No. 24-2235

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

ANDREW THAYER, KRISTI KEORKUNIAN, and LINDA LOEW,

Plaintiffs-Appellants,

v.

CITY OF CHICAGO, TOM CARNEY, in his official capacity as Commissioner of the Chicago Department of Transportation, and LARRY SNELLING, in his official capacity as Superintendent of the Chicago Police Department,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division
Case No. 1:24-cv-3563
The Honorable Thomas M. Durkin

PLAINTIFFS-APPELLANTS' REPLY BRIEF

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SUMMARY OF ARGUMENT

The Protesters have standing to challenge the Ordinance on its face because it implicates their right to free speech and requires them to risk arrest if they protest the Democratic National Convention within the security footprint. The City's arguments to the contrary are based on a conflation of standing requirements with the merits of the case.

The City's arguments on the merits are unpersuasive because they rest on a non-existent "common understanding" of the abstract phrase "potential safety hazards" in the absence of context or explanation, a misstatement of operative language in the Ordinance, and strawman versions of Protesters' arguments.

Accordingly, this Court should expeditiously hold that the Ordinance is unconstitutional and remand the case to the District Court with guidance on appropriate equitable relief.

ARGUMENT

I. Protesters Have Standing to Challenge the Footprint Ordinance on its Face.

A. The Ordinance implicates Protesters' First Amendment rights.

"[W]hen an imprecise law implicates speech and assembly rights, an injured plaintiff may [] facially challenge a statute as void for vagueness." *Bell v. Keating*, 697 F.3d 445, 455 (7th Cir. 2012). "To suffice for standing, and to avoid confusing standing with the merits, plaintiffs' intended course of conduct need only be 'arguably' affected by constitutional interests, and 'arguably' proscribed by the

challenged statute. *Brown v. Kemp*, 86 F.4th 745, 762 (7th Cir. 2023), *citing Babbitt v. United Farm Workers Nat. Union*, 442 U.S. 289, 298 (1979).

A law may "implicate" speech and assembly without regulating speech directly. In *Bell*, the challenged ordinance regulated conduct, not speech, by mandating obedience to police dispersal orders when three or more people in the "immediate vicinity" were engaged in disorderly conduct that was "likely to cause substantial harm or serious inconvenience, annoyance or alarm." 697 F.3d at 450. Still, the plaintiff had a First Amendment interest at stake in his vagueness challenge because it was "impossible for him to know" whether other people would be disorderly at any given protest, so "he must abstain from all protests unless he wishes to risk prosecution." *Id.* at 455. Protesters here face the same dilemma: avoid protests near the United Center during the DNC or else risk punishment if the Superintendent decides that some as-yet undetermined object in their pocket is a "potential safety hazard," or if a police officer deems it a "sealed package."[1]

Next, the City suggests that Protesters' decision to challenge the Ordinance under the Fourteenth Amendment rather than the First Amendment, along with their conclusory statement that the Ordinance self-evidently complies with the First Amendment (which Protesters do not concede), somehow proves that the Ordinance has nothing to do with Protesters' free speech interests. But under *Babbit*, the

[1] The City nonetheless claims that *Bell* is different because the law challenged there "authorized the dispersal of groups who may be exercising First Amendment rights," Resp. Br. 10, but fails to explain why the prospect of dispersal is more threatening to free speech than the prospect of arrest or ejection from a protest area, especially when that prospect exists *only* at a place and during a time when protest is virtually guaranteed.

question is whether the challenger's "*conduct* [is] arguably affected with a constitutional interest," 442 U.S. at 298, not whether the law itself regulates speech.[2] *See also Brown*, 86 F.4th 753 (Pre-enforcement vagueness challenge to ordinance prohibiting interference with hunting by "maintaining a visual or physical proximity to" or "approaching or confronting" a hunter was "affected with a constitutional interest" where plaintiffs' planned newsgathering about hunters could arguably violate the statute).

In any event, because Protesters intend to engage in conduct that the Ordinance may prohibit, they have standing to raise a facial challenge because they face the prospect of arrest and prosecution if they do so. Even if facial challenges outside the First Amendment context are "disfavored," they are permissible, and "the Supreme Court has on a number of occasions entertained facial challenges to criminal statutes that do not implicate First Amendment concerns." *Planned Parenthood of Indiana & Kentucky, Inc. v. Marion Cnty. Prosecutor*, 7 F.4th 594, 603 (7th Cir. 2021), *quoting United States v. Cook*, 970 F.3d 866, 873 (7th Cir. 2020). A statute that "lacks any ascertainable standard for inclusion and exclusion" poses "a trap for the person acting in good faith, who is given no guidepost by which

[2] The City cites *United States v. Calimlim*, 538 F.3d 706, 710 (7th Cir. 2008), in support of its claim that the *ordinance* is "too attenuated from any purported First Amendment concerns to provide standing for a facial challenge to the law." Resp. Br. 9. But *Calimlim* is a *criminal* case in which the defendant was convicted based on the specific facts of his own case. It has nothing to say about facial, pre-enforcement challenges that seek to avoid criminal liability in the first instance.

he can divine what sort of conduct is prohibited." *Id.* As detailed in Appellants' Brief and Part II below, the Footprint Ordinance meets this description.

