

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

ROGER LOPEZ,
Plaintiff,
v.
CITY OF SAN DIEGO,
Defendant.

Case No.: 24cv1577-LL-DDL

**ORDER GRANTING DEFENDANT’S
MOTION TO DISMISS
[ECF No. 12];**

**ORDER DENYING AS MOOT
PLAINTIFF’S MOTION FOR
PRELIMINARY INJUNCTION
[ECF No. 11];**

**ORDER GRANTING UNOPPOSED
EX PARTE MOTION FOR LEAVE
TO FILE A NOTICE OF
SUPPLEMENTAL AUTHORITY
[ECF No. 21]**

Pending before the Court is Plaintiff Roger Lopez’s Motion for Preliminary Injunction. ECF No. 11. Plaintiff seeks to enjoin Defendant, the City of San Diego, from enforcing Ordinance No. O-21822 and the corresponding San Diego Municipal Code sections. *Id.*; *see also* Exhibit A to the Complaint at ECF No. 1. Also pending before the Court is Defendant’s Motion to Dismiss Plaintiff’s Complaint under Federal Rule of Civil

1 Procedure 12(b)(6). ECF No. 12. Both Motions have been fully briefed and are suitable for
2 submission without oral argument. For the reasons set forth below, Defendant’s Motion to
3 Dismiss is **GRANTED** and Plaintiff’s Motion for a Preliminary Injunction is **DENIED**
4 **AS MOOT**.

5 **I. BACKGROUND**

6 **A. City of San Diego’s Ordinance Number O-21822**

7 This case centers on the City of San Diego’s Ordinance Number O-21822¹ (“the
8 Ordinance”) which regulates conduct within 100 feet of health care facilities, places of
9 worship, and school grounds (hereinafter “Covered Facilities”). ECF No. 1. (“Compl.”).
10 The Ordinance amends two sections of the San Diego Municipal Code (“SDMC”), sections
11 52.1001, 52.1002, and adds four new sections 52.1003, 52.1004, 52.1005, 52.1006. *See*
12 Exhibit A to Compl.; *see also* Compl. ¶ 24.

13 The Ordinance, which was enacted by the City of San Diego on June 11, 2024,
14 provides that the “Council desires to prevent the obstruction, harassment, and intimidation
15 of people entering and exiting Covered Facilities while preserving the fundamental
16 constitutional rights of people to peacefully assemble and express opinions on matters of
17 public concern.” Exhibit A to the Compl. at 30. The Ordinance prohibits an individual from
18 obstructing an entrance, exit, or access to a parking lot at a Covered Facility and also
19 prohibits harassment and intimidation as follows:

- 20 (b) Harassment and Intimidation Prohibited. Within a radius of 100 feet of a
21 health care facility, place of worship, or school grounds, no person shall:
22 (1) approach within eight feet of a person in the public right-of-way or
23 sidewalk area who is seeking to enter or exit a health care facility, place
24 of worship, or school grounds to harass or intimidate that person; or
25 (2) harass or intimidate a person in the public right-of-way or sidewalk
26 area who is seeking to enter or exit a health care facility place of
27 worship, or school grounds.

27 ¹ Plaintiff refers to the Ordinance as O-2024-114 in his briefing (*See, e.g.*, ECF No. 16 at 10; *see also* ECF
28 No. 11-1 at 10). For ease of reference, the Court will refer to it as Ordinance Number O-21822, as
captioned in the title of the Ordinance. *See* Exhibit A to the Compl.

1 SDMC 52.1003.

2 The Ordinance requires consent for certain activities within a radius of 100 feet of
3 Covered Facilities as follows:

4 (c) Consent Required. Within a radius of 100 feet of a health care facility, place
5 of worship, or school grounds, unless the person or motor vehicle occupant
6 consents, no person shall:

7 (1) knowingly and willfully approach within eight feet of a person in the
8 public right-of-way or sidewalk areas who is seeking to enter or exit a
9 health care facility, place of worship, or school grounds, to:

10 (i) pass a leaflet or handbill to that person;

11 (ii) display a sign to that person;

12 (iii) engage in oral protest, education, or counseling.

13 (2) knowingly and willfully approach within eight feet of an occupant of a
14 motor vehicle seeking to enter or exit a parking lot, to:

15 (i) pass a leaflet or handbill to the motor vehicle occupant;

16 (ii) display a sign to the motor vehicle occupant; or

17 (iii) engage in oral protest, education, or counseling.

18 *Id.*

19 The Ordinance also sets forth the following “Noise Limitations”:

20 (a) Within a radius of 100 feet of a health care facility, place of worship, or
21 school grounds, no person shall:

22 (1) make, or cause to be made, any disturbing, excessive, or offensive noise
23 which causes discomfort or annoyance to any reasonably person of
24 normal sensitivities; or

25 (2) make, or cause to be made, any noise which unreasonably interferes
26 with the workings of a health care facility, place of worship, or school;
27 or

28 (3) use loud speaking amplifiers or similar devices in a manner that emits
a sound level exceeding 55 decibels any point ten feet or more from the
noise source.

SDMC 52.1004.

The Ordinance is modeled on a Colorado law upheld as constitutional in *Hill v. Colorado*, 530 U.S. 703 (2000). One difference between the two laws is the instant Ordinance’s inclusion of places of worship and school grounds, while the ordinance in *Hill*

1 applied only to health care facilities. *Id.* at 707. Additionally, the instant Ordinance
2 expressly prohibits any acts to “harass or intimidate,” and has a stricter noise ordinance.

