In the
United States Court of Appeals
For the Seventh Circuit

No. 17-2196

VERONICA PRICE, et al.,

Plaintiffs-Appellants,

v.

CITY OF CHICAGO, et al.,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division,
No. 16-cv-8268 – **Amy J. St. Eve**, *Judge.*

ARGUED FEBRUARY 13, 2018 –
DECIDED FEBRUARY 13, 2019

Before SYKES and BARRETT, *Circuit Judges*, and GRIESBACH, *Chief District Judge.**

SYKES, *Circuit Judge*. Pro-life "sidewalk counselors" sued to enjoin Chicago's "bubble zone" ordinance, which bars them from approaching within eight feet of a person in the vicinity of an abortion clinic if their purpose is to engage in counseling, education,

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* Of the Eastern District of Wisconsin, sitting by designation.

leafletting, handbilling, or protest. The plaintiffs contend that the floating bubble zone is a facially unconstitutional content-based restriction on the freedom of speech. The district judge dismissed the claim, relying on *Hill v. Colorado*, 530 U.S. 703 (2000), which upheld a nearly identical Colorado law against a similar First Amendment challenge.

Abortion clinic buffer-zone laws "impose serious burdens" on core speech rights. *McCullen v. Coakley*, 134 S. Ct. 2518, 2535 (2014). Under *Hill*, however, a floating bubble zone like this one is not considered a content-based restriction on speech and thus is not subject to strict judicial scrutiny. 530 U.S. at 725. Rather, the ordinance is classified as a content-neutral "time, place, or manner" restriction and is tested under the intermediate standard of scrutiny, which asks whether the law is narrowly tailored to serve significant governmental interests. *Id.* at 725–26. *Hill* answered that question in the affirmative, holding that the governmental interests at stake—preserving clinic access and protecting patients from unwanted speech—are significant, and an 8-foot no-approach zone around clinic entrances is a narrowly tailored means to address those interests. *Id.* at 716, 725–30.

Hill's content-neutrality holding is hard to reconcile with both *McCullen* and *Reed v. Town of Gilbert*, 135 S. Ct. 2218 (2015), and its narrow-tailoring holding is in tension with *McCullen*. Still, neither *McCullen* nor *Reed* overruled *Hill*, so it remains binding on us. Moreover, Chicago's bubble-zone law is narrower than the one upheld in *Hill*: Colorado's no-approach

zone applies within a 100-foot radius of a clinic entrance; Chicago's applies within a 50-foot radius. Lastly, we would open a circuit split if we allowed this facial challenge to move forward. The Third Circuit, applying *Hill*, upheld Pittsburgh's 8-foot bubble zone against a facial challenge without requiring an evidentiary showing from the City. *See Brown v. City of Pittsburgh*, 586 F.3d 263, 270–73 (3d Cir. 2009). We affirm the judgment.

I. Background

The case comes to us from a dismissal at the pleading stage, so we sketch the facts as alleged in the plaintiffs' complaint, accepting them as true for purposes of this appeal. *Deppe v. Nat'l Collegiate Athletic Ass'n*, 893 F.3d 498, 499 (7th Cir. 2018). Pro-life advocates Veronica Price, David Bergquist, Ann Scheidler, and Anna Marie Scinto Mesia regularly engage in what's known as "sidewalk counseling" on the sidewalks and public ways outside Chicago abortion clinics. This entails peacefully approaching women entering the clinics to give them pro-life literature, discuss the risks of and alternatives to abortion, and offer support if the women were to carry their pregnancies to term. These conversations must take place face to face and in close proximity to permit the sidewalk counselors to convey a gentle and caring manner, maintain eye contact and a normal tone of voice, and protect the privacy of those involved.

In October 2009 the Chicago City Council adopted an ordinance that effectively prohibits sidewalk counseling by banning the close approach it requires. The Council amended the City's disorderly conduct ordinance to prohibit any person from approaching within eight feet of another person near an abortion clinic for the purpose of engaging in the types of speech associated with sidewalk counseling. The ordinance provides:

> A person commits disorderly conduct when he . . . knowingly approaches another person within eight feet of such person, unless such other person consents, *for the purpose of passing a leaflet or handbill to, displaying a sign to, or engaging in oral protest, education, or counseling with such other person in the public way* within a radius of 50 feet from any entrance door to a hospital, medical clinic or healthcare facility. . . .

CHI., ILL., CODE § 8-4-010(j)(1) (2009) (emphasis added). Chicago's ordinance is nearly identical to—indeed, was modeled after—the Colorado law upheld in *Hill*. Both laws impose an 8-foot no-approach bubble zone, but Chicago's law operates within a smaller radius. Colorado's 8-foot bubble zone applies within a 100-foot radius of an abortion-clinic entrance. Chicago's applies within a 50-foot radius. The City's ordinance otherwise mirrors the law at issue in *Hill*.

In August 2016 the four sidewalk counselors and two advocacy groups joined together to sue the City under 42 U.S.C. § 1983 seeking declaratory and

injunctive relief against the enforcement of the bubble-zone ordinance. Their complaint raised four claims: (1) the ordinance infringes the freedom of speech guaranteed by the First Amendment, both facially and as applied; (2) the ordinance is unconstitutionally vague in violation of the Due Process Clause of the Fourteenth Amendment; (3) the City selectively enforces the bubble-zone ordinance in violation of the Equal Protection Clause of the Fourteenth Amendment; and (4) the ordinance infringes the plaintiffs' state constitutional right to freedom of speech and assembly. Much of the complaint describes specific instances of selective or improper enforcement from early 2010 through mid-2016, but those allegations have no bearing on this appeal.

The City moved to dismiss the complaint for failure to state a claim. *See* FED. R. CIV. P. 12(b)(6). The district judge granted the motion in part. She ruled that *Hill* forecloses the facial First Amendment challenge and the due-process vagueness claim. But she allowed the case to proceed on the as-applied First Amendment challenge, the equal-protection claim alleging selective enforcement, and the state constitutional claims. The parties eventually settled these remaining claims and jointly moved to dismiss them. The judge entered final judgment, setting up this appeal contesting only the Rule 12(b)(6) ruling.

II. Discussion

We review a Rule 12(b)(6) dismissal de novo. *O'Boyle v. Real Time Resolutions, Inc.*, 910 F.3d 338, 342 (7th Cir. 2018). The plaintiffs contend that Chicago's bubble-zone ordinance is a content-based restriction on speech and is facially unconstitutional under strict scrutiny. Their fallback position is that the ordinance flunks the narrow-tailoring requirement of the intermediate test for content-neutral restrictions on speech.

The Supreme Court considered and rejected these precise arguments in *Hill*, as the plaintiffs must and do acknowledge. As they see it, however, *Hill* is no longer an insuperable barrier to suits challenging abortion clinic bubble-zone laws. The premise of their claim is that the Court's more recent decisions in *Reed* and *McCullen* have so thoroughly undermined *Hill's* reasoning that we need not follow it.

That's a losing argument in the court of appeals. The Court's intervening decisions have eroded *Hill's* foundation, but the case still binds us; only the Supreme Court can say otherwise. *See State Oil Co. v. Kahn*, 522 U.S. 3, 20 (1997) ("[I]t is this Court's prerogative alone to overrule one of its precedents."). The Court's instructions in this situation are clear: "If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case [that] directly controls, leaving to this Court the prerogative of overruling its own decisions." *Agostini v.*

Felton, 521 U.S. 203, 237–38 (1997) (quotation marks omitted).

That said, in the nineteen years since *Hill* was decided, the Court has refined the concept of content neutrality and clarified the requirement of narrow tailoring in a First Amendment challenge of this type. To see how, it's helpful to trace the doctrinal development in this specific corner of free-speech law.

A. Speech in a Traditional Public Forum

We begin with first principles. "The First Amendment reflects a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." *Snyder v. Phelps*, 562 U.S. 443, 452 (2011) (quotation marks omitted). "Leafletting and commenting on matters of public concern are classic forms of speech that lie at the heart of the First Amendment. . . ." *Schenck v. Pro-Choice Network of W. N.Y.*, 519 U.S. 357, 377 (1997). Moreover, sidewalks and other public ways "occupy a special position in terms of First Amendment protection because of their historic role as sites for discussion and debate." *McCullen*, 134 S. Ct. at 2529 (quotation marks omitted). These public spaces—"traditional public fora" in the doctrinal nomenclature—"have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." *Hague v. Comm. for Indus. Org.*, 307 U.S. 496, 515 (1939).

As the Court explained in *McCullen*:

> It is no accident that public streets and sidewalks have developed as venues for the exchange of ideas. Even today, they remain one of the few places where a speaker can be confident that he is not simply preaching to the choir. With respect to other means of communication, an individual confronted with an uncomfortable message can always turn the page, change the channel, or leave the Web site. Not so on public streets and sidewalks. There, a listener often encounters speech he might otherwise tune out. In light of the First Amendment's purpose to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, this aspect of traditional public fora is a virtue, not a vice.

134 S. Ct. at 2529 (citation and quotation marks omitted). Thus, speech "is at its most protected on public sidewalks." *Schenck*, 519 U.S. at 377.

That the sidewalk counselors seek to reach women as they enter an abortion clinic—at the last possible moment when their speech might be effective—"only strengthens the protection afforded [their] expression." *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 347 (1995). "Urgent, important, and effective speech can be no less protected than impotent speech, lest the right to speak be relegated to those instances when it is least needed. No form of speech is entitled to greater constitutional protection. . . ." *Id.* (citation omitted). And direct "one-on-one communication" has long been recognized as "the most effective, fundamental, and

perhaps economical avenue of political discourse." *McCullen*, 134 S. Ct. at 2536 (quotation marks omitted).

* * *

It is a "guiding First Amendment principle that the government has no power to restrict expression because of its message, its ideas, its subject matter, or its content," and this principle "applies with full force in a traditional public forum." *Id.* at 2529 (quotation marks omitted). "Content-based laws—those that target speech based on its communicative content—are presumptively unconstitutional" and get strict judicial scrutiny; laws of this type "may be justified only if the government proves that they are narrowly tailored to serve compelling state interests." *Reed*, 135 S. Ct. at 2226.

