians, staff, and volunteers at reproductive health care facilities often face "a working environment that is insecure, threatening, and demeaning, due to the unlawful activities of abortion opponents,", and such threats to providers serve as additional obstacles to women's ability to access reproductive health care. CRR HUMAN RIGHTS REPORT, supra note 2, at 34. Accordingly, the Oakland ordinance should be used as a means of protecting the safety and rights of reproductive health care providers—and not as a means of punishing patient escorts—in furtherance of the Ordinance's express purpose of protecting women's right to access reproductive health care.

the challenged restriction was "reasonably related to the legislature's legitimate public safety objectives"). Therefore, exempting patient escorts who are performing their duties as escorts and not engaging in protest activity from prosecution under the Ordinance is entirely in keeping with federal law. For the above reasons, as well as the reasons set forth in the district court's opinion, the Ordinance does not violate the First Amendment as applied to Appellant.

IV. International Human Rights Law and Comparative Law Support a Determination that the Oakland Ordinance Constitutes a Reasonable and Necessary Restriction on the Right to Freedom of Expression.

European human rights law and domestic constitutional law of Canada—both of which are representative of nations and legal systems that have significant parallels to the U.S.—support the determination that restrictions on abortion-related protest activity, like those imposed by the Oakland ordinance, constitute permissible limitations on freedom of expression. The European Court of Human Rights (the "ECHR") and the Canadian courts have adopted balancing tests for determining whether a limitation on freedom of expression is a valid exercise of a State's power to protect and balance the rights of all its citizens and protect public order. Applying those balancing tests, they have held that laws limiting abortion-related protest activity do not violate the right to freedom of expression. The Court should regard these decisions as persuasive authority that the First Amendment permits laws like the Oakland ordinance in order to protect the fundamental rights

of women and promote the government's interest in protecting public order.[14]

A. The European Convention Supports the Determination that the Oakland Ordinance Constitutes a Reasonable Restriction on the Right to Freedom of Expression Necessary to Protect the Rights of Others.

The European Commission on Human Rights (the "European Commission"), is the only regional human rights body that has addressed the issue of restrictions on freedom of expression in the context of protecting women's access to safe, legal reproductive health care services. The European Commission has determined that freedom of expression may be restricted within a prescribed boundary around an abortion clinic, in order to protect the rights of women seeking abortion services and of the health care professionals providing those services.

Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (the "European Convention") guarantees the right to

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[14] *See, e.g., Roper v. Simmons*, 543 U.S. 551, 575-78 (2005) ("it is proper that we acknowledge the overwhelming weight of international opinion against the juvenile death penalty . . . The opinion of the world community, while not controlling our outcome, does provide respected and significant confirmation for our own conclusions."); *Lawrence v. Texas*, 539 U.S. 558, 573-77 (2003) (citing to the European Court of Human Rights case, *Dudgeon v. United Kingdom,* as persuasive authority for the privacy rights of homosexuals); *Thompson v. Oklahoma*, 487 U.S. 815, 830-831(1988) (plurality opinion) (noting the abolition of the juvenile death penalty "by other nations that share our Anglo-American heritage, and by the leading members of the Western European community," and observing that "[w]e have previously recognized the relevance of the views of the international community in determining whether a punishment is cruel and unusual"); *Enmund v. Florida*, 458 U.S. 782, 796-797(1982) (observing that "the doctrine of felony murder has been abolished in England and India, severely restricted in Canada and a number of other Commonwealth countries, and is unknown in continental Europe"); *see also U.S. v. Carey*, No. 2:05-CV-2176-MCE-CMK, 2006 WL 1768304, at * 2 (E.D. Cal. April 21, 2006) (recognizing that U.S. courts should "give respectful consideration to the interpretation of an international treaty rendered by an international court with jurisdiction to interpret such") (citing *Breard v. Green*, 523 U.S. 371, 375 (1998)).

freedom of expression." European Convention for the Protection of Human Rights and Fundamental Freedoms, *entered into force* Sept. 3, 1953, 213 U.N.T.S. 222, Art. 10 [hereinafter European Convention]. However, the exercise of freedom of expression is subject to restrictions or conditions "as are prescribed by law and are necessary in a democratic society" in the interests of such goals as public safety, the prevention of disorder and crime, and the protection of the rights of others. *Id*. at Art. 10, para. 2.