3 On September 5, 2024, Plaintiff Roger Lopez sued the City of San Diego, claiming
4 that the Ordinance violates his free speech rights under the First and Fourteenth
5 Amendment of the United States Constitution, on its face. Compl. Plaintiff is a “sidewalk
6 counselor” who alleges his “only chance to directly help abortion-minded women is on the
7 public sidewalk.” *Id.* ¶ 16. As part of his sidewalk counseling, he stands outside of the
8 downtown Planned Parenthood clinic about 20-25 hours each month “to offer passersby a
9 smile, a shoulder to cry on, and sometimes pamphlets that discuss free pregnancy and
10 childcare resources and social services available to them.” *Id.* He “listens with empathy
11 and as best he can to the story each passerby tells, even when abortion activists block his
12 way and scream obscenities in his face.” *Id.* He alleges that “more than 100 women have
13 chosen life after talking with him over the last 15 years since [he] began counseling in front
14 of abortion clinics.” *Id.* Plaintiff alleges that “counselors including [himself] have begun
15 to self-censor lest they risk heavy damages, penalties, fees, and prison time for the offense
16 of peaceably speaking in a public place.” *Id.* at 47.

17 The relief sought in the Complaint is as follows:

- 18 (A) That the Court declare that [the Ordinance] facially violates the First and
19 Fourteenth Amendment to the United States Constitution;
- 20 (B) That the Court enter preliminary and permanent injunctions against the
21 ordinance;
- 22 (C) That the Court award Plaintiff Lopez nominal damages;
- 23 (D) That the Court award Plaintiff Lopez his costs of litigation, including
24 reasonable attorneys’ fees and costs; and
- 25 (E) That the Court grant such further relief it deems just and proper.

26 Compl. at 24, Prayer for Relief.

27 **II. BACKGROUND**

28 “A motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) for failure to
state a claim upon which relief can be granted ‘tests the legal sufficiency of a claim.’”
Conservation Force v. Salazar, 646 F.3d 1240, 1241–42 (9th Cir. 2011) (quoting

1 *v. Block*, 250 F.3d 729, 732 (9th Cir. 2001)). “A district court's dismissal for failure to state
2 a claim under Federal Rule of Civil Procedure 12(b)(6) is proper if there is a ‘lack of a
3 cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal
4 theory.’ ” *Id.* at 1242 (internal quotation omitted).

5 “Under Federal Rule of Civil Procedure 8(a)(2), a pleading must contain a ‘short and
6 plain statement of the claim showing that the pleader is entitled to relief.’ ” *Ashcroft v.*
7 *Iqbal*, 556 U.S. 662, 677–78 (2009) (quoting Fed. R. Civ. P. 8(a)(2)). “[T]he pleading
8 standard Rule 8 announces does not require ‘detailed factual allegations,’ but it demands
9 more than an unadorned, the-defendant-unlawfully-harmed-me accusation.” (quoting *Bell*
10 *Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). In other words, “[a] pleading that offers
11 ‘labels and conclusions’ or ‘a formulaic recitation of the elements of a cause of action will
12 not do.’ ” *Id.* (quoting *Twombly*, 550 U.S. at 555).

13 “To survive a motion to dismiss, a complaint must contain sufficient factual matter,
14 accepted as true, to ‘state a claim to relief that is plausible on its face.’ ” *Id.* (quoting
15 *Twombly*, 550 U.S. at 570). “A claim has facial plausibility when the plaintiff pleads factual
16 content that allows the court to draw the reasonable inference that the defendant is liable
17 for the misconduct alleged.” *Id.* (citing *Twombly*, 550 U.S. at 556). “[W]here the well-
18 pleaded facts do not permit the court to infer more than the mere possibility of misconduct,
19 the complaint has alleged—but it has not ‘show[n]’—‘that the pleader is entitled to relief.’
20 ” *Id.* at 679 (second alteration in original) (quoting Fed. R. Civ. P. 8(a)(2)).

21 “If a complaint is dismissed for failure to state a claim, leave to amend should be
22 granted ‘unless the court determines that the allegation of other facts consistent with the
23 challenged pleading could not possibly cure the deficiency.’ ” *DeSoto v. Yellow Freight*
24 *Sys., Inc.*, 957 F.2d 655, 658 (9th Cir. 1992) (quoting *Schreiber Distrib. Co. v. Serv-Well*
25 *Furniture Co.*, 806 F.2d 1393, 1401 (9th Cir. 1986)). “A district court does not err in
26 denying leave to amend where the amendment would be futile.” *Id.* (internal citation
27 omitted).

28 ///

1 **III. ANALYSIS**

2 **a. Summary of Parties’ Arguments**

3 In his Complaint, Plaintiff asserts claims for (1) Violation of Plaintiff’s Freedom of
4 Speech and Expressive Association; and (2) Violation of Due Process under the First and
5 Fourteenth Amendment to the United States Constitution. *See generally* Compl. Defendant
6 seeks to dismiss both of Plaintiff’s causes of action arguing that dismissal is required
7 because “the Ordinance closely mirrors the statute upheld in *Hill v. Colorado*, 530 U.S.
8 703 (2000).” MTD at 8. Defendant argues:

9 In *Hill*, the Supreme Court upheld a Colorado law that established a 100-foot
10 buffer zone around healthcare facility entrances, prohibiting individuals from
11 ‘knowingly approach[ing]’ within eight feet of another person without
12 consent for purposes such as distributing leaflets, displaying signs, or
13 engaging in oral protest or counseling. *Id.* at 707. The Colorado statute’s text
14 and purpose are substantially similar to the Ordinance. Under *Hill*, the
Ordinance is narrowly tailored, content-neutral time, place, and manner
regulation that is neither overbroad nor unconstitutionally vague.