On the other hand, the government has "somewhat wider leeway to regulate features of speech unrelated to its content." *McCullen*, 134 S. Ct. at 2529. "[E]ven in a public forum the government may impose reasonable restrictions on the time, place, or manner of protected speech, provided the restrictions are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information." *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (quotation marks omitted).

To date, the Supreme Court has applied the intermediate standard of scrutiny to abortion-clinic buffer zones, with mixed results. We now turn to those cases.

B. The Abortion Clinic Buffer-Zone Cases

1. *Madsen v. Women's Health Center* and *Schenck v. Pro-Choice Network of Western New York*

The Court's first two occasions to address abortion-clinic buffer zones came in cases involving injunctions entered by state and federal courts to address unlawful conduct associated with the large-scale clinic blockades of the early 1990s for which ordinary law-enforcement responses had proven ineffective. *Schenck*, 519 U.S. at 362–63 (describing the clinic blockades); *Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753, 758–59 (1994) (same).

In *Madsen* the Court reviewed a state-court injunction barring the named defendants from entering a 36-foot buffer zone around a particular clinic. 512 U.S. at 760. As relevant here, the injunction also established a 300-foot zone around the clinic within which the defendants were prohibited from "physically approaching any person seeking the services of the [c]linic" without that person's consent. *Id.* The Court first ruled that these restrictions were content neutral and did not require strict scrutiny. *Id.* at 762–64. However, the Court applied a "more stringent" form of intermediate scrutiny because injunctions "carry greater risks of censorship and discriminatory application

than do general ordinances." *Id.* at 764–65. This yielded a split result: The Court upheld the fixed 36-foot buffer zone but invalidated the floating "no approach" zone. *Id.* at 768–70, 773–74.

In *Schenck* the Court applied *Madsen* and upheld a provision in a federal-court injunction prohibiting the named defendants from entering a fixed 15-foot buffer zone around the doorways, driveways, and parking lots of certain abortion clinics. 519 U.S. at 380–83. But the Court invalidated a provision barring the defendants from approaching within 15 feet of any person entering or leaving the clinics. *Id.* at 377–79. The Court held that the 15-foot floating bubble zone was unconstitutional because it prevented the defendants "from communicating a message from a normal conversational distance or handing leaflets to people entering or leaving the clinics who [were] walking on the public sidewalks." *Id.* at 377.

The Court's reasoning rested primarily on the venerable principle that leafletting on public sidewalks is core protected speech. "Leafletting 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." *Id.* But the Court was also concerned that the floating bubble zone was not narrowly tailored: "With clinic escorts leaving the clinic to pick up incoming patients and entering the clinic to drop them off, it would be quite difficult for a protester who wishes to engage in peaceful expressive activity to know how to

remain in compliance with the injunction," resulting in "substantial risk that much more speech will be burdened than the injunction by its terms prohibits." *Id.* at 378. The Court reserved the question "whether the governmental interests involved would *ever* justify some sort of zone of separation between individuals entering the clinics and protesters, measured by the distance between the two." *Id.* at 377 (emphasis added).

2. *Hill v. Colorado*

The Court returned to this subject in *Hill*, this time reviewing a generally applicable law rather than a targeted injunction. As we've noted, Chicago's bubble ordinance is identical to the Colorado law at issue in *Hill* except for the radius within which the no-approach zone applies. Because *Hill* is decisive here, the decision merits close review.

The Court began with the question of content neutrality, observing that the 8-foot bubble zone "is not a regulation of speech" but instead is simply "a regulation of the places where some speech may occur." *Hill*, 530 U.S. at 719. And the Colorado law, the Court said, was not content based because it "was not adopted because of disagreement with the message the speech conveys" but rather to ensure clinic access, protect patient privacy, and "provid[e] the police with clear guidelines." *Id.* at 719–20 (quotation marks and alteration omitted).

The challengers argued that the law was content based because enforcement authorities would have to

examine the content of the statements made by an approaching speaker to determine if a violation of the statute occurred. *Id.* at 720. The Court disagreed, saying that the law "places no restriction on—and clearly does not prohibit—either a particular viewpoint or any subject matter that may be discussed by a speaker. Rather, it simply establishes a minor place restriction on an extremely broad category of communications with unwilling listeners." *Id.* at 723. The Court added: "[W]e have never suggested that the kind of cursory examination that might be required to exclude casual conversation . . . would be problematic." *Id.* at 722. On these understandings, the Court ruled that the bubble-zone law was properly classified as a content-neutral time, place, or manner regulation of speech and did not require strict scrutiny. *Id.* at 725.

Applying intermediate scrutiny, the Court held that Colorado's objectives—preserving clinic access and protecting patients from unwelcome speech—count as significant governmental interests, and an 8-foot floating bubble zone within 100 feet of a clinic entrance is a narrowly tailored means to serve them. *Id.* at 726–30. The Court distinguished the Colorado law from the no-approach zone it had invalidated just three years earlier: "Unlike the 15-foot zone in *Schenck*, this 8-foot zone allows the speaker to communicate at a 'normal conversational distance.'" *Id.* at 726–27 (quoting *Schenck*, 519 U.S. at 377)). The Court acknowledged that the "burden on the ability to distribute handbills is more serious," but that difficulty did not doom the Colorado law. *Id.* at 727. The 8-foot

buffer zone, the Court said, did not "prevent a leafletter from simply standing near the path of oncoming pedestrians and proffering his or her material, which the pedestrians [could] easily accept." *Id.*

Rounding out its narrow-tailoring analysis, the Court rejected the argument that Colorado could achieve its objectives through less restrictive means—say by enforcing its preexisting laws against harassment, disorderly conduct, and battery, as Justice Kennedy posited in dissent. *Id.* at 729; *id.* at 777–78 (Kennedy, J., dissenting). As the Court put it, the statute's "prophylactic aspect" was justified based on the "great difficulty" of protecting abortion clinics and their patients via "legal rules that focus exclusively on the individual impact of each instance of behavior." *Id.* at 729.

3. *McCullen v. Coakley*

Hill was decided in 2000. No new buffer-zone case reached the Court until *McCullen* in 2014. At issue was a Massachusetts law imposing a fixed 35-foot buffer zone around the entrance, exit, and driveway of every abortion clinic in the state. *McCullen*, 134 S. Ct. at 2526. Certain persons were exempt and could freely enter the zone: those entering or leaving the clinic; employees or agents of the clinic; law enforcement, firefighters, construction and utility workers, and other municipal agents; and persons using the sidewalk or public way to reach a destination other than the clinic.

Everyone else was kept out on pain of criminal penalty. *Id.*

As here, pro-life sidewalk counselors challenged the law. *Id.* at 2527. They argued that the buffer-zone law was a content-based restriction on speech and required strict scrutiny. The Court disagreed. First, the Court noted that "the Act does not draw content-based distinctions on its face." *Id.* at 2531. To be sure, the Court explained, the Massachusetts law "would be content based if it required enforcement authorities to examine the content of the message that is conveyed to determine whether a violation has occurred." *Id.* (quotation marks omitted). But enforcement of the law turned not on what people said while in the buffer zone "but simply on where they sa[id] it." *Id.* "Indeed," the Court said, "[a person could] violate the Act merely by standing in a buffer zone, without displaying a sign or uttering a word." *Id.*

The Court continued:

> To be clear, the Act would not be content neutral if it were concerned with [the] undesirable effects that arise from the direct impact of speech on its audience or listeners' reactions to speech. . . . If, for example, the speech outside Massachusetts abortion clinics caused offense or made listeners uncomfortable, such offense or discomfort would not give the Commonwealth a content-neutral justification to restrict the speech.

Id. at 2531–32 (citation, quotation marks, and alteration omitted). In the end the Court concluded that the

justifications for the law—"ensuring safety and preventing obstruction" at clinic entrances—"are, as a general matter, content neutral." *Id.* at 2532.

But the Massachusetts buffer-zone law did not survive intermediate scrutiny. Citing *Schenck* and *Madsen* (but not *Hill*), the Court held that the Commonwealth's safety and access objectives were sufficiently weighty under the intermediate standard of review. *Id.* at 2535. "At the same time," however, "the buffer zones impose serious burdens on [the sidewalk counselors'] speech." *Id.* Relying again on *Schenck*, the Court observed that the fixed 35-foot buffer zone made it "substantially more difficult" for sidewalk counselors to "distribute literature to arriving patients" and to engage in the kind of personal and compassionate conversations required for their messages to be heard. *Id.* at 2536.

Amplifying the theory behind the intermediate standard of scrutiny, the Court significantly clarified the role of the narrow-tailoring requirement:

> The tailoring requirement does not simply guard against an impermissible desire to censor. The government may attempt to suppress speech not only because it disagrees with the message being expressed, but also for mere convenience. Where certain speech is associated with particular problems, silencing the speech is sometimes the path of least resistance. But by demanding a close fit between ends and means, the tailoring

> requirement prevents the government from too readily sacrificing speech for efficiency.

Id. at 2534 (quotation marks and alteration omitted). In other words, "[f]or a content-neutral time, place, or manner regulation to be narrowly tailored, it must not 'burden substantially more speech than is necessary to further the government's legitimate interests.'" *Id.* at 2535 (quoting *Ward*, 491 U.S. at 799). Put in more positive terms, "[t]o meet the requirement of narrow tailoring, the government must demonstrate that alternative measures that burden substantially less speech would fail to achieve [its] interests, not simply that the chosen route is easier." *Id.* at 2540.

Against these background principles of narrow tailoring, the 35-foot fixed buffer zone flunked the test. "A painted line on the sidewalk is easy to enforce, but the prime objective of the First Amendment is not efficiency." *Id.* Massachusetts had less restrictive regulatory options to ensure access to abortion clinics and prevent harassment of patients: existing state and local laws banning obstruction of clinic entrances; "generic criminal statutes forbidding assault, breach of the peace, trespass, vandalism, and the like"; and targeted injunctions like those in *Schenck* and *Madsen*. *Id.* at 2538. But the Commonwealth had not shown that "it seriously undertook to address the problem with less intrusive tools readily available to it." *Id.* at 2539.

