LIFE: AT THE HEART OF THE LAW


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*VIA ELECTRONIC TRANSMISSION*

May 1, 2013

Board of Supervisors
San Francisco City Hall
1 Dr. Carlton B. Goodlett Place
San Francisco, CA 94102-4689

RE: File No. 13062 (amendment to Police Code, Art. 43, Access to Reproductive Health Facilities)

Dear Supervisors:

I am writing in opposition to the above-referenced amendment to the Police Code.

This proposed ordinance suffers from numerous constitutional infirmities. First, the ordinance is not narrowly tailored because it institutes a complete ban on all speech within the restricted area, as opposed to targeting objectionable conduct. Second, the ordinance is not serving a significant governmental interest because current law already prohibits all non-speech conduct threatening any legitimate interests the City might assert. Third, by making one-on-one communication illegal in front of the clinic, the Board is making the same mistake the U.S. Coast Guard made when it mandated a 75-yard "free" zone between activists on boats and the intended audience; there, the 9th Circuit declared that demonstrating at a distance on land was "completely ineffective" at reaching the intended audience which was situated near the water. *Bay Area Peace Navy v. United States*, 914 F.2d 1224 (9th Cir. 1990).

With regard specifically to the issue of speakers being able to effectively communicate with their audience, I understand that proponents of this amendment contend that the current ordinance "doesn't work" because speakers are using a "loophole" that allows them to stand stationary near doorways to hand out

leaflets to persons passing into the clinic. This "loophole" is exactly what the United States Supreme Court approved as an alternative channel of communication in *Hill v. Colorado*, the case that upheld the constitutionality of the 8-foot bubble zone law. In that case, the Court said, "The statute does not, however, prevent a leafleter from simply standing near the path of oncoming pedestrians and proffering his or her material, which the pedestrians can easily accept." 530 U.S. 703, 727 (2000). The Court reiterated this prescription later in the decision, stating "demonstrators with leaflets might easily stand on the sidewalk at entrances" in order to distribute leaflets to persons passing by. Id at 730. The City thus is putting itself in the position of arguing that the fact the speakers are availing themselves of a channel of communication specifically recommended by the Supreme Court is an unforeseen problem with the current ordinance that justifies further restrictions on speech.

Another justification proffered for replacing the bubble zone with a speech-free zone is that enforcement of the former is problematic because it is difficult to measure when someone has breached the 8-foot barrier. Enforcement of a bright-line rule is always difficult if the goal is zero tolerance for its own sake. Undoubtedly the police would be hard-pressed to enforce a 35-mile per hour speed limit at a zero tolerance level. However, if the goal of enforcement is to ameliorate a specific problem – in the instant case, close approaches of persons without their consent – then the fact that the pro-life speakers are remaining at a sufficient distance such that a violation cannot be readily perceived is evidence that the current ordinance is in fact working.

In addition to the constitutional defects outlined above, the ordinance is also overbroad and will thus assuredly be enforced by the police in a discriminatory manner against the acknowledged targets of the ordinance, i.e., pro-life speakers.

The proposed ordinance defines "demonstration activity" as "any activity involving expressive or symbolic conduct, including but not limited to the following: protesting; demonstrating; picketing; displaying or

distributing pictures, literature, or other materials; and engaging in education or counseling activities." The persons exempted from the prohibition on "entering or remaining" in the buffer zone are exempted only to the extent they do not engage in "demonstration activity" while in the zones.

Inevitably, the ordinance will not be enforced evenhandedly. Every person who walks through the restricted zone carrying on a conversation with someone else, speaking on a cell phone, wearing clothing with words or pictures, etc., will be in violation. Patients and their companions entering and leaving a restricted facility will also frequently be in violation, by communicating with one another or with, e.g., a sidewalk counselor standing outside the zone. City employees, construction workers, and ambulance drivers pulling up to the curb within 25 feet of the facility entrance with messages and logos on their vehicles or clothing would be in violation. Similarly, the driver of any car displaying a bumper sticker pulling up to the passenger loading zone in front of a facility would be in violation.

While at many times there will be no one in the area who cares enough to observe and report such violations, at other times the admitted targets of this law, i.e., the pro-life sidewalk counselors, will be present. At these times, it would not be surprising if they took steps to secure even-handed enforcement of the law by making private person's arrests of violators and calling for the police to come to the scene and accept those arrests and/or make reports.

The district attorney has discretion to decline to prosecute cases, but not if that discretion is exercised in a discriminatory manner against only certain "expressive activity" based on its content or viewpoint. With a sufficient number of unprosecuted violations involving speakers engaging in other types of expressive activity, it would not be difficult to establish discriminatory prosecution against only pro-life speakers speaking about abortion.

Finally, I understand that the city is placing considerable reliance on the fact that a similar buffer zone law was upheld by the First Circuit in *McCullen v. Coakley*. The plaintiffs challenging that law have filed a petition for certiorari in the United States Supreme Court, and a ruling on the petition is expected before the Court recesses at the end of June. Although admittedly the odds of any petition being granted are long, it would seem prudent for the Board to wait just a few more weeks before passing the proposed ordinance, in case the Supreme Court does grant the petition, thereby throwing into question the precedent the City is relying on.

Thank you for your attention to this matter.

Very truly yours,

/s/

Catherine Short
Legal Director