15 *Id.* Defendant further argues that “[s]ince *Hill*, courts have repeatedly upheld the facial
16 constitutionality of buffer zones similar to the Ordinance.” *Id.* (citing *Brown v. City of*
17 *Pittsburgh*, 586 F.3d 263, 270-73 (3d Cir. 2009); *Hoye v. City of Oakland*, 653 F.3d 835,
18 843 (9th Cir. 2011); *Vitagliano v. County of Westchester*, 71 F. 4th 130 (2nd Cir. 2023)).
19 In sum, Defendant argues that “*Hill* is directly on point and controls the outcome of this
20 case.” MTD at 8.

21 Plaintiff opposes and argues that “Plaintiff’s claims are not foreclosed by *Hill v.*
22 *Colorado*’s holding.” *Oppo.* at 13.² Plaintiff argues that there are key dissimilarities in the
23 instant Ordinance from the *Hill* case including “why the zones were drawn,” “how quickly
24

25
26 ² In support of Plaintiff’s Opposition to the Motion to Dismiss, Plaintiff includes the Declaration of
27 Christopher J. Galiardo, Plaintiff’s attorney. ECF No. 16-1. In the Declaration, Mr. Galiardo includes
28 maps of the areas at issue in the Ordinance drawn using ArcGIS Map Viewer. *Id.* at ¶¶ 3-9. Defendant
objects to this Declaration as “improper and inadmissible.” ECF No. 17-1. The Court **VERRULES**
Defendant’s Objection as the Court did not consider Mr. Galiardo’s Declaration in its ruling.

1 the zones were drawn,” the “bubble zone design principles” and “smothered alternative
2 communication channels.” *Oppo*. at 13-20. In sum, Plaintiff argues:

3 Even if *Hill* is still good law and is binding precedent in this case despite the
4 abovementioned dissimilarities between the two statutes, [the Ordinance] still
5 clearly violates the First Amendment for reasons given in *Hill*. The logic of
6 and principles articulated in *Hill* compel the conclusion that those and
7 additional dissimilarities mentioned in the Complaint and above combined to
8 convert [the Ordinance] into a content-and viewpoint-based speech
9 restriction. But even if one were to ignore that logic and those principles to
10 conclude that the ordinance is content-neutral, the speech ban the ordinance
imposes does not advance a government interest in a narrowly tailored way
and so cannot survive scrutiny even as a time, place, or manner speech
regulation.

11 *Oppo*. at 21.

12 **b. The First Amendment, Generally**

13 The First Amendment, applicable to the States through the Fourteenth Amendment,
14 prohibits the enactment of laws ‘abridging the freedom of speech.’” *Reed v. Town of*
15 *Gilbert*, 576 U.S. 155, 163 (2015) (quoting U.S. Const. Amend. I). “Content-based laws –
16 those that target speech based on its communicative content – are presumptively
17 unconstitutional” and are subject to strict scrutiny. *Id.* at 163. Laws are content based if
18 they “target speech based on its communicative content,” *id.* or “single[] out particular
19 content for differential treatment.” *Berger v. City of Seattle*, 569 F.3d 1029, 1051 (9th Cir.
20 2009) (en banc). Strict scrutiny permits “[c]ontent-based regulations [to] pass
21 constitutional muster only if they are the least restrictive means to further a compelling
22 interest.” *S.O.C., Inc. v. Cty. Of Clark*, 152 F.3d 1136 (9th Cir. 1998).

23 On the other hand, “[t]he government may place reasonable time, place, and manner
24 restrictions on speech” if the regulation is content neutral. *A.C.L.U. of Nevada v. City of*
25 *Las Vegas*, 466 F.3d 784, 792 (9th Cir. 2006). Content neutral restrictions are subject to
26 intermediate scrutiny and “must be justified without reference to the protected speech’s
27 content,” and “narrowly tailored to serve a significant government interest, leaving open
28

1 ample alternative channels of expression.” *Id.*; *Reed*, 576 U.S. at 163 (“Laws that are
2 content neutral are...subject to lesser scrutiny.”).

3 **c. The Ordinance is Content Neutral**

4 The parties first dispute whether the Ordinance is content based or content neutral,
5 and thus whether strict or intermediate scrutiny applies. Defendant contends that under
6 *Hill*, the statute is content neutral. Plaintiff argues that *Hill* is no longer good law.³ Plaintiff
7 also argues that the “ordinance text *expressly* exempts from its harassment, intimidation,
8 and consented approach restrictions ‘employees, agents, or volunteers of the health care
9 facility...acting within the scope of their employment, agency, or volunteer service,’”
10 which makes the ordinance content based unless it advances public safety and order.”
11 *Oppo*. at 21 (internal citations omitted) (emphasis in original). Plaintiff further argues that
12 the Ordinance is content based because it “discriminates on the basis of content and
13 viewpoint.” *Id.* at 22. Plaintiff states that “[the Ordinance] forbids entering a bubble zone
14 without prior consent to ‘engage in oral protest, education, or counseling,’” and enforcing
15 that provision will “inescapably turn[] on the content (including the function and purpose)
16 of what a person will say.” *Oppo*. at 22. Plaintiff relies on *McCullen* to support his
17 argument that “speech regulation is content based if its ‘concerned with...[l]isteners’
18 reactions to speech.” *Oppo* at 23 (citing *McCullen v. Coakley*, 573 U.S. 464, 471 (2014)).