B. Protesters face a "certainly impending" injury-in-fact because they must risk arrest and prosecution in order to exercise their right to protest the DNC in the vicinity of its primary venue.

The Protesters' intended course of conduct is both constitutionally protected and "'arguably' proscribed by the challenged statute," *Brown*, 86 at 762, causing Protesters to fear that attending demonstrations within the security footprint will lead to arrest and prosecution if articles in their possession are included on the prohibited items list, or if the Superintendent "determines" that they are "potential safety hazards." As Protesters previously explained, Appellants' Br. 7, this dilemma is an injury in fact.[3]

The City's argument to the contrary "confus[es] standing with the merits." *Brown*, 86 F.4th at 762. "[S]tanding 'often turns on the nature and source of the claim asserted,' but it 'in no way depends on the merits' of the claim." *Arizona State Legislature v. Arizona Indep. Redistricting Comm'n*, 576 U.S. 787, 800 (2015), *quoting Warth v. Seldin,* 422 U.S. 490, 500 (1975); *See also Aurora Loan Services, Inc. v. Craddieth*, 442 F.3d 1018, 1024 (7th Cir. 2006) ("The point is not that to establish standing a plaintiff must establish that a right of his has been infringed; that would conflate the issue of standing with the merits of the suit.")

[3] This point bears repeating because the City appears to believe that Protesters' standing requires a showing of imminent *arrest*, as opposed to the imminent deterrence of Protesters' right to freedom of speech and assembly.

Echoing the District Court, the City claims that the items Protesters plan to bring to DNC demonstrations are "well beyond the pale of any reasonable interpretation of the Ordinance," because the Ordinance "covers only 'potential safety hazards.'" Resp. Br. 8. But this (erroneous) claim begs the very questions at issue on the merits, such as whether the phrase "potential safety hazards" has an ascertainable meaning in this context, and whether and how it relates to the list in Exhibit A to the Ordinance. *See* Part II.A below and Appellants' Br. at 5.

Likewise, the City says that Protesters' fears that the Superintendent may add additional items to the list without their knowledge is not a basis for standing because they "can only speculate that the Superintendent will ever designate additional items." Resp. Br. at 11. But it would be equally speculative to assume the Superintendent will *not* exercise an authority that the Ordinance expressly grants to him, or that he has not already done so. Protesters may not "be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids." *Bouie v. City of Columbia*, 378 U.S. 347, 351 (1964) *quoting Lanzetta v. State of New Jersey,* 306 U.S. 451, 453 (1939)). The City also claims that the Ordinance constrains the Superintendent's discretion because he can designate only "potentially hazardous" items, and everyone agrees what that means. Protesters disagree, but again, this is a question for the merits. *See* Part II.B.

For similar reasons, the City misses the mark with its argument that Protesters may avoid any injuries by simply refraining from bringing any items that

might be prohibited to the protest. Resp. Br. 8-9. For one thing, this suggestion is of cold comfort to Ms. Keorkunian, who brings a blood monitoring kit to protest to avoid a debilitating low-sugar episode.[4] A43. More broadly, the argument assumes that the category of prohibited objects has discernable boundaries to guide decisions about what items to bring. One might as well tell Margaret Papachristou that if she is concerned that her evening constitutional might make her a "common night walker[]," she can avoid arrest simply by staying home. *See Papachristou v. City of Jacksonvill*e, 405 U.S. 156, 158 n. 1 (1972).

II. The City Fails to Rebut the Vagueness of the Ordinance.

Two features of the Ordinance render it unconstitutionally vague: (1) the Superintendent's unfettered discretion to ban any object that, in his estimation, poses a "potential safety hazard[]," without making those determinations public, and (2) the broad categories of articles on the prohibited items list. *See generally* Appellants' Br. at 7, The City's defense of the Ordinance requires it to contort the language of the Ordinance, reason in circles, and mischaracterize Protesters' arguments. Moreover, the City fails to apply the heightened standards of clarity required of laws that implicate constitutional rights, impose criminal penalties, lack a scienter requirement, and prohibit commonplace activity normally considered innocent. Id. 15.