In determining whether a restriction on the right to freedom of expression is permitted under the European Convention, the Commission considers: (1) whether there has been an actual interference with an individual's freedom of expression; (2) whether such interference has been prescribed by law, meaning that the interference is based in law and the relevant law meets standards of clarity and accessibility; (3) whether the interference has a legitimate aim; and (4) whether the interference is "necessary in a democratic society." *Van Den Dungen v. the Netherlands*, App. No. 22838/93, 80 Eur. Comm'n H.R. Dec. & Rep. 147, § 2 (1995); *see also Open Door & Dublin Well Woman v. Ireland*, 246 Eur. Ct. H.R. (ser. A.) (1992). In order to establish that a restriction on freedom of expression is "necessary in a democratic society," the ECHR has further stated that it must be established that there is an existence of a "pressing social need" for the restriction and that the restriction is "proportionate to the legitimate aim pursed." *Van Den*

Dungen v. the Netherlands, App. No. 22838/93, 80 Eur. Comm'n H.R. Dec. & Rep. 147, § 2 (1995).

In *Van Den Dungen v. Netherlands*, the European Commission applied the balancing test to limitations on abortion-related protest activity that are similar, albeit more restrictive, to the limitations imposed by the Oakland ordinance. In *Van Den Dungen*, the applicant was enjoined from protesting within 250 meters of an abortion clinic after the clinic alleged that the applicant's activity had shocked and upset patients, sometimes to the extent of causing them to postpone medical treatment. *Van Den Dungen v. the Netherlands*, App. No. 22838/93, 80 Eur. Comm'n H.R. Dec. & Rep. 147 (1995). The applicant claimed that the injunction violated his rights to freedom of expression; the Netherlands maintained that the injunction constituted a reasonable restriction on freedom of expression that was necessary to protect the rights of women to seek legal medical services without being intimidated or harassed. *Id.*

The European Commission determined that the injunction did constitute an interference with the applicant's right to freedom of expression, but also found that the interference was "aimed at the protection of the rights of others," specifically the rights of women and of the health care professionals providing abortion services. It therefore determined that "the interference had a legitimate aim." *Id.* at §2. In concluding that the restriction of the applicant's protest activity met the

requirement of proportionality, the European Commission noted that the injunction did not deprive the applicant of his right to protest abortion entirely, but merely restricted his right in order to protect the rights of others. *Id.*

The European Convention's balancing test is similar to the "time, place, and manner" test used by the U.S. Supreme Court and federal courts, in particular with its focus on determining that the restrictions imposed on freedom of expression are necessary to protect significant public interests and proportionately tailored to the protection of those interests. Given the substantial similarities between this test and the balancing test adopted in *Hill*, as well as the similarities between the injunction upheld in *Van Den Dungen* and the limitations imposed on abortion-related protest activity by the Oakland ordinance, the Court should find the European Commission's reasoning to be persuasive in determining that the Oakland ordinance is consistent with the First Amendment's protections for freedom of expression.

B. Canadian Courts Have Determined that Legal Restrictions on Abortion-Related Protest Activity Are Consistent with the Canadian Charter.

Canada's experience with regulating anti-abortion protest activity at reproductive health care facilities provides a useful analogue for the U.S. The protections of freedom of expression guaranteed by the Canadian Charter are subject to "such reasonable limits prescribed by law as can be demonstrably

justified in a free and democratic society." CANADIAN CHARTER OF RIGHTS AND FREEDOMS, PART I OF CONSTITUTION ACT, 1982, being Schedule B to the Canada Act 1982, ch. 11 (U.K.). For a limitation on freedom of expression to be justified under Section 1, a court must find that: (1) the objective of the limitation is "of 'sufficient importance' to warrant overriding the constitutionally protected right," meaning that "the objective must relate to concerns that are 'pressing and substantial;'" and (2) the means chosen to achieve the objective are reasonable and justified. *R. v. Spratt*, [2008] B.C.C.A. 340 para. 32 (Can.) (citing *R. v. Oakes*, [1986] 1 S.C.R. 103 (Can.)). To satisfy the second prong of the test, the court must determine that: the limitation is not "arbitrary, unfair, or based on irrational considerations;" the limitation impairs the right as little as possible; and there is proportionality between the effects of the limitation and the objective of the limitation.