19 In *Hill*, the plaintiffs, who were also sidewalk counselors, sought to “educate,
20 counsel, persuade, or inform passerbys about abortion, and abortion alternatives.” 530 U.S.
21 at 708. The plaintiffs in *Hill* challenged the constitutionality of a Colorado statute, which
22 made it unlawful within 100 feet of the entrance to a healthcare facility to “‘knowingly
23 approach’ within eight feet of another person, without that person’s consent, ‘for the
24 purpose of passing a leaflet or handbill to, displaying a sign to, or engaging in oral protest,
25 education, or counseling with such other person.’” *Id.* at 707. The Ordinance at issue here
26

27
28 ³ For the reasons set forth later in this Order, the Court finds that *Hill* remains good law, and this Court is bound by its holdings.

1 is modeled after the statute in *Hill*. *Id.* The Supreme Court in *Hill* held that the Colorado
2 statute was content neutral and valid under intermediate scrutiny. *Id.* at 707 n.1, 725-30. In
3 *Hill*, the court reasoned that (1) “it [was] a regulation of the places where some speech may
4 occur” rather than a “regulation of speech”; (2) “it was not adopted ‘because of
5 disagreement with the message it conveys’” and the law’s “restrictions apply equally to all
6 demonstrators, regardless of viewpoint, and the statutory language makes no reference to
7 the content of the speech”; and (3) “the State’s interests in protecting access and privacy,
8 and providing the police with clear guidelines, are unrelated to the content of the
9 demonstrators’ speech,” *id.* at 719-20 (quoting *Ward v. Rock Against Racism*, 491 U.S.
10 781, 791 (1989)). Additionally, the Court found that the statute “places no restrictions on
11 – and clearly does not prohibit – either a particular viewpoint or any subject matter that
12 may be discussed by a speaker. Rather, it simply establishes a minor place restriction on
13 an extremely broad category of communications with unwilling listeners.” *Id.* at 723.

14 Like in *Hill*, here, the Ordinance does not facially distinguish between different
15 kinds of speech, ideas, or messages. It applies uniformly to all individuals, regardless of
16 the message they wish to convey, and regulates only the manner in which speech is
17 conducted near Covered Facilities. It applies to passing a leaflet, displaying a sign,
18 engaging in oral protest, education or counseling. Exhibit A to the Compl. at 12-13. The
19 Supreme Court has consistently found similar restrictions on broad categories of
20 communications to be content neutral because they applied to everyone, regardless of
21 viewpoint or subject matter. *See, e.g., Heffron v. Int’l Soc’y for Krishna Consciousness,*
22 *Inc.*, 452 U.S. 640, 643-44, 648-49 (1981); *Turner Broad Sys., Inc. v. F.C.C.*, 512 U.S.
23 622, 645 (1994) (explaining that rules that make distinctions “based only upon the manner
24 in which speakers transmit their messages to viewers, and not upon the messages they
25 carry” are not presumed to violate the First Amendment). In fact, the Ninth Circuit recently
26 found a regulation requiring a distinction between classes of speech to be content neutral.
27 *See Project Veritas v. Schmidt*, 2025 WL 37879, at *4 (9th Cir. Jan. 7, 2025) (“a
28 [r]egulation may remain content neutral despite touching on content to distinguish between

1 classes or types of speech – such as speech that constitutes solicitation...so long as it does
2 not discriminate on the basis of viewpoint or restrict discussion of an entire topic”).

3 Plaintiff takes issue with the exemption for employees, agents, or volunteers of the
4 health care clinic, but courts have held that “[t]here is nothing inherently suspect about
5 providing some kind of exemption to allow individuals who work at the clinics to enter or
6 remain within the buffer zone[].” *McCullen*, 573 U.S. at 483. The *McCullen* court reasoned
7 that there was a need for an exemption for clinic employees to enter and exit the clinic, and
8 “the ‘scope of their employment’ qualification simply ensures that the exemption is limited
9 to its purpose of allowing the employees to do their jobs.” *Id.* Similarly, in this case, the
10 Ordinance’s exemptions for clinic employees do not render it viewpoint based. *Id.*

11 Plaintiff’s argument that *Hill* is no longer good law also fails. In support thereof,
12 Plaintiff argues that the three assumptions that the *Hill* court relied on to conclude that
13 Colorado’s buffer zone was content neutral have been abandoned. *Oppo*. at 12 (citing *Reed*,
14 576 U.S. at 163-164; *McCullen*, 573 U.S. at 481, 495; *Fellowship of Christian Athletes v.*
15 *San Jose Unified Sch. Dist. Bd. of Educ.*, 82 F.4th 664, 686 n.8 (9th Cir. 2023) (en banc)).
16 Plaintiff further argues that “[a]fter having never approvingly cited *Hill*’s holding even
17 once in the decades that followed it, the Supreme Court pulled no punches when
18 denouncing it in *Dobbs* in 2022.” *Oppo*. at 12 Plaintiff’s conclusory argument is not
19 supported by the cases on which he relies. For example, *Reed* addressed content-based
20 restrictions, so the facts in that case are different from those in *Hill*, where the statute
21 regulated conduct not content. In *Reed*, at issue was a town’s “comprehensive code
22 governing the manner in which people may display outdoor signs.” *Reed*, 576 U.S. 159.
23 The Sign Code treated Temporary Directional Signs less favorably than both Ideological
24 Signs and Political Signs which led the Supreme Court to conclude that the Sign Code was
25 “content based on its face.” *Id.* at 164. Unlike the Sign Code in *Reed*, in *Hill*, the Colorado
26 statute said nothing about what one can talk, counsel, educate, protest, or leaflet about. In
27 *Hill* (and in the instant case), it was not the message of the speech that was important, but
28 the manner of the speech. In other words, unlike in *Reed*, the Colorado statute was

1 concerned with the manner of speech and regulating any messages conveyed through
2 “leafletting, displaying a sign, or engaging in oral protest, education, or counseling.” 530
3 U.S. at 721-22.

