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MEMORANDUM OF LAW

DATE: August 14, 2014

TO: Shelley Zimmerman, Chief of Police

FROM: City Attorney

SUBJECT: Constitutionality of San Diego's Demonstration Activity Buffer Zone Ordinance

INTRODUCTION

On June 26, 2014, the United States Supreme Court unanimously held that Massachusetts' buffer zone surrounding reproductive health care facilities violated the First Amendment. *McCullen v. Coakley*, 573 U.S. --, 134 S. Ct. 2518 (2014). San Diego has a fixed 15-foot buffer zone surrounding entrances to and exits from health care facilities, places of worship, and school grounds. This Memorandum will evaluate whether San Diego's ordinance remains valid in light of the new Supreme Court decision.

QUESTION PRESENTED

Is San Diego's buffer zone ordinance contained in San Diego Municipal Code section 52.1001 valid under the First Amendment?

SHORT ANSWER

Likely, yes. San Diego's ordinance is far less restrictive than the invalidated Massachusetts statute and other fixed buffer zones that have been challenged and upheld. San Diego Municipal Code section 52.1001 would likely withstand a First Amendment challenge.

BACKGROUND

In 2007, Massachusetts amended its law establishing a buffer zone surrounding health care facilities where abortions were offered or performed. The law as amended prohibited any person from knowingly entering or remaining on a public way or sidewalk within a radius of 35 feet of any portion of an entrance, exit or driveway to a reproductive health care facility or within the rectangle area between an entrance, exit, or driveway to such a facility and the street. Mass. Gen. Laws ch. 266, § 120E½(b) (2007). Several individuals challenged this law claiming violations of the First and Fourteenth Amendments. The First Circuit Court of Appeals upheld the statute and the United States Supreme Court granted certiorari. The Supreme Court invalidated Massachusetts' law and provided a detailed First Amendment analysis, which will be discussed below.

ANALYSIS

I. LEGAL FRAMEWORK FOR FIRST AMENDMENT ANALYSIS

First Amendment rights are those accorded among the highest protections in the law. First Amendment scrutiny will be applied to a law that regulates or restricts speech, even if the regulation or restriction is only incidental to regulation of conduct. *McCullen,* 134 S. Ct. at 2529. The standard applied to government regulation of speech depends on whether the regulation is content based or content neutral. Content based regulation must be evaluated under "strict scrutiny" and must be the "least restrictive means of achieving a compelling state interest." *Id.* at 2530, citing *United States v. Playboy Entertainment Group, Inc.,* 529 U.S. 803, 813 (2000). In contrast, government regulation of speech that is content neutral will be subject only to "intermediate scrutiny." *Turner Broadcasting System, Inc. v. F.C.C.*, 512 U.S. 622, 642 (1994), citing *Clark v. Community for Creative Non-Violence,* 468 U.S. 288, 293 (1984). Under this standard, a government imposed time, place, or manner restriction on speech must be "narrowly tailored to serve a significant governmental interest," and leave open "ample alternative channels for communication of information." *McCullen,* 134 S. Ct. at 2529, (citing *Ward v. Rock Against Racism,* 491 U.S. 781, 791 (1989)).

II. CONSTITUTIONAL DEFICIENCY OF THE MASSACHUSETTS LAW

In its analysis of the Massachusetts law, the Supreme Court first determined that the buffer zone law was content neutral. Although it applied only to public sidewalks outside reproductive health care facilities, the law was facially neutral. *McCullen*, 134 S. Ct. at 2531. It applied to anyone who violated the buffer zone regardless of the message content. A person could be in violation of the law by simply standing on the sidewalk engaged in no speech or expressive activity at all. *Id.*

The petitioners argued that the law was content based because the limited location where it applied resulted in only restricting abortion-related speech. The Court looked to Massachusetts' content neutral justifications for the law to overcome this argument. The express intent of the law was to promote public safety, access to healthcare, and the "unobstructed use of public sidewalks and roadways." *Id.* These goals, combined with facial neutrality, the Court

reasoned, have been held to be content neutral. The disproportionate effect on abortion-related speech did not render the law content based. *Id*. Therefore, strict scrutiny was not applied and the Justices evaluated the statute using the intermediate scrutiny standard.

The Court quickly accepted that public safety, access to healthcare, and free use of public rights of way were legitimate government interests. *Id.* at 2535. The analysis then turned to whether the buffer zone statute was sufficiently narrowly tailored to serve those interests. The Court held that it was not *Id.* at 2539.

Evidence showed that the petitioners' desired speech was most effective through personal conversations and by providing literature directly to members of the target audience. *Id.* at 2535. The expansiveness of the buffer zone deprived them "of their two primary methods of communicating with patients." *Id.* at 2536. For example, the buffer zone excluded one petitioner from 56 feet surrounding an abortion clinic. *Id.* at 2527. The buffer zone outside another clinic excluded a different petitioner from over 93 feet of the sidewalk and driveway outside the clinic. *Id.* This, the Court found, burdened "substantially more speech than necessary to achieve the Commonwealth's asserted interests." *Id.* at 2537.