Abortion has been legal in Canada since 1988. *Morgentaler v. The Queen*, [1988] 1 S.C.R. 30, 32-33 (Can.). In the decade following the legalization of abortion, there was extensive anti-abortion protest activity at reproductive health care clinics in British Columbia, including the attempted murder of an abortion provider, numerous blockades of abortion clinics, and regular harassment and intimidation of staff and patients at reproductive health care clinics. Both the legislative response to that protest activity and the judicial

decisions stemming from freedom of speech challenges to that legislation are relevant to the Court's consideration of the Oakland ordinance. *R. v. Lewis*, [1996] 24 B.C.L.R. (3d) 247 para. 22 (Can.), *available at* http://www.canlii.org/en/bc/bcsc/doc/1996/1996canlii3559/1996canlii3559.html (last visited Oct. 27, 2009) (noting that, in the years immediately following the legalization of abortion in Canada, there were 26 blockades of the Everywoman's Health Centre, a reproductive health care clinic in British Columbia, which prevented women from entering the clinic and accessing services, and numerous other attempts to shut down the clinic or make it inaccessible to both patients and staff); *R. v. Spratt*, [2008] B.C.C.A. 340 paras. 52-56, 64 (Can.) (protest activity at Everywoman's Health Centre between 1992 and 1995 occurred regularly and included picketing with protestors wearing or carrying signs, sidewalk counseling, prayer vigils, verbal harassment of clinic staff, and intimidation of staff and patients, for example by recording identifying information about them, such as their car license plate numbers); *id.* at para. 64 (in 1994, a doctor who had provided services at a reproductive health clinic in British Columbia was shot and almost killed in his home by an anti-abortion activist).

In response to the increasingly extreme tactics employed by anti-abortion protestors, the British Columbia Provincial Legislature passed the Access to Abortion Services Act (the "Access Act") "to ensure safe access by women to

clinics so they can obtain therein the medical service to which they are entitled by law" *R. v. Demers*, [2003] B.C.C.A. 28 para. 7 (Can.) and to allow women to obtain such "reproductive health services in an atmosphere of privacy and dignity." *R. v. Lewis*, [1996] 24 B.C.L.R. (3d) 247 para. 22 (Can.) (citing British Columbia, *Debates of the Legislative Assembly*, Vol. 21, No. 7 (19 June 1995) at p.15668)). Similar to the Oakland ordinance, the Access Act makes it unlawful to engage in certain types of protest activity within a prescribed boundary around an abortion clinic, but does not limit protest activities outside of the defined boundary. Access to Abortion Services Act, R.S.B.C. 1996, ch.1, §§ 2(1), 14(2), *available at* http://www.canlii.org/en/bc/laws/stat/rsbc-1996-c-1/latest/ (last visited Oct. 27, 2009) [hereinafter Access to Abortion Services Act]. In this way the Access Act "allows for the creation of access zones around facilities providing abortion, where people using or providing abortion services may not be harassed, neither physically nor verbally, on the issue of abortion." *R. v. Lewis*, [1996] 24 B.C.L.R. (3d) 247 para. 51 (Can.) (citing British Columbia, *Debates of the Legislative Assembly*, Vol. 21, No. 7 (19 June 1995) at p.15668).

The Access Act has been subject to several legal challenges by protestors who have been arrested for violating the law; those challenges claimed that the Access Act impermissibly infringed upon freedom of speech. In response, the Canadian courts, including the Supreme Court of Canada, have repeatedly and