4 Also, notwithstanding Plaintiff’s argument to the contrary, the court in *McCullen*
5 does cite *Hill*, stating that “[t]he statute was modeled on a similar Colorado law that this
6 Court had upheld in *Hill v. Colorado*.” *McCullen*, 573 U.S. at 470. The Supreme Court’s
7 statement in *McCullen* regarding the *Hill* decision indicates that it was aware of it, cited it,
8 did not overturn it, and that it remains good law. *See, e.g., Agostini v. Felton*, 521 U.S. 203,
9 237 (1997) (“[I]f a precedent of th[e] [Supreme] Court has direct application in a case, yet
10 appears to rest on reasons rejected in some other line of decision, the Court of Appeals
11 should follow the case [that] directly controls, leaving to this Court the prerogative of
12 overruling its own decisions.”). Thus, *Hill* remains good law, and this Court is bound by
13 its holdings.

14 Plaintiff’s arguments regarding the “key dissimilarities” that exist between the law
15 in *Hill* and the Ordinance are also without merit. *Oppo*. at 16-17. First, Plaintiff argues
16 “[f]rom the day Ordinance [] was inked to the day the clinic’s political director backdoored
17 a grateful campaign contribution to the current city attorney the day the ordinance was
18 approved, no one involved with enacting it seemed to doubt that it aimed only to suppress
19 pro-life speech.” *Id.* at 15. Even assuming that is true, as the Supreme Court explained in
20 *Hill*, a statute is not “viewpoint based” simply because its enactment was motivated by the
21 conduct of partisans on one side of a debate. 530 U.S. at 724. In *Hill*, the court still found
22 the statute to be content neutral even though the legislative record revealed that the statute
23 was passed primarily to address pro-life speech outside abortion clinics. *Id.* at 715.
24 Additionally, the Supreme Court has repeatedly upheld buffer zones without requiring an
25 immediate threat at every regulated location. *See Hill*, 530 U.S. at 715; *see also McCullen*,
26 573 U.S. at 486-87. Notwithstanding this, the challenged Ordinance explicitly states that
27 “demonstration activities around Covered Facilities have subjected [citizens] to harassment
28 and abuse” and “aggressive demonstration activities pose significant public safety threats

1 and risk bodily harm to the demonstrators blocking driveways and doorways, and to the
2 persons trying to access Covered Facilities.” Exhibit A to the Compl. at 8.

3 Plaintiff’s argument regarding the purported dissimilarity because of the “speed of
4 enactment” also fails. *Oppo*. at 15. San Diego enacted a buffer zone in 1997 and the instant
5 Ordinance is merely an update to that ordinance. As the Ordinance explicitly states, “the
6 City of San Diego adopted a buffer zone ordinance in 1997 applicable to health care
7 facilities, places of worship, and school grounds (Covered Facilities), which has not been
8 amended since its adoption.” Exhibit A to the Compl. at 7. In support of this argument,
9 Plaintiff relies on *Schenk v. Pro-Choice Network of W.N.Y.*, 519 U.S. 357 (1997) and
10 *Madsen v. Women’s Health Ctr., Inc.*, 512 U.S. 753 (1994), stating that these cases set forth
11 guidelines for how quickly a government can make that last resort to speech-free zones
12 outside abortion clinics. However, there is nothing in those cases that require governments
13 to conduct a staged and escalatory approach before enacting reasonable time, place, and
14 manner restrictions. Also, *Hill* affirmed the constitutionality of buffer zones based on
15 general principles of public safety and access to facilities, which is what the San Diego
16 City Council noted in the purpose of its Ordinance. 530 U.S. at 726.

17 Plaintiff’s argument regarding the “bubble zone design principles” also fails. *Oppo*.
18 at 16-17. Plaintiff argues that “the bubble zone principles articulated in *Hill* and applied in
19 *Hoye* suggest that even if San Diego could satisfy all the other criteria for creating those
20 zones (it cannot), bubbles eight feet wide still would need to be struck down because they
21 ‘prevent [affected speakers] from communicating a message at a normal conversational
22 distance.’” *Oppo*. at 18 (citing *Schenk*, 519 U.S. at 377; *Hoye v. City of Oakland*, 653 F.3d
23 835 (9th Cir. 2011)). The Supreme Court in *Hill* explicitly held that the eight-foot buffer is
24 a reasonable distance noting that the “8-foot restriction on an unwanted physical approach
25 leave ample room to communicate a message through speech.” *Hill*, 530 U.S. at 726-730
26 (“Signs, pictures, and voice itself can cross an 8-foot gap with ease.”). Plaintiff relies on
27 *Schenk*, which predates *Hill*, and provides no legal support for his argument that the bubble
28 zone principles articulated in *Hill* do not apply here.

1 Finally, Plaintiff’s argument that the instant Ordinance “more comprehensively []
2 shuts down alternative communication channels than the statute in *Hill* did” also fails.
3 Oppo. at 18. Defendant City of San Diego concedes that “the noise provisions, while
4 stricter than those in *Hill*, remain consistent with the principles of time, place, and manner
5 regulations.” Reply at 6. Defendant states that “while the Ordinance may differ in scope,
6 these differences are constitutionally insignificant.” *Id.* For the reasons set forth in more
7 detail below, the Court agrees with Defendant that the few differences between the instant
8 ordinance and the statute in *Hill* (the inclusion of places of worship and school grounds,
9 the express prohibition of any acts to “harass or intimidate,” and a slightly stricter noise
10 ordinance) are constitutionally insignificant and remain consistent with the principles of
11 time, place, and manner regulations.