"Given the vital First Amendment interests at stake, it is not enough for Massachusetts simply to say

that other approaches have not worked." *Id.* at 2540. The Court concluded that "[t]he buffer zones burden substantially more speech than necessary to achieve the Commonwealth's asserted interests." *Id.* at 2537.

The Court closed with this:

> [The sidewalk counselors] wish to converse with their fellow citizens about an important subject on the public streets and sidewalks—sites that have hosted discussions about the issues of the day throughout history. [Massachusetts] assert[s] undeniably significant interests in maintaining public safety on those same streets and sidewalks, as well as in preserving access to adjacent healthcare facilities. But here the Commonwealth has pursued those interests by the extreme step of closing a substantial portion of a traditional public forum to all speakers. It has done so without seriously addressing the problem through alternatives that leave the forum open for its time-honored purposes. The Commonwealth may not do that consistent with the First Amendment.

Id. at 2541.

4. *Reed v. Town of Gilbert*

One more case is important to the current doctrinal landscape, though it did not involve an abortion-clinic buffer zone. *Reed* was a First Amendment challenge to the Sign Code in the Town of Gilbert, Arizona, which classified signs by the type of information they

conveyed and regulated each category differently. 135 S. Ct. at 2224–25. For example, "Ideological Signs"—defined as any sign "communicating a message or idea[] for noncommercial purposes" other than construction signs, directional signs, and certain other categories—were treated most favorably. *Id.* at 2224. "Political Signs"—any "temporary sign designed to influence the outcome of an election"—were treated less favorably than Ideological Signs. *Id.* "Temporary Directional Signs" were regulated most heavily. *Id.* at 2225.

The Court began with an important clarification of the content-neutrality inquiry. First, a "regulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or message conveyed." *Id.* at 2227. The Court explained that the threshold question in the test for content neutrality is whether the challenged regulation "on its face draws distinctions based on the message a speaker conveys." *Id.* (quotation marks omitted). The Court continued: "Some facial distinctions based on a message are obvious, defining regulated speech by particular subject matter, and others are more subtle, defining regulated speech by its function or purpose. Both are distinctions drawn based on the message a speaker conveys" and require strict scrutiny. *Id.*

The Court then identified a "separate and additional category of laws that, *though facially content neutral*, will be considered content-based regulations of speech: laws that cannot be justified without reference to the content of the regulated speech[] or . . .

were adopted by the government because of disagreement with the message the speech conveys." *Id.* (emphasis added) (quotation marks and alteration omitted). Laws of this type also get strict judicial scrutiny. *Id.* at 2227.

On this illumination of the concept of content neutrality, the Court ruled that the Town's Sign Code "is content based on its face." *Id.* The Town's regulatory requirements for "any given sign . . . depend entirely on the communicative content of the sign." *Id.* As the Court put it:

> If a sign informs its reader of the time and place a book club will discuss John Locke's Two Treatises of Government, that sign will be treated differently from a sign expressing the view that one should vote for one of Locke's followers in an upcoming election, and both signs will be treated differently from a sign expressing an ideological view rooted in Locke's theory of government.

Id.

The Town insisted that strict scrutiny did not apply because it had not discriminated between particular ideas or viewpoints within each sign category. The Court resoundingly rejected that position: "A law that is content based on its face is subject to strict scrutiny regardless of the government's benign motive, content-neutral justification, or lack of animus toward the ideas contained in the regulated speech." *Id.* at 2228 (quotation marks omitted). Put somewhat more

directly: "[A] speech regulation targeted at specific subject matter is content based even if it does not discriminate among viewpoints within that subject matter." *Id.* at 2230.

The Town could not defend its Sign Code under strict scrutiny. The Court assumed for the sake of argument that the Town's objectives—aesthetics and traffic safety—were compelling enough to satisfy this most exacting standard of review. *Id.* at 2231. But the Code's content-based distinctions were "hopelessly underinclusive." *Id.* The Town could not explain how its interests in beautification and safety were furthered by strictly limiting temporary directional signs but allowing other types of signs to proliferate. *Id.* "In light of this underinclusiveness," the Court held, "the Town has not met its burden to prove that its Sign Code is narrowly tailored to further a compelling governmental interest." *Id.* at 2232.

C. *Hill* After *Reed* and *McCullen*

Hill is incompatible with current First Amendment doctrine as explained in *Reed* and *McCullen*. To begin, *Hill* started from the premise that "[t]he principal inquiry in determining content neutrality . . . is whether the government has adopted a regulation of speech because of disagreement with the message it conveys." 530 U.S. at 719 (quoting *Ward*, 491 U.S. at 791). After *Reed* that's no longer correct. We now know that the first step in the content-neutrality inquiry is

to ask whether the challenged law is "content based on its face." *Reed*, 135 S. Ct. at 2228.

As *Reed* explained, a "*separate* and *additional* category" of content-based laws includes facially neutral laws that "cannot be justified without reference to the content of the regulated speech[] or . . . were adopted because of disagreement with the message the speech conveys." *Id.* at 2227 (emphases added) (quotation marks and alteration omitted). But "an innocuous justification cannot transform a facially content-based law into one that is content neutral." *Id.* at 2228. "Because strict scrutiny applies *either* when a law is content based on its face *or* when the purpose and justification for the law are content based, a court must evaluate each question before it concludes that the law is content neutral and thus subject to a lower level of scrutiny." *Id.* (emphases added).

In fairness, *Hill* did not completely ignore the actual text of the Colorado statute. Though not clearly delineated, its facial analysis was twofold. The Court first concluded that Colorado's bubble-zone law was content neutral because it didn't restrict "either a particular viewpoint or any subject matter that may be discussed by a speaker." *Hill*, 530 U.S. at 723. In other words, the absence of viewpoint or subject-matter discrimination was a sufficient indicator of content neutrality. Second, the Court dismissed the fact that enforcement authorities had to examine the content of an approaching speaker's statements to determine if a violation of the law had occurred: "We have never held, or suggested, that it is improper to look at the content

of an oral or written statement in order to determine whether a rule of law applies to a course of conduct." *Id.* at 721.

Neither rationale survives *McCullen* and *Reed*. *McCullen* explained in no uncertain terms that a law is indeed content based if enforcement authorities must "examine the content of the message that is conveyed to determine whether a violation has occurred." 134 S. Ct. at 2531 (quotation marks omitted). And *Reed* clarified that the lack of viewpoint or subject-matter discrimination does not spare a facially content-based law from strict scrutiny. 135 S. Ct. at 2230. As we explained shortly after *Reed* was decided, the Court has "effectively abolishe[d] any distinction between content regulation and subject-matter regulation. Any law distinguishing one kind of speech from another by reference to its meaning now requires a compelling justification" *Norton v. City of Springfield*, 806 F.3d 411, 412 (7th Cir. 2015). In the wake of *McCullen* and *Reed*, it's not too strong to say that what *Hill* explicitly rejected is now prevailing law.

There is more. *Reed* explained that a law is content based if it draws "more subtle" facial distinctions like those that "defin[e] regulated speech by its function or purpose." 135 S. Ct. at 2227. By its terms, the law upheld in *Hill* regulates speech undertaken "for the *purpose* of . . . engaging in oral protest, education, or counseling." 530 U.S. at 707 (emphasis added) (quotation marks omitted). And divining purpose clearly requires enforcement authorities "to examine the content of the message that is conveyed." *McCullen*, 134

S. Ct. at 2531 (quotation marks omitted). How else could the authorities distinguish between a sidewalk counselor (illegal) and a panhandler, a pollster, or a passerby who asks for the time (all legal)?

Here's another incongruity between *Hill* and the Court's current jurisprudence. *McCullen* emphasized that a law is content based if it is "concerned with [the] undesirable effects that arise from the direct impact of speech on its audience or listeners' reactions to speech." 134 S. Ct. at 2531–32 (quotation marks and alteration omitted). Yet *Hill* repeatedly cited concern for listeners' reactions as an *acceptable justification* for Colorado's bubble-zone law. True, the Court also mentioned concerns about clinic access and safety, but that does not diminish its emphasis on Colorado's interest in "protect[ing] listeners from unwanted communication" and safeguarding the right "to be let alone." 530 U.S. at 715–16, 724 (quotation marks omitted). Indeed, the Court highlighted the "emotional harm suffered when an unwelcome individual delivers a message . . . at close range." *Id.* at 718 n.25. The bubble-zone law upheld in *Hill* was aimed in substantial part at guarding against the undesirable effects of the regulated speech on listeners. After *McCullen* that's not a content-neutral justification.

Finally, *Hill's* narrow-tailoring analysis conflicts with *McCullen's* insistence that "the government must demonstrate that alternative measures that burden substantially less speech would fail to achieve [its] interests, not simply that the chosen route is easier." 134 S. Ct. at 2540. Recall *McCullen's* exhortation against

the use of broad prophylactic regulations in speech-sensitive zones: "A painted line on the sidewalk is easy to enforce, but the prime objective of the First Amendment is not efficiency . . . Given the vital First Amendment interests at stake, it is not enough for Massachusetts simply to say that other approaches have not worked." *Id.* In stark contrast, *Hill* specifically *approved* the "bright-line prophylactic" aspect of Colorado's bubble-zone law *precisely because* other less restrictive measures—e.g., laws against harassment and breach of the peace—were harder to enforce. 530 U.S. at 729.

In short, *McCullen* and *Reed* have deeply shaken *Hill's* foundation. Yet the case remains on the books and directly controls here. The plaintiffs urge us to follow the Third Circuit's lead in *Bruni v. City of Pittsburgh*, which reversed the dismissal of a challenge to Pittsburgh's fixed 15-foot clinic buffer zone and remanded for a case-specific narrow-tailoring analysis in light of *McCullen*. 824 F.3d 353, 372–73 (3d Cir. 2016). The court held that dismissal at the pleading stage was improper based on *McCullen's* "important clarification of the rigorous and fact-intensive nature of intermediate scrutiny's narrow-tailoring analysis." *Id.* at 372. This was so, the court held, notwithstanding circuit precedent that upheld Pittsburgh's 15-foot buffer zone just a few years earlier. *Id.* at 367–73 (distinguishing *Brown v. City of Pittsburgh*, 586 F.3d 263 (3d Cir. 2009)).