[4] Diabetics are far from the only group who may have a need, rather than a preference, to bring particular items to a protest. For people with disabilities or injuries, parents with small children, or certain religious practitioners, the ability to protest may depend on their possession of objects that may or may not be prohibited.

A. There is no common understanding of "potential safety hazard" without further context or explanation.

The City repeatedly claims that the Ordinance simply prohibits "potential safety hazards" in the security footprint, Resp. Br. 2, that there is a "common understanding" of the phrase "potential safety hazards," *id.* at 20, and that this common understanding meaningfully constrains the scope of the prohibited items list and the Superintendent's authority to designate new items for prohibition. Id. 23. These claims are inaccurate.

First, as explained previously at length, Appellants' Br. at 25-26, the term "safety hazard" is highly context-dependent and flexible. Without any qualifying language, a "safety hazard" might refer only to objects that cause great bodily injury, or it might include objects capable of causing a mild scratch. It might mean items that cause immediate harm (e.g., a firearm) or harm that is not apparent until later (e.g., poison ivy). A "*potential* safety hazard" is even less clear, because it could refer to objects that are very likely to cause harm, or objects that cause harm only under specific, narrow circumstances. The Ordinance contains no standards to allow an ordinary person to determine just how potentially hazardous a potentially hazardous object must be. *Cf. Whatley v. Zatecky*, 833 F.3d 762, 783 (7th Cir. 2016) (statute that prohibited defendant from possessing three grams of cocaine near a building that provides serves for minors "on a regular basis" unconstitutionally vague because it lacked "any standard in the statute, in a regulation, or in the Indiana case law" to clarify the completely subjective word "regular.")

The City nonetheless argues that the term "potential safety hazard" "has a clear, understandable core," because it "plainly prohibits a multitude of items that ordinary people understand to present such hazards," including "some of the examples listed in Exhibit A." Resp. Br. at 15. But "the existence of *some* obviously" hazardous items does not "establish the . . . constitutionality" of a law that authorizes the Superintendent to designate additional, unpublished prohibitions. *Johnson v. United States*, 576 U.S. 591, 603 (2015). The City's comparison of this case with *Planned Parenthood of Indiana & Kentucky, Inc. v. Marion Cnty. Prosecutor*, 7 F.4th 594 (7th Cir. 2021), is inapt. There, this Court upheld a statute requiring abortion providers to report any "abortion complications," defined as any one of twenty-five "physical or psychological conditions arising from the induction or performance of an abortion." 7 F.4th at 596. Although the Court acknowledged some ambiguity in the statute and the potential for arbitrary enforcement, *Id.* at 604, 605, it found that the "complications that a reasonable doctor would find to have arisen from an abortion constitute a core of the Complications Statute." *Id.* at 604.

The Court's reasoning in *Planned Parenthood* does not apply here. First, the "core" of that statute was defined by the expert assessment of a "reasonable doctor." Here, the City claims that the core of the Ordinance is defined by a "common understanding" of ordinary people who are not security experts and are not privy to the information the Superintendent used to determine that particular items are "potential safety hazards." Second, the prohibited conduct was limited to an *exhaustive* list of medical conditions. (A previous version of the statute containing a

non-exhaustive list had been preliminarily enjoined. *Id.* at 596.) Here, the prohibited conduct "includ[es], but [is] not limited to" the items in Exhibit A to the Ordinance. A33. Finally, the Court noted that the case "as currently briefed does not directly implicate or inhibit the exercise of constitutionally protected rights, which would heighten our concern about the vagueness of the statute." *Planned Parenthood* at 606 (alterations, quotation marks, and citation omitted). This case *does* implicate those rights.

Next, the City claims that ordinary people should be able to understand the term "potential safety hazard" based on their experiences at sites like courthouses, Soldier Field, and the U.S. Capitol, which have lists of prohibited items that partially overlap with the Ordinance's list. Resp. Br. 17. Protesters have already explained why such lists are not analogs of exhibit A of the Ordinance. Appellant's Br. at 19. Putting aside the fact that many ordinary people do not regularly visit such sites, and when they do, they do not necessarily pay close attention to the prohibited items list, officials at these locations do not rely on visitors to have a comprehensive understanding of "potential safety hazards" in order to avoid arrest or prosecution. Instead, they have backstops that prevent people from entering with prohibited items, including websites (which sometimes include an email or phone number for people who have questions), posted signs, and screening protocols. Perhaps most important, live human beings conduct screenings and are available to answer questions.[5] These measures mitigate the vagueness of a phrase like "safety