12 Indeed, another court in this district recently weighed in on the same challenged
13 Ordinance. *See Blythe v. City of San Diego*, 24cv211-GPC-DDL, 2025 WL 108185 (S.D.
14 Cal. Jan. 14, 2025).⁴ In *Blythe*, the court found the Ordinance is content neutral, narrowly
15 tailored to serve the government’s interest in protecting those entering and exiting Covered
16 Facilities, provides ample alternative channels of communication, and is not
17 constitutionally overbroad. *Id.* For the reasons above, the Court finds that the Ordinance is
18 content neutral.

19 **d. The Ordinance is a Valid Time, Place, and Manner Regulation**

20 Having concluded the Ordinance is content neutral, the Court must next determine
21 whether it is narrowly tailored to serve a legitimate and significant governmental interest
22 and that “it leaves open ample alternative channels for communication.” *Hill*, 530 U.S. at
23 725-26; *see also McCullen*, 573 U.S. at 477. The regulation need not be the least restrictive
24 means of serving the government’s interest, but the government “may not regulate
25 expression in such a manner that a substantial portion of the burden on speech does not
26

27
28 ⁴ Although the Court was already aware of the *Blythe* decision, the Court **GRANTS** Plaintiff’s Unopposed
Ex Parte Application for Leave to File a Notice of Supplemental Authority (ECF No. 21).

1 serve to advance its goals.” *McCullen*, 573 at 486 (quoting *Ward*, 491 U.S. at 798-99).
2 Plaintiff argues that “the Ordinance does not advance any governmental interest” and that
3 it is “not narrowly tailored and overly broad.” *Oppo*. at 23-26.

4 As an initial matter, the City of San Diego has a substantial and legitimate interest
5 in protecting individuals attempting to access Covered Facilities. *See Hill*, 530 U.S. at 728-
6 29; *see also Hoyer v. City of Oakland*, 653 F.3d 835, 844-45 (9th Cir. 2011) (the ordinance
7 was modeled after the statute in *Hill*, so the “analysis of the Ordinance’s facial
8 constitutionality [wa]s mostly controlled by that case” except where the ordinance departed
9 from the Colorado statute). Plaintiff has failed to allege sufficient facts in the Complaint to
10 depart from the Supreme Court’s holding in *Hill*, which recognized a governmental interest
11 in protecting individuals attempting to access Covered Facilities. *See, e.g., Graff v. City of*
12 *Chicago*, 9 F.3d 1309, 1323 (7th Cir. 1993) (en banc) (“Where the courts have already
13 upheld a similar ordinance because of the governmental interests at stake, a future litigant
14 should not be able to challenge similar governmental interests without showing some
15 distinction at the pleading stage.”); *see also G.K. Ltd. Travel v. City of Lake Oswego*, 436
16 F.3d 1064, 1073 (9th Cir. 2006) (The Court “generally defer[s] to the legislative body
17 passing the law in determining whether the government’s ends are advanced by a
18 regulation.”).

19 Plaintiff argues that the Ordinance is not narrowly tailored. First, Plaintiff notes that
20 “[t]he San Diego Municipal Code gives city police broad activity to break up crowds
21 gathered on sidewalks” and “many generally applicable laws also prevent obstructions sans
22 speech bans.” *Oppo*. at 26-27. Plaintiff also relies on *Berger v. City of Seattle* for the
23 proposition that “a speech-restricting a law is not narrowly tailored if it either (1) ‘only
24 marginally, if at all, promotes the City’s asserted interest’; or (2) ‘applies, on its face, to an
25 extraordinarily broad group of individuals, the vast majority of whom are not responsible
26 for the evil [the government] seeks to remedy.’” *Oppo*. at 27 (citing *Berger*, 569 F.3d 1029,
27 1041 (9th Cir. 2009) (en banc)).
28

1 Notably, the facts in *Berger* are vastly different from the facts in the instant case. In
2 *Berger*, the Ninth Circuit held that a permitting system established by the City of Seattle
3 for the Seattle Center was facially unconstitutional under the First Amendment noting that
4 the Supreme Court “has repeatedly concluded that single-speaker permitting requirements
5 are not a constitutionally valid means of advancing [the government’s] interest because,
6 typically, (1) they sweep too broadly, (2) they only marginally advance the government’s
7 asserted interests, and (3) the government’s interests can be achieved by less intrusive
8 means.” *Id.* at 1038 (internal citations omitted).

