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MEMORANDUM OF LAW

DATE: July 17, 1997

TO: Deputy Mayor Barbara Warden

FROM: City Attorney

SUBJECT: Viability of the City's Floating Buffer Zone Ordinance in Light of Recent Case Law

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QUESTION PRESENTED

The City currently has in place an ordinance, San Diego Municipal Code section 52.1001, that allows a recipient of unwanted speech to create a mobile, 8-foot floating buffer zone, or "bubble," around himself or herself within 100 feet[1] of a health care facility, place of worship, or school. A person can create such a buffer zone by orally requesting the speaker to withdraw, or by displaying a sign requesting withdrawal. If the speaker then fails to withdraw, the speaker becomes subject to misdemeanor prosecution. Municipal Code section 52.1002 further provides that a speaker who refuses to withdraw may be subject to a private cause of action by the recipient of the unwanted speech.

You have asked whether the City's floating buffer zone ordinance is constitutional in light of the United States Supreme Court ruling in Schenck v. Pro Choice Network of Western New York, -- U.S. --, 117 S. Ct. 855 (1997)[2] and the case it relies on, Madsen v. Women's Health Center, 512 U.S. 753 (1994). Earlier this week, the Ninth Circuit Court of Appeals issued an

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[1]The 100-foot "access area" applies to public streets, public places, and places open to the public within the 100-foot area. State trespassing laws govern entry on private property.

[2]Schenck involved an injunction requiring abortion protesters to stay 15 feet away from persons entering or leaving a clinic, and fifteen feet away from vehicles seeking access to clinics.

opinion in a related case, Sabelko v. City of Phoenix[3], 97 Daily Journal D.A.R. 8990 (July 15, 1997), which is also critical, and we believe may control the determination of whether our own floating buffer zone ordinance remains valid.

SHORT ANSWER

Based upon the rulings in the two cases cited above, we believe that a court would find that our floating buffer zone ordinance unconstitutionally infringes upon freedoms protected by the First Amendment. Although we believe a court would find the ordinance meets two of the three essential tests of a permissible infringement on such freedoms, the decisions in Schenck and Sabelko would probably lead a court to find that the City's ordinance does not meet the third essential test: it is not sufficiently narrowly tailored to meet the City's legitimate interests in protecting the right to privacy and access to health care without unduly burdening First Amendment rights. As a result, a court would probably invalidate the City's ordinance.

ANALYSIS

A. First Amendment Analysis

1. Content Neutrality

When the government regulates speech in a public forum,[4] the first standard for evaluating the constitutionality of the regulation depends on whether the regulation is based on the content of the speech ("content-based"), or applies regardless of the content

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[3] The Phoenix ordinance is virtually identical to the City's ordinance, except that it applies only to health care facilities, while the City's ordinance applies as well to schools and places of worship. The City's ordinance further clarifies that mere statements of opinion or disagreements do not constitute a request to withdraw; this distinction, however, does not change our analysis that Sabelko applies to our own ordinance.

The Sabelko case was pending before the U. S. Supreme Court when the Supreme Court issued its opinion in Schenck. Thereafter, and based upon Schenck, the Supreme Court remanded the Sabelko case to the Ninth Circuit for reconsideration and a ruling consistent with the Schenck decision.

[4]Our ordinance applies to public streets and public places, and thus operates in a public forum. See Frisby v. Schultz, 487 U.S. 474, 480-81 (1988). Public streets and sidewalks are traditional public fora.

("content-neutral"). Perry Educ. Ass'n. v. Perry Local Educators Ass'n., 460 U.S. 37, 45 (1983). If it is content-based, the regulation must pass "strict scrutiny," i.e., the regulation must be necessary in order to serve a compelling state interest, and must be narrowly tailored to meet that interest. Id. If the regulation is content-neutral, reasonable restrictions on the time, place and manner of exercising the freedom of speech will be upheld as long as it is narrowly tailored to serve a significant government interest, and leaves open ample alternative channels for communication.[5] Id.; Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989) (citations omitted).

To determine content-neutrality, the inquiry is whether the government's speech regulation is based on disagreement with the message conveyed. Id. A regulation that is based on the recipient's reaction to speech is considered content-based, not content-neutral. Forsyth County, GA. v. Nationalist Movement, 505 U.S. 123, 134-35 (1992).