We do not regard *Bruni's* approach as a viable option here. As we've noted, Chicago's bubble-zone

ordinance is a carbon copy of the Colorado law upheld in *Hill* except for the smaller radius within which it applies. And *Hill's* narrow-tailoring analysis was highly generalized; it did not rest on the specific facts of the case or an evaluation of Colorado's evidentiary showing. Accordingly, a remand for a case-specific narrow-tailoring analysis would effectively deny *Hill's* controlling force.

It would also create a circuit split. In *Brown*, the predecessor case to *Bruni*, the Third Circuit upheld a separate provision in Pittsburgh's abortion-clinic law establishing an 8-foot no-approach bubble zone within a 100-foot radius of clinic entrances—"a virtually verbatim copy of the *Hill* statute"—without requiring a factual showing from the City. 586 F.3d at 273. *Bruni* left that part of *Brown* untouched.

Hill directly controls, notwithstanding its inconsistency with *McCullen* and *Reed*. Only the Supreme Court can bring harmony to these precedents. The district judge correctly dismissed the facial First Amendment challenge.

D. Due-Process Vagueness Claim

In a cursory final argument, the plaintiffs maintain that Chicago's bubble-zone ordinance is unconstitutionally vague. This argument too is foreclosed by *Hill*, which rejected a vagueness challenge to Colorado's bubble-zone law. 530 U.S. at 732–33. The plaintiffs rely on Justice Kennedy's dissenting position: "In the context of a law imposing criminal penalties for

pure speech, 'protest' is an imprecise word; 'counseling' is an imprecise word; 'education' is an imprecise word." *Id.* at 773 (Kennedy, J., dissenting). Perhaps he was right, but his view did not carry the day. The judge properly dismissed the due-process vagueness claim.

III. Conclusion

The road the plaintiffs urge is not open to us in our hierarchical system. Chicago's bubble-zone ordinance is materially identical to—indeed, is narrower than—the law upheld in *Hill*. While the Supreme Court has deeply unsettled *Hill*, it has not overruled the decision. So it remains binding on us. The plaintiffs must seek relief in the High Court.

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

VERONICA PRICE, et al. Plaintiffs, v. THE CITY OF CHICAGO, et. al. Defendants.	)	No. 16-cv-8268 Hon. Amy J. St. Eve

MEMORANDUM OPINION AND ORDER

AMY J. ST. EVE, District Court Judge:

Defendants the City of Chicago (the "City"), Rahm Emmanuel in his official capacity as the Mayor of the City of Chicago, Rebekah Scheinfeld in her official capacity as Commissioner of Transportation for the City of Chicago, and Eddie T. Johnson in his official capacity as the Superintendent of the Chicago Police Department (collectively, "Defendants") move to dismiss Plaintiffs Veronica Price, David Bergquist, Ana [sic] Scheidler, Anna Marie Scinto Mesia, the Pro-Life Action League, and The Live Pro-Life Group's (collectively, "Plaintiffs") complaint under Federal Rule of Civil Procedure 12(b)(6). (R. 16.) For the following reasons, the Court grants in part and denies in part Defendants' motion.

BACKGROUND[1]

I. Factual Allegations

This case centers on the City of Chicago's Disorderly Conduct Ordinance (the "Ordinance"), which was enacted in October 2009 and provides that a person commits disorderly conduct when he:

> knowingly approaches another person within eight feet of such person, unless such other person consents, for the purpose of passing a leaflet or handbill to, displaying a sign to, or engaging in oral protest, education, or counseling with such other person in the public way within a radius of 50 feet from any entrance door to a hospital, medical clinic or healthcare facility.

Municipal Code of Chicago ("MCC") § 8–4–010(j)(1); 2 Journal of the Proceedings of the City Council of the City of Chicago, Illinois, Oct. 7, 2009, 72711–12. The Ordinance is modeled on and nearly identical to a Colorado law upheld as constitutional in *Hill v. Colorado*, 530 U.S. 703 (2000). The only material difference between the two laws is the size of the area within which the eight-foot "bubble zone" applies: the Ordinance's restrictions apply inside of a 50-foot radius, while the Colorado statute's restrictions applied

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[1] The facts presented in the Background are taken from the complaint and are presumed true for the purpose of resolving the pending motion to dismiss. *See Teamsters Local Union No. 705 v. Burlington N. Santa Fe, LLC*, 741 F.3d 819, 823 (7th Cir. 2014); *Alam v. Miller Brewing Co.*, 709 F.3d 662, 665–66 (7th Cir. 2013); *see also Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007).

within a 100-foot radius. *Compare* MCC § 8-4-010(j)(1), *with Hill*, 530 U.S. at 707 n.1 (quoting Colo. Rev. Stat. § 18-9-122(3)).

Plaintiffs are citizens and organizations "who peacefully exercise their First Amendment rights on the public ways near abortion clinics in the City of Chicago by reaching out to women who are approaching the clinics for the purpose of securing abortion in order to share alternatives and inform the women of the dangers inherent in abortion." (R. 1, Compl., at ¶ 4.) They "counsel, pray, display signs, [and] distribute literature . . . on the public sidewalks and rights of way outside abortion clinics and elsewhere on the public ways in the City of Chicago." (*Id.* at ¶ 19.) Particularly relevant to this case is the practice of "sidewalk counsel[ing]," in which Plaintiffs "attempt to engage women approaching the abortion clinics in a one-on-one conversation in a calm, intimate manner in order to offer information about the dangers involved in abortion and to offer alternatives to abortion and help in pursuing those alternatives." (*Id.* at ¶ 20.) Plaintiffs allege that their communication is most effective when coming into close contact with women, which allows Plaintiffs to hand out literature and avoid shouting. (*Id.* at ¶¶ 21–25.)

Plaintiffs allege that officers from the Chicago Police Department ("CPD") have enforced the Ordinance against Plaintiffs when it does not apply, preventing the exercise of their First Amendment rights. (*Id.* at ¶ 31.) Plaintiffs detail the following incidents in their complaint:

- On November 19, 2009, near the Family Planning Associates abortion clinic known as the Albany Medical Center ("Albany")—which according to Plaintiffs is now closed—CPD Officer Erbacci told Ana Scheidler that the Ordinance "imposed an *absolute* buffer zone prohibiting any pro-life counselor from coming within 50 feet of a clinic entrance door." (*Id.* at ¶¶ 5, 31 (emphasis in original).) He threatened to cite anyone who came within fifty feet of the clinic door. (*Id.* at ¶ 32.) Additionally, he said that sidewalk counselors could not approach within eight feet of a person walking to the clinic even *more* than fifty feet away from the door. (*Id.* at ¶ 31.) Erbacci's understanding of the Ordinance was incorrect, as the Ordinance prevents individuals from approaching within eight feet of another person within fifty feet of a clinic door. Outside of the fifty-foot zone, the Ordinance does not apply, and, within the fifty-foot zone, the Ordinance does not apply to conduct that does not involve "approaching" within eight feet of another person.

- On November 21, 2009, at Planned Parenthood's Near North Center location (the "Near North clinic"), CPD Sergeant Tietz told Pro-Life Action League counselors that the Ordinance prohibited "approaching *or even standing* within eight feet of anyone approaching the facility entrance door." (*Id.* at ¶ 33 (emphasis in original).) When the pro-life advocates "respectfully challenged the officer's interpretation, he told them that if he had to go get the Ordinance from the station

he would come back and arrest them." (*Id.* at ¶ 34.) He then told a pro-life group to remove their signs from within fifty feet of the clinic door. (*Id.*)

- On January 9, 2010, CPD Officer Hagan told pro-life counselors at the Near North clinic that they could not come within 150 feet of the clinic. (*Id.* at ¶ 36.) She then changed her instruction to the following: "You guys cannot come within eight feet of this doorway. If you come within 50 feet of the doorway, and within eight feet of the doorway, and start giving them things, chanting prayers, when someone is coming down, you will be written an NOV. *You cannot do any abortion* [inaudible], counseling, or anything like that. . . . It's a law in the City of Chicago. They made it and I'm here to enforce it." (*Id.* (emphasis in original).) Plaintiffs also allege that they and other pro-life counselors were prohibited by the police officer from speaking to people going to the clinic, even if the counselors were stationary. (*Id.* at ¶ 37.)

- On January 10, 2010, a CPD officer told a pro-life advocate named David Avignone that he could not stand within eight feet of a clinic entrance. (*Id.* at ¶ 38.) He refused, and the officer called for backup. (*Id.*) Eventually, the sergeants who arrived as backup concluded that Avignone was correct. (*Id.* at ¶ 39.)

- On February 13, 2010, at the Near North clinic, Officer Hagan told pro-life counselors that they could not approach within ten feet

of the clinic entrance door. (*Id.* at ¶ 40.) The distance of ten feet is not mentioned in the Ordinance.

- On July 3, 2010, pro-life advocate Joseph Holland was praying in a stationary position on a wall a "few feet away from the entrance door to the clinic." (*Id.* at ¶ 42.) He was eventually arrested for "standing within 8 feet of the clinic entrance door." (*Id.* at ¶ 47.) The arresting officer later indicated that he interpreted the Ordinance to prohibit any kind of verbal expression within a 50-foot buffer zone. (*Id.* at ¶ 49.)

- On several occasions, CPD officers have ordered Plaintiffs and other pro-life advocates to stay outside of a 50-foot buffer zone around clinic entrances. (*Id.* at ¶ 53.) The Plaintiffs give examples from October 6, 2012 at Albany involving Sergeant Whitney; February 26, 2013 at Albany involving Officer Haran; March 9, 2013 involving Officer Whitney; June 6, 2015 at Albany; and August 27, 2015 at Albany.[2] (*Id.* at ¶¶ 53–57.)

- On October 11, 2014, at Albany, Sergeant Olszewski of the CPD ordered pro-life advocates to remain at least 50 feet away from the parking lot. (*Id.* at ¶ 79.)

- On November 21, 2015, a CPD officer told a pro-life counselor at a Family Planning

[2] On this occasion, the officers initially told Plaintiffs that they must stay fifty feet away from the gate of the clinic parking lot, but later reduced it to eight feet. (R. 1 at ¶ 57.)