9 The challenged Ordinance in this case is nothing like the permitting system at issue
10 in *Berger*. Plaintiff, once again, fails to articulate why the Supreme Court’s reasoning in
11 *Hill* does not apply here. The Colorado statute in *Hill*, like the Ordinance, prohibited
12 intentional approaches within eight feet of another person outside healthcare facilities. It
13 also limited its applicability to a 100-foot radius from the entrance to a healthcare facility.
14 *Hill*, 530 U.S. at 715. The regulated areas in *Hill* are nearly identical in size to those covered
15 in the Ordinance, both of which apply to healthcare facilities and require a culpable mental
16 state. The Ordinance serves the City’s goal of protecting those from entering and exiting
17 the Covered Facilities from unwanted encounters “by enacting an exceedingly modest
18 restriction on the speakers’ ability to approach.” *Id.* at 729. It does not ban any form of
19 protected speech. Demonstrators can communicate their messages and otherwise engage
20 in protected speech, but at an eight-foot distance and demonstrators with leaflets can
21 peacefully pass them out to willing listeners without physically approaching unwilling
22 listeners. *Hill*, 530 U.S. at 729-30. Finally, a content-neutral regulation does not need to be
23 the least restrictive or least intrusive means of achieving the statutory goal. *Id.* at 726; *see*
24 *also McCullen*, 573 U.S. at 486 (content neutral restriction “need not be the least restrictive
25 or least intrusive means of serving the government’s interests.”) (internal quotation marks
26 and citation omitted); *Turner Broadcasting System, Inc. v. F.C.C.*, 512 U.S. 622, 662 (U.S.
27 June 27, 1994) (a content neutral regulation “need not be the least speech-restrictive means
28 of advancing” a governmental interest); *Ward*, 491 U.S. at 798.

1 Accordingly, the Ordinance is narrowly tailored to serve the government’s interest
2 in protecting those entering and exiting the Covered Facilities.

3 **e. The Ordinance Leaves Open Ample Alternative Channels of**
4 **Communication**

5 Plaintiff argues that Ordinance shuts down alternative communication channels
6 “much more comprehensively” than the statute in *Hill*. *Oppo*. at 18. Plaintiff argues that
7 there are “three important ways” that the Ordinance is different than the statute in *Hill*. *Id.*
8 at 19. First, Plaintiff argues that the “Colorado statute measures its 100-foot zone from a
9 facility entrance, but San Diego measures its [zone] from an outer entry gate.” *Id.* Second,
10 Plaintiff argues that the “Colorado statute applied only to licensed healthcare facilities, but
11 San Diego’s applies to any place a licensed healthcare worker regularly sees patients or
12 provides medical information or advice.” *Id.* Third, Plaintiff argues that “the Colorado
13 statute prohibited obstructing healthcare facilities, whereas the San Diego ordinance also
14 prohibits obstructing any parking lot a facility owns, uses, or even tells a patient she can
15 use.” *Id.* Finally, Plaintiff argues that the “‘harassment’ provision and an unprecedentedly
16 oppressive noise ordinance [are] found nowhere in the Colorado statute.” *Id.* at 19.

17 The Court finds that Plaintiff’s argument overstates the significance of the slight
18 modifications of the instant Ordinance from the Colorado statute in *Hill*. The Court finds
19 that the reasoning from *Hill* still applies here. For example, the fact that the Colorado
20 statute measures its 100-foot zone from a facility *entrance*, but San Diego measures its own
21 from an outer entry gate does not impact the constitutionality of the Ordinance. *Oppo*. at
22 19. Notably, Plaintiff fails to cite any authority or explain why this modification is
23 constitutionally significant enough to make the reasoning of the *Hill* inapplicable to this
24 case. Sidewalk counselors may still engage in First Amendment activities at reasonable
25 distances from those entering and exiting the clinic, and they are free from restrictions as
26 to willing listeners who provide consent.

27 Plaintiff also takes issue with the fact that the Colorado statute prohibited obstructing
28 healthcare facilities, whereas the San Diego Ordinance also prohibits obstructing any

1 parking lot a facility owns or uses. Once again, this is still narrowly tailored to serve the
2 government’s interest in protecting those entering and exiting the Covered Facilities. Also,
3 the fact that the instant Ordinance includes a “harassment provision” and a slightly stricter
4 noise ordinance still does not silence speech. *See United States v. Waggy*, 936 F.3d 1014,
5 1018-20 (9th Cir. 2019) (explaining that an anti-harassment statute that proscribes
6 harassing conduct does not violate the First Amendment.). For the reasons set forth herein,
7 the Ordinance, even with these provisions, complies with the principles of time, place, and
8 manner regulations. The Court agrees with Defendant that the harassment provision
9 definitions mirror widely accepted criminal counterparts in the California Penal Code and
10 are not unconstitutionally vague. Reply at 6; *see Hill*, 530 U.S. at 724.

11 There are ample alternative channels of communication here. As the *Hill* Court
12 found, eight feet of separation will not impact readers’ ability to read signs. *Hill* at 726-27
13 (“The 8-foot separation between the speaker and the audience should not have any adverse
14 impact on the readers’ ability to read signs displayed by demonstrators.”). Although the
15 Ordinance regulates noise level when using amplification equipment, the Ordinance still
16 allows for conversation at a normal distance, and gives those handing out leaflets the ability
17 to offer the material at a distance to which the pedestrian can easily accept or decline. *Id.*
18 at 726-28 (noting that the ordinance still permitted communication at a “normal
19 conversational distance” and permitted leafletting to consenting pedestrians). Here,
20 although the Ordinance contains a noise provision that was not included in *Hill*, the Court
21 finds that it is still narrowly tailored.

22 It is well established that an alternative channel need not be ideal, but merely
23 adequate. *See Heffron*, 452 U.S. at 654-55. “The First Amendment does not guarantee the
24 right to communicate one’s views at all times and places or in any manner that may be
25 desired.” *Id.* at 647. Here, for example, sidewalk counselors or other demonstrators are still
26 free to set up in one spot, hold up signs, communicate at a normal conversational distance,
27 and use loud speaking amplifiers as long as they do not exceed 55 decibels any point ten
28 feet or more from the noise source. In sum, the Ordinance only restricts certain types of

1 speech in the place[s] where the restriction is most needed” to advance the government
2 interest. *Hill* at 730; *see also Frisby v. Schultz*, 487 U.S. 474, 483 (1988) (An alternative
3 channel is adequate if it “permits the more general dissemination of a message.”).