The City's ordinance affects those engaged in "demonstration activity," which includes protesting, picketing, distributing literature, engaging in oral protest, education, or counseling activities. One may argue that it targets only "protest" speech, while "support" speech is not punished. However, the ordinance on its face does not regulate the content of the speaker's message. The ordinance applies to any person engaged in demonstration activity, no matter what the subject or content of the demonstrator's[6] message. No particular message is singled out for regulation. Therefore, the ordinance is content-neutral, and the "reasonable time, place and manner" test applies.

Our conclusion in this regard is supported by the opinion in Sabelko, in which the Ninth Circuit found that the Phoenix ordinance was indeed "content neutral." Given that the City's ordinance and the Phoenix ordinance are identical in all material respects, the court would likely find that our ordinance is likewise content neutral.

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[5]A classic example of a reasonable time, place and manner restriction is the well-recognized prohibition against yelling "Fire!" in a theater, when there is no reasonable reason to do so.

[6]Case law in this area refers to "speakers," "protesters," and "demonstrators" to describe those persons whose speech is being burdened. Unless otherwise noted, the term "demonstrator" is used in this memorandum to describe all such persons, because the City's ordinance refers to "demonstration activity."

2. Significant Governmental Interest

The second inquiry is whether there is a significant governmental interest being served by the regulation in question. In Madsen, the Supreme Court found that the government has a significant interest in protecting a woman's freedom to seek lawful medical or counseling services in connection with her pregnancy, and that there is a significant governmental interest in protecting medical privacy. 512 U.S. at 767-768.

In the present case, although the ordinance does not specifically describe all the City's interests, those interests clearly include protecting and preserving several constitutional rights, including the rights of privacy and the freedom to seek medical services, as well as the constitutionally-guaranteed right of religious freedom. The City also has an interest in promoting public safety and order. The interests stated by the City in the ordinance's recitals include the prevention of intimidation and harassment directed at persons seeking access to health care facilities, places of worship, and schools. The City found that those persons are particularly vulnerable to adverse effects from harassing or intimidating activities at close range. One of the recitals says:

> WHEREAS, such activity near health care facilities, places of worship or schools creates a "captive audience" situation because persons seeking services cannot avoid the area outside of the facilities if they are to receive the services provided therein, and their physical and emotional ailments or conditions can make them especially vulnerable to the adverse physiological and emotional effects of such harassing or intimidating activities directed at them from extremely close proximity . . . .

Courts recognize the "captive audience" principle as one which allows otherwise protected speech to be burdened, because the recipient cannot avoid the speaker.[7]

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[7]The courts are generally more willing to protect listeners inside their homes. Frisby v. Schultz, 487 U.S. 474, 484-85 (1988) (legislation prohibiting targeted residential picketing upheld; there is no right to force speech into the home of an unwilling listener). Outside the home, particularly in a public setting, it is usually up to the listener to avoid the speaker. The Supreme Court has also, however, approved of use of the "captive audience" principle to support an injunction against protesters at abortion clinics. Madsen, 512 U.S. at 767-68.

In both Madsen and Schenck, the Supreme Court approved a combination of governmental interests, including those asserted by the City, as sufficient to justify some burdening of speech. The approved interests include protecting a woman's freedom to seek lawful medical or counseling services in connection with her pregnancy, ensuring the public safety and order, promoting the free flow of traffic, and protecting citizens' property rights.

The Sabelko court likewise had no problem finding that the interests served by the Phoenix ordinance served such significant governmental interests. We believe that a court reviewing the City's ordinance would find this test satisfied as well.

3. Narrow Tailoring of the Ordinance

The third test is whether the ordinance is narrowly tailored to serve the identified significant governmental interests, leaving open ample alternative channels of communication, and burdening no more speech than is necessary to serve the identified interests. Ward, 491 U.S. at 791. Here we believe the City's ordinance, like the ordinance in Sabelko, would fail.

The City's ordinance does not bar anyone from speaking to a recipient; a demonstrator may approach a recipient and speak until asked to withdraw. Even after withdrawing to the eight-foot limit, the demonstrator may continue to speak. Further, the floating zone may only be invoked within 100 feet of a facility, and beyond that our ordinance imposes no limitations on the approach. One might conclude that such provisions appear to allow sufficient alternatives and are therefore "narrowly tailored" to serve the acknowledged governmental interests.