Associates clinic (the "Washington clinic") that he could not come within ten feet of the clinic entrance. (*Id.* at ¶¶ 5, 58.)

- On April 2, 2016, at the Near North clinic, Sergeant Murphy of the CPD told pro-life counselors to move 100 feet from the door. (*Id.* at ¶ 60.) After conferring with another officer, he said they "need only move 50 feet away from any entrance to the clinic, and for anyone entering the clinic, the pro-life advocates had to 'give them an eight-foot buffer zone.'" (*Id.*) During this interaction, Sergeant Murphy also said that counselors could not engage with women verbally and mentioned that his understanding of the Ordinance had been informed by what his "higher ups" explained to him. (*Id.* at ¶ 65.)

Plaintiffs also allege that the Ordinance is selectively applied to pro-life advocates but not pro-choice advocates, who, according to Plaintiffs, violate the Ordinance. (*Id.* at ¶ 67.) They detail the following examples in support of their claim[3]:

- On September 27, 2014, Officer Grantz responded to a call from clinic escorts at the Washington clinic. (*Id.* at ¶ 70.) Plaintiffs and other pro-life advocates were ordered to stay at least fifty feet away from the clinic entrance

[3] All of the examples of selective enforcement also constitute examples of misapplication of the Ordinance, since the Ordinance applies equally to pro-life and pro-choice advocates.

while pro-choice clinic escorts[4] "were allowed free rein within the buffer zone." (*Id.*)

- On October 4, 2014, Officer Grantz ordered Plaintiffs to remain 10–15 feet away from the Washington clinic entrance, but he did not order the pro-choice escorts to do the same. (*Id.* at ¶¶ 72–73.) Officer Grantz told Plaintiffs that the Ordinance did not apply to the escorts because [sic] "are invited by the clinic and have 'authorized entry into the building.'" (*Id.* at ¶ 74.) During the same day at the same clinic, CPD Officer Schipplick told pro-life advocates that they must remain at least eight feet from the clinic door, but the officer also told the pro-life advocates that the pro-choice escorts did *not* have to be at least eight feet away. (*Id.* at ¶¶ 77–78.)
- On October 29, 2014, plaintiff David Bergquist stood near the Washington clinic door with a sign expressing his pro-life views. (*Id.* at ¶ 85.) An employee of Pro-Life Action League eventually took his place, and Bergquist moved about four feet from the entrance. (*Id.* at ¶ 86.) CPD officers arrived and told the pro-life counselors that they should move back because they were obstructing the entrance, which Plaintiffs say was not true. (*Id.* at ¶ 87.) Later, after a clinic escort complained, one of the officers "immediately took"

[4] Based on the complaint, clinic escorts are akin to a pro-choice version of a pro-life counselor. They appear to act as counterprotestors against pro-life protestors, and they attempt to shield clinic patients from pro-life counselors.

the escort's side, telling the Pro-Life Action League employee to move eight feet away from the door. (*Id.* at ¶ 88.)

- On April 4, 2015, responding to complaints by pro-choice escorts, the police told pro-life counselors to move seven or eight feet away from the door based on the Ordinance. (*Id.* at ¶¶ 91–94.) "While Plaintiffs and their colleagues were prohibited even from stationing themselves within eight feet of the clinic entrance, . . . the escorts moved freely within the prohibited zone." (*Id.* at ¶ 95.)

- On May 21, 2015, Plaintiff Ann Scheidler engaged a woman parking her car at the Albany clinic on the street. (*Id.* at ¶ 96.) A pro-choice escort told her to go to the parking lot and shoved her. (*Id.*) Officer Scalera of the CPD "took the side of the escort, telling Ms. Scheidler that she had no right 'to bother people.'" (*Id.* at ¶ 97.) He did not "instruct the escorts or caution them in any manner." (*Id.* at ¶ 98.)

- On June 6, 2015, at the Washington clinic, a clinic escort admitted to the police that she had "bumped" a pro-life advocate who claimed that the escort had shoved her. (*Id.* at ¶ 99.) The responding officer, Officer Little, "declined to even document the incident." (*Id.*)

- On April 2, 2016, with a police officer present, a pro-life counselor was near the door of a clinic and "reached out to hand [a woman going into the clinic] a gift bag," but a clinic escort blocked the counselor. (*Id.* at ¶¶ 101–02.)

> "The woman [entering the clinic] stopped, hesitated, as if she were going to come back for the bag, but the escort took her by the arm and pulled her into the clinic." (*Id.*)

Plaintiffs also allege that the nonenforcement of the Ordinance and other laws against the clinic escorts has caused them to grow "more aggressive." (*Id.* at ¶ 90.) They enumerate various instances in which escorts have acted aggressively and have blocked Plaintiffs' movements and messages. (*See*, *e.g.*, *id.* at ¶¶ 42–45, 81–105.) Some of these instances involve escorts approaching pro-life advocates to order them to move (*See*, *e.g.*, *id.* ¶¶ 43, 96, 101.) Additionally, Plaintiffs allege that escorts regularly violate the Ordinance, but "the police have never applied the Ordinance against such escorts and pro-choice advocates." (*Id.* at ¶ 69.)

II. Procedural History

Plaintiffs filed their complaint on August 23, 2016. (R. 1.) They allege four causes of action. First, Plaintiffs claim the Ordinance violates the First Amendment on its face and as applied. (*Id.* at ¶¶ 109–32.) Second, Plaintiffs allege that the Ordinance violates their due process rights under the Fourteenth Amendment on its face and as applied because it is unconstitutionally vague. (*Id.* at ¶¶ 133–39.) Third, Plaintiffs claim a violation of the Equal Protection Clause based on selective enforcement of the Ordinance. (*Id.* at ¶¶ 140–48.) Fourth, Plaintiffs allege a violation of the Illinois

Constitution. (*Id.* at ¶¶ 149–53.) Plaintiffs seek declaratory relief, injunctive relief, nominal damages, and attorneys' fees and costs. (R. 1 at 32.)

LEGAL STANDARD

"A motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6) challenges the viability of a complaint by arguing that it fails to state a claim upon which relief may be granted." *Camasta v. Jos. A. Bank Clothiers, Inc.*, 761 F.3d 732, 736 (7th Cir. 2014). Under Rule 8(a)(2), a complaint must include "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). The short and plain statement under Rule 8(a)(2) must "give the defendant fair notice of what the . . . claim is and the grounds upon which it rests." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (quoting *Conley v. Gibson*, 355 U.S. 41, 47 (1957)). A plaintiff's "[f]actual allegations must be enough to raise a right to relief above the speculative level." *Id.* Put differently, "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Twombly*, 550 U.S. at 570). In determining the sufficiency of a complaint under the plausibility standard, courts must "accept all well-pleaded facts as true and draw reasonable inferences in [a plaintiff's] favor." *Roberts v. City of Chicago*, 817 F.3d 561, 564 (7th Cir. 2016).

ANALYSIS

I. First Amendment Facial Challenge

Defendants argue that dismissal is required because, under Supreme Court precedent involving a materially identical law, the Ordinance is a content neutral restriction on speech that passes constitutional muster under intermediate scrutiny review. (*See* R. 18, Defs.' Mem. Supp. Mot. Dismiss, at 3.)

"The First Amendment, applicable to the States through the Fourteenth Amendment, prohibits the enactment of laws 'abridging the freedom of speech.'" *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2226 (2015) (quoting U.S. Const. amend. I). "Content-based laws—those that target speech based on its communicative content—are presumptively unconstitutional" and are subject to strict scrutiny. *Id.* at 2226–27. Content-neutral laws that restrict speech in a public forum like a sidewalk, on the other hand, "are subject to an intermediate level of scrutiny . . . because in most cases they pose a less substantial risk of excising certain ideas or viewpoints from the public dialogue." *ACLU of Ill. v. Alvarez*, 679 F.3d 583, 603 (7th Cir. 2012) (alternation [sic] in original) (quoting *Turner Broad. Sys., Inc. v. F.C.C.*, 512 U.S. 622, 642 (1994)); *see McCullen v. Coakley*, 134 S. Ct. 2518, 2529, 2534 (2014) ("[E]ven in a public forum the government may impose reasonable restrictions on the time, place, or manner of protected speech, provided the restrictions are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant

governmental interest, and that they leave open ample alternative channels for communication of the information." (quotation mark omitted) (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989))).

The parties here dispute whether the Ordinance is content neutral or not, and thus whether strict or intermediate scrutiny applies. (*Compare* R. 18 at 3–6, *with* R. 21, Pl.'s Response Mot. Dismiss, at 4–8.) Defendants contend that under *Hill v. Colorado*, 530 U.S. 703 (2000), the statute is content-neutral. Plaintiffs, in contrast, argue that *Hill* is no longer good law in light of *McCullen v. Coakley*, 134 S. Ct. 2518 (2014), and *Reed v. Town of Gilbert*, 135 S. Ct. 2218 (2015). The Court now turns to those cases.

In *Hill*, the Supreme Court held that a Colorado statute—which, as Plaintiffs recognize, was nearly identical to the Ordinance at issue here, (R. 15, Mem. Supp. Mot. Prelim. Inj., at 6 & n.1)—was content neutral and valid under intermediate scrutiny. 530 U.S. at 707 n.1, 725–30. Indeed, as previously noted, the only material difference between the two laws is the size of the area within which the eight-foot "bubble zone" applies: the Ordinance's restrictions apply inside of a 50-foot radius, while the Colorado statute's restrictions applied within a 100-foot radius. *Compare* MCC § 8-4-010(j)(1), *with Hill*, 530 U.S. at 707 n.1 (quoting Colo. Rev. Stat. § 18-9-122(3)).

The Supreme Court first concluded that the statute was content neutral, *Hill*, 530 U.S. at 725, explaining that (1) "it [was] a regulation of the places where

some speech may occur" rather than a "regulation of speech"; (2) "it was not adopted 'because of disagreement with the message it conveys'" and the law's "restrictions apply equally to all demonstrators, regardless of viewpoint, and the statutory language makes no reference to the content of the speech"; and (3) "the State's interests in protecting access and privacy, and providing the police with clear guidelines, are unrelated to the content of the demonstrators' speech," *id.* at 719–20 (quoting *Ward*, 491 U.S. at 791). Additionally, the Court noted that the statute "places no restrictions on—and clearly does not prohibit—either a particular viewpoint or any subject matter that may be discussed by a speaker." *Id.* at 723.