[5] Notably, the City does *not* ratify the District Court's assumption that a person carrying a prohibited item would be stopped before entering the security footprint. *See* A4.

hazards" by making it difficult for an innocent person to enter the area while inadvertently carrying a prohibited item.[6]

Finally, as Protesters have explained, Appellants' Br. 17-18, the City's contention that "courts have repeatedly held that the word 'hazard' has a sufficiently clear core of meaning," Resp. Br. 18, is misleading. The cases the City cites uphold laws in which the word hazard is used, where the laws provide definitions, guidelines, and context that allow ordinary people to determine what the word means. The City attempts to dismiss these distinctions as picayune, Resp Br. ___, but language that helps the ordinary person to understand which "hazards" are prohibited is at the core of the vagueness challenge.

B. The City misreads the statute to prohibit "potential safety hazards" instead of items that the Superintendent has determined to pose "potential safety hazards."

Contrary to the City's repeated representations, *see, e.g.*, Resp. Br. at 2, 4, 5, 6, 15, the Ordinance does not prohibit "potential safety hazards." It prohibits items that "pose[] potential safety hazards, *as determined by* [the Superintendent] in consultation with the United States Secret Service [USSS] and the Chicago Office of Emergency Management and Communications [OEMC]." A34. This distinction makes a difference, because even if there were some common understanding of the phrase "potential safety hazards" (which there is not), there is not and cannot be a common understanding of the class of objects that the Superintendent has

[6] The City asserts that criminal penalties attach to bringing prohibited items into the U.S. Capitol, but it cites only the Capitol Police website, not any statute or regulation. The list, by itself, is not constitutional or unconstitutional by itself; the question is the how the law defines criminal liability with respect to the list.

determined or will determine to be potential safety hazard (unless the Superintendent makes his determinations public, which the Ordinance does not require him to do).

The City objects that the Superintendent does not have unfettered discretion to determine that additional items are potential safety hazards because he is "[]constrained by the requirement that such items be 'potential safety hazards.'" But the Superintendent's discretion to determine that something is a potential safety hazard is no more constrained by the phrase "potential safety hazard" than a person's discretion to choose where to go on vacation is constrained by the word "vacation." The choice might be constrained by timing, expense, food allergies, or need for internet access, and a friend who knows of those constraints might be able to narrow down the person's likely destination. But if all the friend knows is the common understanding of word "vacation," she can do no more than guess where the person may go. The Footprint Ordinance contains no definitions, explanatory language, or context that would allow someone to narrow the vast universe of objects that the Superintendent might determine to be potentially hazardous.

Moreover, the Superintendent's determination of "potential safety hazards" may sharply diverge from the (alleged) common understanding of the term if they are based on his own information and expertise or that of his consultants at USSS and OEMC. For example, regular airplane passengers know that they must remove their shoes for screening, but the common understanding of "potential safety hazards" on airplanes did not include shoes until someone attempted to detonate

explosives hidden in his shoe. The Superintendent may receive intelligence about plans to use some ordinary object to cause harm at the DNC. It could be perfectly clear to the Superintendent that the object is potentially hazardous, but members of the public are not on notice of that. Indeed, if the phrase "potential safety hazard" had a "common understanding," and the Superintendent's authority was limited to listing additional items within that understanding, the authority would be superfluous, because everyone would already understand that those items were prohibited. In short, the City accuses Protesters of reading the phrase "potential safety hazard" out of the Ordinance, but it is the City that reads the phrase "as determined by the Superintendent" out of the Ordinance—sometimes literally. *See* Resp. Br. at 2 (eliding those words from a quotation of the Ordinance).

The City applies this elision of the Ordinance to its interpretation of Exhibit A, claiming that "the Ordinance does not prohibit 'sealed packages' . . ., but rather sealed packages insofar as they are potential hazards to safety at the DNC." Resp. Br. at 21. But the Ordinance contains no such limiting language. Instead, it prohibits the possession of "potential safety hazards, as determined by the Superintendent . . ., including, but not limited, to *any* item listed in Exhibit A." A34. (emphasis added). Thus, Exhibit A is not a list of items that are prohibited insofar as they are hazardous; it is a list of items that the Superintendent *has determined* to be hazardous, based on considerations that are not known to ordinary people.