4 For the reasons stated herein, the Court finds that the Ordinance is content neutral,
5 narrowly tailored to a significant government interest, and provides ample alternative
6 channels of communication. The Ordinance is thus a reasonable time, place, and manner
7 restriction. Accordingly, Plaintiff’s First Amendment claim for freedom of speech and
8 expressive association cannot succeed.

9 **f. The Ordinance is Not Overbroad or Vague**

10 Plaintiff also argues that the Ordinance violates due process because it is overbroad
11 and vague. *Oppo.* at 30. For example, Plaintiff argues that “ordinary people cannot know
12 what activity the ordinance criminalizes” in light of the Ordinance’s definitions of
13 “harassment,” “serious alarm,” and “cause substantial distress.” *Id.* at 31. Plaintiff argues
14 that “[s]uch a standardless sweep conjures a specter of ‘policemen, prosecutors, and juries
15 [unleashed] to pursue their personal predilections.’” *Id.* at 32 (internal citations omitted).

16 A law is constitutionally overbroad “if it prohibits a substantial amount of protected
17 speech.” *United States v. Williams*, 553 U.S. 285, 292 (2008); *see also Moody v.*
18 *NetChoice, LLC*, 603 U.S. 707, 723 (2024) (“The question is whether ‘a substantial number
19 of [the law’s] applications are unconstitutional judged in relation to the statute’s plainly
20 legitimate sweep”). As set forth above, the Ordinance does not prohibit messages, signs,
21 literature, or oral statements, but rather regulates where these communications may occur.
22 Once again, Plaintiff’s argument is foreclosed by *Hill*. 530 U.S. at 730. In that case, the
23 “[p]etitioners argued...that the statute is too broad because it protects too many people in
24 too many places, rather than just the patients at the facilities where the confrontational
25 speech occurred.” *Id.* The *Hill* court rejected this argument and found that “the fact that the
26 coverage of a statute is broader than the specific concern that led to its enactment is of no
27 constitutional significance. What is important is that all persons entering or leaving health
28 care facilities shared the interests served by the statute.” *Id.* at 730-31. Here, for the reasons

1 set forth above, the Ordinance is a valid time, place, and manner restriction on protected
2 speech. The Ordinance applies to generally to all individuals, not just Plaintiff. The purpose
3 of the Ordinance is to promote unimpeded access to Covered Facilities without prohibiting
4 substantive speech by Plaintiff or others. In sum, Plaintiff has failed to meet his burden to
5 show that the Ordinance is constitutionally overbroad. *See generally United States v.*
6 *Hansen*, 599 U.S. 762 (2023) (“[I]nvalidation for overbreadth is strong medicine that is not
7 be casually employed.”).

8 An ordinance is unconstitutionally vague “if it fails to provide people of ordinary
9 intelligence a reasonable opportunity to understand what conduct it prohibits.” *Hill*, 530
10 U.S. at 703. Where a case involves the First Amendment, a greater degree of specificity
11 and clarity is required. *See Cal. Teachers Ass’n v. State Bd. of Educ.*, 271 F.3d 1141, 1150
12 (9th Cir. 2001). However, “perfect clarity and precise guidance have never been required
13 even of regulations that restrict expressive activity.” *Ward*, 491 U.S. at 781. Once again,
14 the language of the Ordinance is not ambiguous and includes definitions of certain key
15 terms such as “harassment” and “intimidation” using widely accepted legal standards.
16 Plaintiff relies on the dissent in *Hill* in his Complaint to support his argument that “[t]he
17 terms oral protest, education, or counseling are at least as imprecise as criminal prohibitions
18 on speech the Court has declared void for vagueness in past decades.” Compl. ¶ 80 (internal
19 citations omitted). However, the Court is bound by the majority decision in *Hill*’s
20 resolution on these issues, not the dissent.

21 In conclusion, taking all of Plaintiff’s allegations as true and making reasonable
22 inferences in his favor, the Complaint fails to sufficiently allege that the Ordinance is
23 unconstitutionally overbroad or vague. Accordingly, Plaintiff’s argument that the
24 Ordinance violates Due Process under the First and Fourteenth Amendments must be
25 dismissed.

26 **g. Leave to Amend**

27 Finally, while Federal Rule of Civil Procedure 15(a)(2) provides that “[t]he court
28 should give leave [to amend] freely when justice so requires,” the Court finds that

1 amendment under the circumstances of this case would be futile. *See Vasquez v. Los*
2 *Angeles County*, 487 F.3d 1246, 1258 (9th Cir. 2007) (citing *Schmier v. U.S. Court of*
3 *Appeals for the Ninth Circuit*, 279 F.3d 817, 824 (9th Cir. 2002) (recognizing “[f]utility of
4 amendment” as a proper basis for dismissal without leave to amend)). Here, in light of the
5 Court’s finding that Plaintiff’s challenge to the Ordinance is foreclosed by the binding
6 precedent of *Hill* and for the additional reasons stated in this Order, amendment cannot
7 cure the deficiencies of the Complaint. Accordingly, granting leave to amend would be
8 futile, and is **DENIED**.

9 **IV. CONCLUSION**

10 For the foregoing reasons, the Court **GRANTS** Defendant’s Motion to Dismiss
11 without leave to amend and **DENIES AS MOOT** Plaintiff’s Motion for Preliminary
12 Injunction.

13 **IT IS SO ORDERED.**

14 Dated: March 21, 2025



Honorable Linda Lopez
United States District Judge