In reaching its conclusion, the Court rejected the argument that the statute was content-based "[b]ecause the content of the oral statements made by an approaching speaker must sometimes be examined to determine whether the knowing approach is covered by the statute"—that is, to determine whether the speaker approached another person for the purposes of, among other things, "engaging in oral protest, education, or counseling." *Id.* at 707 n.1, 720. The Court explained that it is acceptable "to look at the content of an oral or written statement in order to determine whether a rule of law applies to a course of conduct"—for example, to determine if a communication is a threat or an offer to sell goods. *Id.* at 721. With regard to the conduct that the Colorado statute addressed, the Court noted that "it is unlikely that there would often be any need to know exactly what words were spoken

in order to determine whether 'sidewalk counselors' are engaging in 'oral protest, education, or counseling' rather than pure social or random conversation." *Id.* Moreover, the Court explained that in the theoretical case in which reviewing the content of a statement were necessary to determine if it is covered by the statute, such a review would be a "cursory examination" to determine if the communication were "casual conversation." *Id.* at 721–22.

A. McCullen Did Not Overrule *Hill*

Plaintiffs contend that "[t]he very foundations of the Court's reasoning in *Hill* have been eviscerated by *McCullen* . . . and *Reed*." (R. 21 at 5.) In *McCullen*, the Supreme Court considered a Massachusetts statute that, broadly speaking, prevented individuals from knowingly standing on a public way or sidewalk within 35 feet of an entrance to a reproductive health care facility during business hours. 134 S. Ct. at 2526. Various exemptions existed for people entering or leaving the facility, employees or agents of the facility, law enforcement and other municipal agents, and people using the public sidewalk or right of way for the purpose of reaching a location other than the reproductive health care facility. *Id.* The statute in *McCullen* differed from the law at issue in *Hill* as well as the Ordinance, which do not ban people from standing near clinics, but rather prevent people from approaching within eight feet of another person within a certain radius of a healthcare facility without consent for particular purposes. *See supra.* Although the Court found the

Massachusetts law content and viewpoint neutral, *McCullen*, 134 S. Ct. at 2534, it held that the law failed under intermediate scrutiny, *id.* at 2534–41.

Plaintiffs, drawing on a concurring opinion from *McCullen*, contend that "the majority [opinion] had '*sub silentio* (and perhaps inadvertently) overruled *Hill*' with its observation that a law 'would not be content neutral if it were concerned with undesirable effects that arise from the direct impact of speech on its audience or [l]isteners' reactions to speech.'" (R. 21 at 5 (quoting *McCullen*, 134 S. Ct. at 2546 (Scalia, J., concurring); *McCullen*, 134 S. Ct. at 2531–32 (majority op.) (citation omitted) (internal quotation marks omitted)).) The interest of avoiding the undesirable effects that arise from speech, Plaintiffs argue, "was a core justification for the Colorado statute, and thus *Hill*, undermined by the majority [in *McCullen*], was overruled, even if not expressly, in the view of the three concurring justices." (*Id.* (citing *Hill*, 530 U.S. at 715 (explaining that states have a legitimate interest in the health and safety of their citizens and that this interest "may justify a special focus on unimpeded access to health care facilities and the avoidance of potential trauma to patients associated with confrontational protests")).)

The question then is whether *Hill* still binds this Court after *McCullen.* The Supreme Court has made clear "that '[i]f a precedent of [the Supreme Court] has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly

controls, leaving to [the Supreme] Court the prerogative of overruling its own decisions." *Agostini v. Felton*, 521 U.S. 203, 237 (1997) (quoting *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989)); *see also Bosse v. Oklahoma*, 137 S. Ct. 1, 2 (2016) (per curiam) ("Our decisions remain binding precedent until we see fit to reconsider them, regardless of whether subsequent cases have raised doubts about their continuing vitality." (quoting *Hohn v. United States*, 524 U.S. 236, 252–53 (1998))). The Seventh Circuit has said, however, "We are bound to follow a decision of the Supreme Court unless we are powerfully convinced that the [Supreme] Court would overrule it at the first opportunity." *Colby v. J.C. Penney Co.*, 811 F.2d 1119, 1123 (7th Cir. 1987); *see also Olson v. Paine, Webber, Jackson & Curtis, Inc.*, 806 F.2d 731, 734 (7th Cir. 1986) ("Ordinarily a lower court has no authority to reject a doctrine developed by a higher one. If, however, events subsequent to the last decision by the higher court approving the doctrine—especially later decisions by that court, or statutory changes—make it almost certain that the higher court would repudiate the doctrine if given a chance to do so, the lower court is not required to adhere to the doctrine."); *F.D.I.C. v. Mahajan*, No. 11 C 7590, 2013 WL 3771419, at *2 (N.D. Ill. July 16, 2013).

The Court cannot conclude that *Hill* is no longer good law after *McCullen*. First, *Hill* is directly on point—the Ordinance is the same as the statute at issue in *Hill* except for the size of the radius in which the 8-foot bubble zones apply (the Ordinance provides for

a smaller radius and thus restricts less speech than the Colorado statute). *McCullen*, in contrast dealt with a similar but ultimately distinct statute, as explained above. Second, the Supreme Court in *McCullen* granted certiorari on two questions: (1) "Whether the First Circuit erred in upholding Massachusetts' selective exclusion law under the First and Fourteenth Amendments, on its face and as applied to petitioners?"; and (2) If *Hill* . . . permits enforcement of this law, whether *Hill* should be limited or overruled?" Petition for a Writ of Certiorari, *McCullen*, 134 S. Ct. 2518 (2014), (No. 12-1168), 2013 WL 1247969, at *i; *McCullen*, 133 S. Ct. 2857 (2013). The majority opinion in *McCullen*, however, does not cite to *Hill* except to note that a predecessor to the Massachusetts law "was modeled on a similar Colorado law that this Court had upheld" and that the First Circuit relied on *Hill* to sustain the former version of the Massachusetts statute. 134 S. Ct. at 2525. Given the precedent indicating that a district court must act with the utmost restraint when determining if a directly applicable Supreme Court case is still controlling, the Court will not presume the *McCullen* Court overruled *Hill* without mentioning doing so, particularly when the question of whether to overrule *Hill* was squarely before the Court.[5] Third, it is not clear, as Plaintiffs argue, that the statute from *Hill* was "concerned with undesirable effects that arise from the direct impact of speech on

[5] Two of the justices in the majority in *Hill* also joined the majority in *McCullen*. While this is not dispositive, it suggests that *McCullen* did not cast *Hill* aside.

its audience or [l]isteners' reactions to speech." (R. 21 at 5 (internal quotation marks omitted) (quoting *McCullen*, 134 S. Ct. at 2531–32).) Instead, the *Hill* Court focused on patients' privacy interests in avoiding unwanted, intrusive communication in situations in which avoiding such communication is not practical. *See Hill*, 530 U.S. at 715–18. Furthermore, the statute in *McCullen* was content neutral and similarly oriented to protecting patient access to healthcare. *See* 134 S. Ct. at 2534–35.

B. Reed Did Not Overrule *Hill*

Plaintiffs also argue that the Ordinance is not content neutral in light of *Reed*. That case dealt with a town's "comprehensive code governing the manner in which people may display outdoor signs." *Reed*, 135 S. Ct. at 2224. The "sign code" prohibited the display of outdoor signs without a permit, but exempted 23 categories of signs. *Id.* The Supreme Court identified three categories as particularly relevant. *Id.* The first was "Ideological Sign[s]," which "include[d] any 'sign communicating a message or ideas for noncommercial purposes that is not a Construction Sign, Directional Sign, Temporary Directional Sign Relating to a Qualifying Event, Political Sign, Garage Sale Sign, or a sign owned or required by a governmental agency.'" *Id.* (first alteration in original) (quoting Gilbert, Ariz., Land Development Code ("Sign Code"), Glossary of General Terms at 23)). These signs could measure up to twenty square feet and be "placed in all 'zoning districts' without time limits." *Id.* (quoting Sign Code,

§ 4.402(J)). The second category of signs was "Political Sign[s]," which included "any 'temporary sign designed to influence the outcome of an election called by a public body." *Id.* (alteration in original) (quoting Sign Code, Glossary at 23). The Sign Code treated these signs "less favorably than ideological signs." *Id.* The third category of signs was "Temporary Directional Signs Relating to a Qualifying Event," which included "any 'Temporary Sign intended to direct pedestrians, motorists, and other passerby to a qualifying event' "—a term defined as any "assembly, gathering, activity, or meeting sponsored, arranged, or promoted by a religious, charitable, community service, educational, or other similar non-profit organization." *Id.* (internal quotation marks omitted) (quoting Sign Code, Glossary at 25). The Sign Code treated Temporary Directional Signs less favorably than both Ideological Signs and Political Signs. *Id.*

The Supreme Court concluded that the Sign Code was "content based on its face." *Id.* at 2227. The Court explained that the Sign Code defined (1) Temporary Directional Signs "on the basis of whether a sign conveys the message of directing the public to church or some other 'qualifying event,' " (2) Political Signs "on the basis of whether a sign's message is 'designed to influence the outcome of an election,' " and (3) Ideological Signs "on the basis of whether a sign 'comunicat[es] [sic] a message or ideas' that do not fit within the Code's other categories." *Id.* (quoting Sign Code, Glossary at 23–25). As a result, the Court reasoned, the

"restrictions in the Sign Code that apply to any given sign . . . depend entirely on the communicative content of the sign." *Id.* The Court added that "[m]ore to the point, "the [petitioner] Church's signs inviting people to attend its worship services are treated differently from signs conveying other types of ideas." *Id.*

Plaintiffs point to language in *Reed* in which the Supreme Court noted: "Some facial distinctions based on a message are obvious, defining regulated speech by particular subject matter, and others are more subtle, *defining regulated speech by its function or purpose.* Both are distinctions drawn based on the message a speaker conveys, and, therefore, are subject to strict scrutiny." (R. 21 at 6 (emphasis in original) (quoting *Reed*, 135 S. Ct. at 2227).) The Ordinance, Plaintiffs argue, "on its face regulates speech by its function or purpose." *Id.* Furthermore, Plaintiffs contend:

> The Court in *Reed* rejected arguments of the government that the regulation could be considered content neutral, even if it expressly drew distinctions based on communicative content, as long as the Town did not regulate based on disagreement with the message contained, [*Reed*], 135 S. Ct. at 2227, or if its interests in regulating were unrelated to the content of the regulated speech. *Id.* at 2228. Similar reasons were approved in *Hill, see* 530 U.S. at 719–20, but the Court in *Reed* decided that these justification [sic] put the cart before the horse: they skipped "the crucial first step in the content-neutrality analysis: determining

> whether the law is content neutral on its face." 135 S. Ct. at 2228.