Even assuming, however, that the phrase "potential safety hazard" limits the scope of categories like "sealed packages," "pointed objects," or "thermal containers"

(which it does not), the application of that phrase to those categories remains indeterminate because the Ordinance does not indicate the *kind* of harm, the *severity* of the harm, or the *likelihood* of harm that an object must pose in order to qualify as a "potential safety hazard." For example, an ordinary person would not be able to determine which sealed packages pose a potential safety hazard without knowing what kind of threat to public safety a sealed package could pose. The ordinary person might guess that sealed packages are prohibited because they might conceal explosives, poison, or other hazardous material, but he likely does not know which sealed packages are capable of concealing those materials. He does not know if the limitation relates to the size of the package, what it is made of, how it is sealed, or some other factor. The City scoffs at the idea that an ordinary person would consider a sealed packet of gummies to be prohibited under the Ordinance Resp. Br. 21, but it does not even attempt to describe the class of objects that *are* prohibited as sealed packages.

C. The City mischaracterizes Protesters' argument about Exhibit A to the Ordinance.

Selectively quoting Protesters' brief, the City claims that Protesters "seem to argue that, for the Ordinance to pass for the Ordinance to pass constitutional muster, it must list every 'specific object' prohibited, rather than use 'broad categories of objects.'" Resp. Br. 19. In fact, Protesters have made no such argument, but it makes for a convenient strawman. which City duly bats down. Id. 19-20. It fails to engage with the actual argument, which is (as the sentence following the quoted fragments makes clear) that the Ordinance is unconstitutional

because it "contains no definitions or other limits to constrain the breadth of these categories." Appellant's Br. 20.

The City has made no effort – in the Ordinance or in litigation – to provide even the most general description of the category of "sealed packages" or "pointed objects" that it believes constitute "potential safety hazards." It is not difficult to do so, assuming the City itself understands the contours of those categories. For example, the City could prohibit "any pointed object, including knives of any kind, that is capable of piercing human skin and causing injuries serious enough to require hospital treatment." Such a functional definition significantly narrows the class of "pointed objects" that might be prohibited and provides a workable standard that ordinary people can apply when assembling protest gear.

III. This Court should provide guidance to the District Court regarding injunctive relief.

As Protesters have explained, Appellants' Br. at 6, the District Court asked the parties to brief only the first prong of the preliminary injunction standard – likelihood of success on the merits – and denied the motion on that basis alone. Still the City appears to fault Protesters for failing to brief the remaining factors, Resp. Br. 5, and for asking *this* Court for an injunction, Resp. Br. at 26, which Protesters have not done. Nonetheless, the City proceeds to describe why it thinks the harms of enjoining the Footprint Ordinance outweigh the First Amendment injuries that Protesters will suffer if it does not. Id. at 26-29.

The District Court has broad powers to fashion equitable relief, and a preliminary injunction need not be an all-or-nothing proposition. The City says that

it must be allowed to prohibit items within the security footprint to avert disaster and protect democracy. Id. at 26-27. But the City has *not* explained how it would be harmed by more targeted relief to ensure that those protesting the DNC receive fair notice of what they may bring to a demonstration without risking arrest. If this Court holds the Ordinance unconstitutional, it should provide guidance to the District Court on equitable relief, especially given the short time remaining until the Convention.

In *Planned Parenthood*, although this Court upheld the statute at issue, it observed that the government "would be well-advised to" adopt administrative guidance clarifying the law's ambiguities and provided suggestions for doing so. 7 4th 595, 606. Similar guidance would be helpful here. Specifically, this Court should advise the District Court that it has authority to order the City to take targeted measures to mitigate the vagueness of the Ordinance, including but not limited to:

- Adopt standards to constrain the categories of objects in Exhibit A to the Ordinance.
- Post the list of prohibited objects, along with any newly designated "potential safety hazards" and interpretive standards, prominently on City websites, and publicize their availability.
- Adopt standards for the enforcement of the Ordinance, including a prohibition on citing or arresting protesters carrying prohibited items

until they have had an opportunity to dispose of the item or leave the security footprint, absent evidence of criminal intent.

These and other clarifying measures would not diminish public safety; rather, they would improve compliance with the Ordinance and minimize tense confrontations between the police and protesters arising from the Ordinance.

CONCLUSION

For the foregoing reasons, Protesters respectfully request the Court to reverse the District Court's denial of their Motion for Preliminary Injunction.

Respectfully submitted,

Dated: August 5, 2024

s/ *Rebecca K. Glenberg*

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CERTIFICATE OF COMPLIANCE WITH CIRCUIT RULE 32(c)

As required by Fed. R. A P. 32(g), I certify that the foregoing Reply Brief of Plaintiffs-Appellants contains 4,845 words, excluding the parts of the brief exempted by Fed. R. A P. 32(f).

s/ *Rebecca Glenberg*

CERTIFICATE OF SERVICE

I hereby certify that on August 5, 2024, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

s/ *Rebecca Glenberg*