consistently held that the Access Act constitutes a valid restriction on freedom of expression. *R. v. Lewis*, [1996] 24 B.C.L.R. (3d) 247 paras. 79, 101 (Can.) (the objective "of equal access to abortion services, enhanced privacy and dignity for women making use of the services and improved climate and security for service providers" outweighs the infringement of the right to freedom of expression and therefore the Access Act is "demonstrably justified in a free and democratic society."); *R. v. Demers,* [1999] 17 B.C.T.C. 117 paras. 90-91 (Can.) (upholding the constitutionality of the Access Act); *R. v. Demers*, [2003] B.C.C.A .28 para. 1 (Can.) (dismissing the claim of a convicted protestor that the Access Act infringed upon his freedom of expression); *R. v. Demers*, [2003] 2 S.C.R. vi, at *1 (Can.) (dismissing protestor's application for leave to appeal lower court decision finding Access Act constitutional); *R. v. Spratt*, [2008] B.C.C.A. 340 paras. 34-40 (Can.) (upholding the Access Act as consistent with the Canadian Charter's protections for freedom of expression).

The reasoning of the British Columbia Court of Appeals in *R. v. Spratt* is illustrative of the Canadian courts' analysis of restrictions on anti-abortion protest activity at reproductive health care facilities. In *Spratt*, the Court of Appeals rejected arguments that the Access Act was not adequately prescribed by law and found that it clearly and precisely set out the boundaries of permissible and non-permissible conduct. *R. v. Spratt*, [2008] B.C.C.A. 340 paras. 34-40 (Can.). The

Court then found the Act's objective of enhanced privacy and dignity for women seeking legal abortion services and improved climate and security for reproductive health care providers was a sufficiently important objective to pass the first prong of the balancing test. *Id*. at paras. 71-72. The Court also held that the Act's restrictions were reasonable and justified, reasoning that the creation of an access zone was not "arbitrary, unfair, or based on irrational considerations" because the access zone created "distance and therefore protection to the staff and patients of the clinic from the physical threats and emotional upset caused by the actions of the protesters and the proximity of their strong message." *Id*. at para. 74. Relying in part on the reasoning of the U.S. Supreme Court in *Hill*, the Court determined that the access zone was reasonably tailored to the specific protest activity that had necessitated the passage of the Act and therefore did not impair the right to freedom of expression more than was necessary. *Id*. at paras. 77-89. Finally, the Court determined that there was proportionality between the effects of the Act and its objective because the "objective of the Act [was] sufficiently important to justify a limitation on the way in which freedom of expression is exercised in an area adjacent to the facilities providing abortion services." *Id*. at para. 91.

Thus, Canada has adopted a balancing test for determining the legitimacy of law that restricts freedom of expression which is markedly similar to the analysis used by U.S. federal courts in First Amendment cases and, on the basis of that

balancing test, has repeatedly concluded that restrictions on protest activity at reproductive health care facilities are a reasonable and necessary limitation on freedom of expression. Given the similarities between the Canadian courts' balancing test and the "time, place, and manner" test used by U.S. federal courts, and the substantive parallels between the Access law and the Oakland ordinance, the Court should consider the reasoning of the Canadian courts as persuasive authority supporting a finding that the Oakland ordinance does not violate the First Amendment.

CONCLUSION

For the reasons set forth above, this Court should affirm the judgment entered by the district court.

Respectfully submitted,

/S/ Jennifer Mondino

Janet Crepps
Jennifer Mondino
CENTER FOR REPRODUCTIVE RIGHTS
120 Wall Street, 14th Floor
New York, NY 10005
(917) 637-3600

Counsel for Amici Curiae

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7) and Ninth Circuit Rule 32-1, the attached *Amicus Curiae* Brief is proportionately spaced, has a typeface of 14 points, and contains 6,680 words.

/S/ Jennifer Mondino

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Janet Crepps
Jennifer Mondino
CENTER FOR REPRODUCTIVE RIGHTS
120 Wall Street, 14th Floor
New York, NY 10005
(917) 637-3600

Counsel for Amici Curiae

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on February 23, 2010.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

I further certify that some of the participants in the case are not registered CM/ECF users. I have mailed the foregoing document by First-Class Mail to the following non-CM/ECF participant:

Walter U. Weber
300 First Interstate Bank Bldg.
150 North Stone Ave.
Tucson, AZ 85701

/S/ Jennifer Mondino

_____

Janet Crepps
Jennifer Mondino
CENTER FOR REPRODUCTIVE RIGHTS
120 Wall Street, 14th Floor
New York, NY 10005
(917) 637-3600

Counsel for Amici Curiae