(R. 21 at 6–7.)

Even if *Reed* seemingly conflicts with some of *Hill*'s reasoning, the Court cannot hold that *Hill* is no longer binding.[6] First and most importantly, the Supreme Court in *Reed* did not discuss whether it correctly decided *Hill* or whether it overruled *Hill*. Second, while Plaintiffs correctly note that the *Hill* Court relied on the conclusions that (1) the Colorado law was not enacted because of disagreement with a particular message and (2) the state's interests embodied in the law were unrelated to the content of speech, *Hill*, 530 U.S. at 719–20, this reliance was not the only basis for *Hill*'s outcome. The Supreme Court also pointed out, for example, that the Colorado statute regulated the places where speech may occur rather than speech itself. *Id.* at 719.

Additionally, while the *Reed* Court said that laws that define speech based on "its function or purpose" are not content neutral, 135 S. Ct. at 2227; *see also id.* at 2230, it is not clear—especially in light of the Supreme Court's directive to follow an on-point case even if subsequent cases appear to reject the on-point case's reasoning—that the statute at issue in *Hill* is such a law. In *Reed*, the Sign Code "depend[ed] entirely on the

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[6] As Defendants point out, one court has "note[d] that the holding in *Reed* did not overturn the holding[ ] in *Hill*." *Reilly v. City of Harrisburg*, No. 1:16-CV-0510, 2016 WL 4539207, at *3 n.4 (M.D. Pa. Aug. 31, 2016); (R. 18 at 4 n.1.).

communicative content of the sign." *Id.* at 2227. As the Court explained, a sign informing people of a book club meeting in which participants would discuss the works of John Locke would "be treated differently from a sign expressing the view that one should vote for one of Locke's followers in an upcoming election, and both signs w[ould] be treated differently from a sign expressing an ideological view rooted in Locke's theory of government." *Id.* In *Hill*, in contrast, it was not the message of the speech that was important—instead it was the manner of speech. 530 U.S. at 721–22. The Colorado law singled out messages conveyed through "leafletting, displaying a sign, or engaging in oral protest, education, or counseling," but, unlike the Sign Code, the Colorado law had nothing to say about what one can talk, counsel, educate, protest, or leaflet about. *Id.* at 707 n.1; *see also Turner*, 512 U.S. at 645 (explaining that rules that make distinctions "based only upon the manner in which speakers transmit their messages to viewers, and not upon the messages they carry" are not presumed to violate the First Amendment).[7]

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[7] Plaintiffs also rely on *Norton v. City of Springfield*, 806 F.3d 411 (7th Cir. 2015), a case in which the Seventh Circuit applied *Reed* to an ordinance that prohibited oral requests for an immediate donation of money and concluded that the ordinance was not content neutral. *Norton* does not help Plaintiffs here, however, because it is not a decision of the Supreme Court and *Hill* was not directly on point in that case. Additionally, the Ordinance, unlike the law at issue in *Norton*, is not clearly a "subject-matter regulation." *Norton*, 806 F.3d at 412. In *Norton*, the law mandated that in certain situations people could not speak about a particular subject—asking for an immediate donation of money.

C. *Hill* Controls the Intermediate Scrutiny Analysis

Because the Ordinance is content neutral, the Court must determine if the Ordinance is narrowly tailored to serve a legitimate and significant governmental interest and that "it leaves open ample alternative channels for communication." *Hill*, 530 U.S. at 725–26. *Hill* upheld a statute under the intermediate scrutiny test that was materially identical to the law at issue here except that the Ordinance has a smaller radius in which the eight-foot bubble zone applies (and therefore is less restrictive than the Colorado statute). *Id.* at

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Id. The Ordinance, in contrast, permits individuals to speak about any subject, but limits the manner in which they convey information (*i.e.*, by prohibiting counseling). In other words, the Ordinance is not clearly a "law distinguishing one kind of speech from another by reference to its meaning," *id.*—for example, "a law that distinguishes discussion of baseball from discussion of politics," *Left Field Media LLC v. City of Chicago*, 822 F.3d 988, 992 (7th Cir. 2016). Given that the laws in *Norton* and this case are not exactly alike and given that the Court is bound to follow *Hill*, which is directly on point, the Court must apply the holding of *Hill*.

Plaintiffs further argue in a sentence-long footnote that the Ordinance is content-based because it "exempts speech related to labor disputes at health care facilities" but restricts abortion speech. (R. 21 at 6 n.4.) Plaintiffs base this argument on an Illinois state law that preempts local law. (*Id.*) Cursory arguments raised in footnotes are deemed waived. *See Harmon v. Gordon*, 712 F.3d 1044, 1053 (7th Cir. 2013); *Long v. Teachers' Ret. Sys. of Ill.*, 585 F.3d 344, 349 (7th Cir. 2009); *Keith v. Ferring Pharma., Inc.*, No. 15 FC 10381, 2016 WL 5391224, at *13 (N.D. Ill. Sept. 27, 2016). Additionally, the Ordinance—the law the Plaintiffs challenge as content-based—makes no distinction based on speech related to labor disputes. Instead, state law makes such a distinction.

725–30. The City of Chicago passed the Ordinance in light of *Hill* and the government relies upon it here. Because *Hill* controls this case, Plaintiffs' facial claim cannot succeed. *See Hoye v. City of Oakland*, 653 F.3d 835, 844–45 (9th Cir. 2011) (explaining that an ordinance was modeled after the law in *Hill*, so the "analysis of the Ordinance's facial constitutionality [wa]s mostly controlled by that case" except where the ordinance departed from the Colorado statute).

Plaintiffs argue that dismissal is not appropriate because Defendants carry the burden to show evidence supporting their proffered justification for the Ordinance and Defendants have not submitted factual support at this stage in the litigation. (R. 21 at 6 n.3.) Here, however, *Hill* is directly on point and provided the model for the Ordinance. "Where the courts have already upheld a similar ordinance because of the governmental interests at stake, a future litigant should not be able to challenge similar governmental interests without showing some distinction at the pleading stage." *Graff v. City of Chicago*, 9 F.3d 1309, 1323 (7th Cir. 1993) (en banc) (plurality op.) (discussing other Seventh Circuit cases in which the court affirmed the dismissal of facial challenges).[8] Plaintiffs do not point

[8] Both concurring opinions in this case agreed with the plurality opinion's conclusion that dismissal of the plaintiff's First Amendment claim was appropriate under the intermediate scrutiny test for reasonable time, place, and manner restrictions. *See Graff*, 9 F.3d at 1319–23 (plurality op.); *id.* at 1333 (Flaum, J., concurring); *id.* at 1335 (Ripple, J., concurring) ("I therefore respectfully submit that time, place, and manner analysis is an appropriate analytical tool for the assessment of this statute, and,

to sufficient facts alleged in the complaint that justify departure from the Supreme Court's holding in *Hill* regarding the facial validity of a law identical to the Ordinance in all material respects (other than the Colorado law's broader radius in which it applies). Accordingly, Plaintiffs' facial First Amendment claim cannot succeed.[9]

II. As-Applied Challenges

Plaintiffs argue that even if *Hill* controls, "it certainly has no bearing on Plaintiffs' *as-applied challenge.*" (R. 21 at 9.) Plaintiffs point to two problems with the enforcement of the Ordinance: that it is selectively enforced against only pro-life advocates and that it is regularly misinterpreted by police officers, resulting in its enforcement in situations in which it does not

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like my colleagues who have joined the principal opinion, I believe that the ordinance in question can be sustained on this basis."). The en banc panel in *Graff* consisted of twelve judges. Five judges joined the plurality, three judges dissented, Judge Cudahy joined Judge Flaum's concurrence, and two judges joined Judge Ripple's concurrence (including Judge Cudahy). Consequently, a majority of the en banc panel agreed that dismissal of the plaintiff's First Amendment claim was appropriate.

[9] Plaintiffs' arguments that the Ordinance is unconstitutionally vague and overbroad, (*see* R. 27, Defs.' Reply, at 5–7 (discussing Plaintiffs' contentions)), also must fail under *Hill*, which considered and rejected those arguments, 530 U.S. at 730–33. This Court is bound by *Hill*'s resolution of those issues. Additionally, Plaintiffs' claim that the ordinance is an unconstitutional prior restraint is dismissed under *Hill*, 530 U.S. at 734, and because Plaintiffs failed to respond to Defendants' argument that this claim should be dismissed under *Hill*, (*see* R. 27 at 9–10).

apply. (R. 21 at 13.) Defendants argue that the Court should dismiss the claim because Plaintiffs fail to plead a claim in accordance with *Monell v. N.Y.C. Dep't of Soc. Servs.*, 436 U.S. 658 (1978). (R. 18 at 10.) Specifically, Defendants argue that under § 1983, the City[10] is not vicariously liable for the acts of its employees. Instead it is liable for the acts of City employees committed pursuant to a City policy. (R. 18 at 10–11.) According to Defendants, Plaintiffs have failed to adequately plead that it is City policy to enforce the Ordinance only against pro-life advocates or to enforce it improperly in situations in which it does not apply. (*Id.* at 10–13.) Consequently, Defendants contend, the Court should dismiss this claim. (*Id.* at 13.)