The Court then examined several less restrictive buffer zone laws and concluded that Massachusetts had not attempted to achieve its goals with "less intrusive tools readily available to it." *Id.* at 2539. Based on these concerns and the substantial amount of speech burdened by the buffer zone, the Court held that Massachusetts' buffer zone statute violated the First Amendment because it was not sufficiently narrowly tailored.

III. SAN DIEGO'S ORDINANCE IS VALID UNDER THE FIRST AMENDMENT

A. San Diego's Ordinance

San Diego's buffer zone ordinance applies to any person engaged in demonstration activity near a health care facility, place of worship, or school grounds. San Diego Municipal Code (SDMC) § 52.1001. Demonstration activity is defined to include "advocating, protesting, picketing, distributing literature, or engaging in oral advocacy or protest, education or counseling activities." *Id.* at § 52.1001(a). The ordinance declares it unlawful to remain within 15 feet of an entrance or exit to a health care facility, place of worship, or school grounds after having been requested to withdraw by a person entering or exiting the establishment. *Id.* at § 52.1001(b). Fifteen feet is measured from the threshold of the entrance or exit. *Id.* at § 52.1001(d). Once a demonstrator has withdrawn to 15 feet or more, he or she must remain at that distance until the person requesting withdrawal has either entered the establishment or is outside the 15-foot zone. *Id.* at § 52.1001(b). Violations of the ordinance may be enforced through criminal penalties or a private civil action. *Id.* at §§ 12.0201, 52.1002.

B. First Amendment Analysis

1. Content Neutrality

A court would likely find San Diego's buffer zone ordinance to be content neutral and subject only to intermediate scrutiny. The ordinance is facially neutral. It restricts the location where demonstration activity may be performed, but imposes the restriction on all demonstration activity regardless of the message content.

SDMC section 52.1001 applies to demonstration activity at health care facilities, places of worship, and school grounds. The fact that the ordinance applies to specific locations, and incidentally affects speech topics related to those locations, does not render it content based. To the contrary, facially neutral restrictions applied only to reproductive health care clinics have been upheld as content neutral. *Hill v. Colorado*, 530 U.S. 703, 725 (2000) (upholding a health care facility buffer zone). San Diego's ordinance applies more broadly than the Massachusetts abortion clinic buffer zone in *McCullen* and the Colorado health care facility buffer zone in *Hill.* It does not restrict the content of any particular message despite regulating conduct at certain places. A court would likely find it to be content neutral.

2. Significant Government Interest

San Diego's buffer zone was amended to its current form in December 1997. The amending ordinance recited several justifications including promoting access to health care facilities, places of worship, and school grounds, as well as preserving the constitutional rights of both patrons of such establishments and demonstrators. San Diego Ordinance O-18452 (Dec. 16, 1997). The ordinance was expressly intended only to prohibit activities that "threaten, impair or impede" privacy rights, free access to health care and education, the free exercise of religion, and "constitutionally-protected speech." *Id.*

These types of interests that promote public safety and protect constitutional rights are typically found to be legitimate government interests. *Schenck v. Pro-Choice Network of Western New York*, 519 U.S. 357, 376 (1997). *See also Madsen v. Women's Health Center, Inc*., 512 U.S. 753, 767-68 (1994). The Supreme Court found similar interests of Massachusetts to be valid in *McCullen,* noting that the buffer zone "clearly serves these interests." *McCullen*, 134 S. Ct. at 2535. Likewise, San Diego's governmental interests, as declared in the 1997 ordinance, would most likely be viewed as legitimate government interests withstanding First Amendment scrutiny.

3. Narrowly Tailored

The third prong of the intermediate scrutiny analysis, narrow tailoring, is often the most difficult. In *McCullen*, the Court found that Massachusetts' buffer zone was not sufficiently narrowly tailored to serve the governmental interests. *McCullen*, 573 U.S. at 2539. San Diego decided to amend its 1997 ordinance based on the rulings in *Schenck,* 519 U.S. 357, and *Sabelko v. City of Phoenix*, 120 F.3d 161 (9th Cir. 1997) (finding a floating 8-foot buffer zone not narrowly tailored and unconstitutional). This Office concluded that San Diego's then existing

8-foot floating buffer zone within a 100-foot fixed zone, nearly identical to the Phoenix ordinance in *Sabelko*, was not narrowly tailored. 1994 City Att'y MOL 304 (97-19; July 17, 1997). The Municipal Code was then amended to the current 15-foot fixed buffer zone.