A municipality may face liability under § 1983 for unconstitutional acts caused by "(1) an official policy adopted and promulgated by its officers; (2) a governmental practice or custom that, although not officially authorized, is widespread and well settled; or (3) an official with final policy-making authority." *Thomas v. Cook Cty. Sheriff's Dep't*, 604 F.3d 293, 303 (7th Cir. 2009). With respect to the second category, *Monell* liability attaches if a widespread custom or practice violates the constitution, *Gable v. City of Chicago*, 296 F.3d 531, 537 & n.3 (7th Cir. 2002), or if municipal

[10] Plaintiffs' claims against the Mayor, Superintendent of the Chicago Police Department, and the Commissioner of the Department of Transportation are official capacity claims, which the Court construes as suits against the municipality. *See Kentucky v. Graham*, 473 U.S. 159, 167–68 & n.14 (1985); *Yeskigian v. Nappi*, 900 F.2d 101, 103 (7th Cir. 1990); *Suber v. City of Chicago*, 10 C 2876, 2011 WL 1706156, at *2 n.2 (N.D. Ill. May 5, 2011).

"policymakers were 'deliberatively indifferent as to [the] known or obvious consequences [of a practice]'"—"[i]n other words, they must have been aware of the risk created by the custom or practice and must have failed to take appropriate steps to protect [Plaintiffs]." *Id.* (first alteration in original) (quoting *Gable*, 296 F.3d at 537). The training of law enforcement personnel can be "so inadequate that it amounts to a 'policy' of 'deliberate indifference to the rights of persons with whom the police come into contact.'" *Smith v. City of Joliet*, 965 F.2d 235, 237 (7th Cir. 1992) (quoting *Graham v. Sauk Prairie Police Comm'n*, 915 F.2d 1085, 1100 (7th Cir. 1990)); *see also Alexander v. City of South Bend*, 433 F.3d 550, 557 (7th Cir. 2006). This deliberate indifference standard is not met by mere negligence or even gross negligence or recklessness. *Smith*, 915 F.2d at 1100.

The Seventh Circuit has made clear that "there is no clear consensus as to how frequently" certain conduct must occur to impose *Monell* liability based on a widespread custom or practice, although the Seventh Circuit has in certain contexts held that one instance and three instances were insufficient. *See Thomas*, 604 F.3d at 303 (citing *Cosby v. Ward*, 843 F.2d 967, 983 (7th Cir. 1988), and *Gable*, 296 F.3d at 538).[11] "[A] series

[11] The Court notes that in *Gable*, where the Seventh Circuit concluded that three instances were insufficient, the litigation had proceeded to the summary judgment stage. 296 F.3d at 541. It "thus do[es] not speak to the nature of allegations sufficient to survive a motion to dismiss." *Caines v. Vill. of Forest Park*, No. 02 C 7472, 2003 WL 21518558, at *5 (N.D. Ill. July 2, 2003).

of violations," however, can "lay the premise of deliberate indifference." *Id.* (quoting *Palmer v. Marion County*, 327 F.3d 588, 596 (7th Cir. 2003)); *see also Sroga v. Preckwinkle*, No. 14 C 06594, 2016 WL 1043427, at *7 (N.D. Ill. Mar. 16, 2016) ("Generally speaking, to adequately state a widespread-practice claim under *Monell*, [the plaintiff] must allege repeated constitutional violations to raise the inference that the [defendant municipality] was 'aware of the risk created by the custom or practice . . . and failed to take appropriate steps,' *Thomas*, 604 F.3d at 303, or that the risk was 'so obvious' that the policymakers can be said to have been deliberately indifferent to the risk, *City of Canton, Ohio v. Harris*, 489 U.S. 378, 389 (1989).'"); *Hare v. County of Kane*, No. 14 C 1851, 2014 WL 7213198, at *2 (N.D. Ill. Dec. 15, 2014). "[I]t is not impossible for a plaintiff to demonstrate the existence of an official policy or custom by presenting evidence limited to his experience," but the presentation of such evidence makes it more difficult to show there was a widespread custom or practice instead of a random event. *Grieverson v. Anderson*, 538 F.3d 763, 774 (7th Cir. 2008); *see also Jaythan v. Bd. of Educ. of Sykuta Elementary Sch.*, No. 16 C 5700, 2016 WL 6596054, at *4 (N.D. Ill. Nov. 8, 2016) (published op.). When the same incident of which a plaintiff complains "has arisen many times and the municipality has acquiesced in the outcome, it is possible (though not necessary) to infer there is a policy at work." *Valentino v. Vill. of S. Chi. Heights*, 575 F.3d 664, 675 (7th Cir. 2009) (quoting *Lewis v. City of Chicago*, 496 F.3d 645, 656 (7th Cir. 2007)).

Plaintiffs have alleged sufficient instances of improper enforcement of the Ordinance to state a plausible claim under *Monell*. As recounted in the Background section, Plaintiffs have alleged numerous—at least fifteen—examples of improper enforcement of the Ordinance at a variety of locations involving various pro-life advocates and police officers. These instances include, for example, treating the Ordinance as a 50-foot buffer zone, referring to distances not mentioned in the Ordinance, enforcing the Ordinance based on the distance from a parking lot gate rather than the entrance door to a clinic, or prohibiting pro-life advocates from standing in a particular place without reference to whether they were "approaching" another person as the Ordinance requires. Plaintiffs also allege at least seven occasions in which (1) the police told pro-life advocates that they could not stand in a particular location without telling the same thing to pro-choice advocates or (2) the police appeared to reflexively favor pro-choice advocates over pro-life advocates. Additionally, the Plaintiffs allege that pro-choice advocates regularly violate the Ordinance without any police intervention. Taking these allegations as true and adding in the many times the police have intervened against Plaintiffs, the Court can reasonably draw an inference that permits Plaintiffs' selective enforcement theory to survive the current motion to dismiss.

In short, taking all of Plaintiffs' allegations as true and making reasonable inferences in their favor, the complaint sufficiently alleges a pattern of conduct that

indicates a widespread custom or practice of discriminatory enforcement of the Ordinance, deliberate indifference to the widespread unconstitutional enforcement of the Ordinance, or a training policy that is "so inadequate that it amounts to a 'policy' of 'deliberate indifference to the rights of persons with whom the police come into contact.'"[12] *Smith*, 965 F.2d at 237 (quoting *Graham*, 915 F.2d at 1100); *cf. Serna v. Sears*, No. 13-cv-03359, 2015 WL 3464460, at *2–3 (N.D. Ill. May 29, 2015) (concluding that a *Monell* claim survived a motion to dismiss because a plaintiff need not prove his claim at the pleading stage); *Hare*, 2014 WL 7213198, at *2–4 (concluding that a single plaintiff's allegations of frequent instances of inadequate medical care in a jail over a twenty-five day period were sufficient to "provide an implication that" a widespread policy existed of providing all inmates with that particular plaintiff's medical needs with inadequate care); *McGee v. City of Chicago*, No. 11 C 2512, 2011 WL 4382484, at *4 (N.D. Ill. Sept. 16, 2011) (explaining that a *Monell* claim survived a motion to dismiss even though the plaintiff "provide[d] little in the way of facts regarding the specific contours of the policy, whether the policy was express or more akin to a custom, or how widespread it was"). Moreover given the sufficiency of these allegations, discovery could uncover additional

[12] Defendants have not argued that the discriminatory enforcement of the Ordinance and the improper enforcement of the Ordinance do not violate the Constitution. Instead, they focus on the question of whether Plaintiffs can tie the allegedly unconstitutional enforcement of the Ordinance to the City of Chicago under *Monell*.

evidence currently unavailable to Plaintiffs of a widespread practice—for example, deposition testimony of CPD officers regarding CPD policies—which would further bolster Plaintiffs' claims. *See Olson v. Champaign County*, 784 F.3d 1093, 1100 (7th Cir. 2015) (explaining that plaintiffs' "pleading burden should be commensurate with the amount of information available to them" and, in such a situation, allegations are sufficiently plausible if they raise a reasonable expectation that discovery will reveal supporting evidence (quoting *Bausch v. Stryker Corp.*, 630 F.3d 546, 561 (7th Cir. 2010))).

Accordingly, Plaintiffs' Equal Protection claim and as-applied First Amendment claim arising from an alleged widespread policy of discriminatory enforcement, inadequate training, or deliberate indifference to constitutional violations survive Defendants' motion to dismiss.[13]

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[13] Defendants argue that the Court should dismiss Plaintiffs' claims under the Illinois Constitution for the same reasons that the Court should dismiss Plaintiffs' claims under the First Amendment. (R. 18 at 13.) Alternatively, Defendants request that the Court decline to exercise supplemental jurisdiction over Plaintiffs' state-law claims. (*Id.*) Plaintiffs make no argument related to their Illinois constitutional claims. Assuming Defendants are correct that the Illinois Constitution is coextensive with the First Amendment—which is a questionable proposition, *see Peterson v. Vill. of Downers Grove*, 103 F. Supp. 3d 918, 925 n.3 (N.D. Ill. 2015) (citing *City of Chicago v. Pooh Bah Enters., Inc.*, 865 N.E.2d 133, 168 (Ill. 2006))—the Court dismisses the Plaintiffs' Illinois constitutional claims only to the extent that they mirror the federal claims dismissed in this opinion.

CONCLUSION

For the foregoing reasons, the Court grants in part and denies in part Defendants' motion to dismiss.

DATED:
January 4, 2017

ENTERED

/s/ Amy J. St. Eve
AMY J. ST. EVE
U.S. District Court Judge

MUNICIPAL CODE OF CHICAGO

DISORDERLY CONDUCT § 8-4-010(j)

A person commits disorderly conduct when he knowingly:

* * *

j. Either: (1) knowingly approaches another person within eight feet of such person, unless such other person consents, for the purpose of passing a leaflet or handbill to, displaying a sign to, or engaging in oral protest, education, or counseling with such other person in the public way within a radius of 50 feet from any entrance door to a hospital, medical clinic or healthcare facility, or (2) by force or threat of force or by physical obstruction, intentionally injures, intimidates or interferes with or attempts to injure, intimidate or interfere with any person entering or leaving any hospital, medical clinic or healthcare facility. A person convicted of disorderly conduct shall be fined not more than $500.00 for each offense.

United States Constitution, First Amendment

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.