San Diego's current buffer zone would likely be found to be narrowly tailored. In *McCullen*, the Court opined that "[w]hen selecting among various options for combating a particular problem, legislatures should be encouraged to choose the one that restricts less speech, not more." *McCullen*, 134 S. Ct. at 2532. The Court then discussed several other buffer zone statutes and injunction terms that were less restrictive than the Massachusetts buffer zone.

A previous version of Massachusetts' buffer zone law was upheld after a First Amendment challenge in 2004. That version of the law established a fixed 18-foot buffer zone around the entrances and driveways of abortion clinics. Within the 18-foot zone, it was unlawful to approach within 6 feet of another person without that person's consent. *McGuire v. Reilly*, 386 F.3d 45 (1st Cir. 2004). A similar law in Colorado was upheld by the United States Supreme Court in *Hill*, 530 U.S. 703. The Colorado law prohibited anyone from knowingly approaching within 8 feet of another person without consent while within 100 feet of a health care facility entrance. *Id.* at 707.

Courts have also upheld fixed buffer zones. In *Schenck*, the Supreme Court upheld an injunction creating a fixed 15-foot buffer zone around the doorways, driveways, and driveway entrances at an abortion clinic. *Schenck*, 519 U.S. at 380. The Court reasoned that the fixed buffer zone was necessary to ensure successful ingress and egress of clinic patrons. *Id.* In contrast, the Court struck down a 15-foot floating buffer zone surrounding people and vehicles entering or leaving the same clinic. The Court reasoned that such a buffer zone restricted more speech than was necessary, would prevent consensual conversation or leafleting, and would "restrict the speech of those who simply line the sidewalk or curb in an effort to chant, shout, or hold signs peacefully." *Id.*

The Court also evaluated an abortion clinic injunction in *Madsen v. Women's Health Center, Inc.*, 512 U.S. 753 (1994). In that case, the Court upheld an injunction term prohibiting people from "'congregating, picketing, patrolling, demonstrating or entering' any portion of the public right-of-way . . . within 36 feet of the property line of the clinic . . . ." *Madsen*, 512 U.S. at 768. The Court accepted that the purpose of this term was to protect unobstructed access to the clinic and upheld the 36-foot buffer zone around the public right-of-way. *Id.* at 770. The Court then struck down a similar 36-foot rule applied to private property areas of the clinic because there was no showing that such a restriction was necessary to protect clinic access and it restricted more speech than was necessary. *Id.* at 771.

San Diego's ordinance is less restrictive than many of the other statutes and injunction terms previously found valid under the First Amendment. San Diego's 15-foot buffer zone applies only to the entrance or exit of a health care facility, place of worship, or school grounds. Unlike the invalid term in *Madsen*, it does not burden areas not near an entrance or exit. San Diego's ordinance is also not nearly as expansive as the 36-foot restriction approved in *Madsen*.

Furthermore, San Diego's ordinance does not have a term allowing for massive expansion of the buffer zone similar to the Massachusetts statute in *McCullen*. Finally, San Diego's ordinance is less restrictive than the 15-foot fixed buffer zone approved in *Schenck* because withdrawal is only required upon request of the establishment's patron.

As one of the least restrictive buffer zones among those evaluated by the United States Supreme Court, San Diego's ordinance would likely be upheld. It restricts speech only within 15 feet of an entrance or exit, and only upon the request of a patron. Absent such a request, a person remains free to convey the desired message in any lawful manner. Additionally, the time of the restriction is extremely short. The affected person must only remain 15 feet away until the patron requesting withdrawal has either entered the facility or is outside the 15-foot zone. SDMC § 52.1001(b). After that time, the person is free to approach a different person and re-enter the 15-foot area. The ordinance is narrowly tailored to restrict speech only for a short time to allow free ingress and egress to and from a protected establishment and to protect patrons from undesired confrontation immediately near the entrance or exit.

4. Ample Alternative Channels for Communication

The *McCullen* Court did not analyze the last prong of the intermediate scrutiny analysis because the Massachusetts statute failed on the narrowly tailored prong. However, it is clear that San Diego's ordinance is so narrow that a person wishing to engage in "demonstration activity" may engage in other forms of communication even if asked to withdraw. Though less conducive to quiet personal conversation, a distance of 15 feet is not so great as to prevent the intended audience from hearing the communication altogether. Ample opportunity still exists for verbal or visual communication of the message. A court would likely find that San Diego's ordinance successfully leaves open ample alternative channels for communication.

CONCLUSION

Unlike the speech restrictions found by the Court to violate the First Amendment, San Diego Municipal Code section 52.1001 is narrowly tailored to limit speech only for a short time within a small area. San Diego's ordinance imposes these limitations in order to protect the significant government interests of preserving access to health care facilities, places of worship, and school grounds, as well as to preserve public safety and constitutional rights. It does not

restrict all forms of communication, but only those necessary to achieve these interests. Based on the First Amendment jurisprudence of the United States Supreme Court, including the new *McCullen* decision, San Diego's ordinance is likely to withstand a Constitutional challenge.

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