The Ninth Circuit in Sabelko found otherwise. Taking its lead from the Schenck case, in which the Supreme Court had struck down a fifteen-foot floating buffer zone[8], the Ninth Circuit found that the eight-foot floating zone in the Phoenix ordinance likewise was not narrowly tailored. By preventing leafleting and communication at a normal conversational distance, the floating zone prevents "classic forms of speech that lie at the heart of the First Amendment." Schenck, 117 S. Ct. at 866; Sabelko, 97 D.A.R. at 8991. Because the buffer zone "floated," demonstrators would have difficulty determining how to comply with the requirement:

> Protesters could presumably walk 15 feet behind the individual, or 15 feet in front of the individual while walking backwards. But they are then faced with the problem of watching out for other individuals entering or leaving the clinic . . . [A]ttempts to stand 15 feet from someone entering or leaving a clinic and to

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[8]The Supreme Court did allow a fixed fifteen-foot buffer zone, requiring demonstrators to stay fifteen feet away from doorways, parking lot entrances and driveways.

> communicate a message--certainly protected on the face of the injunction--will be hazardous if one wishes to remain in compliance with the injunction.

Sabelko, 97 D.A.R. at 8991, quoting Schenck, 117 S. Ct. at 867. The Sabelko court then concluded that the floating eight-foot zone in the Phoenix ordinance suffered the same defect. Moreover, because floating zones could apply to more than one person entering or leaving the clinic at the same time, demonstrators would have difficulty determining whether they were in one or more prohibited zones, and could not accurately determine whether they were at any given time in or out of compliance. Id.

Because the City's ordinance is virtually identical to the Phoenix ordinance, a court reviewing the City's ordinance is likely to find this same defect and rule that the ordinance is unconstitutional.

B. Other Related Laws

Notwithstanding the constitutional infirmity of the City's floating buffer zone ordinance, there are other laws that protect the significant governmental interests involved. State law prohibits physically detaining or obstructing an individual's passage into or out of a health care facility, place of worship, or school. Penal Code § 602.11. Federal law prohibits the physical obstruction, injury, intimidation and interference of any person seeking reproductive health services or exercising their right of religious freedom at a place of worship. Title 18 U.S.C. § 248(a), the Freedom of Access to Clinic Entrances Act of 1994 ("FACE"). FACE has been upheld as constitutional. Riely v. Reno, 860 F. Supp. 693, 700-05 (D. Ariz. 1994). These laws are listed on Appendix "A" attached to this memorandum. There are no published opinions addressing Penal Code section 602.11. However, neither Schenck nor Sabelko affect any of these laws.

CONCLUSION

The Schenck case set the ground rules for permissible buffer zones, and in so doing invalidated floating buffer zones that unduly restrict freedoms protected by the First Amendment. By its ruling, the Sabelko court has indicated how the Ninth Circuit will interpret and apply these rules. In light of both rulings, we believe the City's existing floating buffer zone ordinance would be found constitutionally defective. Although it is content-neutral and serves significant governmental interests, a court would probably rule that it infringes upon First Amendment freedoms, because it is not narrowly tailored. Moreover, because the "floating" aspect of the zones creates the situation that the Court found unconstitutional, we do not believe that the ordinance can be modified to include any type of floating zone.

Although the existing ordinance is likely unenforceable, there may be alternative measures the City can adopt to protect the recognized governmental interests in privacy, access to health care, and freedom of speech. We are prepared to review the City's options and discuss them with you.

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LAWS ASSOCIATED WITH DEMONSTRATIONS

A. Penal Code Sections

1. 148(a) - Resisting Arrest
2. 242/243(b) - Battery on a Peace Officer
3. 594 - Vandalism
4. 408 - Unlawful Assembly
5. 409 - Refusal to Disperse When Ordered To
6. 415(1) - Disturbing the Peace - Fighting
7. 415(2) - Disturbing the Peace - Loud Noise
8. 415(3) - Disturbing the Peace - Offensive Words
9. 602.11 - Obstructing Passage to Health Care Facilities, Places of Worship, Schools
10. 640.6 - Graffiti on Property of Another

B. Vehicle Code Section

1. 23110(a) - Throwing Substances at Vehicles

C. San Diego Municipal Code Sections

1. 52.80.01 - Trespass
2. 52.2001-52.2003 - Targeted Residential Picketing
3. 59.5.0502B(2)(b) - Noise Violations
4. 81,.08 - Authority of Police in Crowds

D. United States Code

1. Title 18, U.S.C. section 248(a) - Freedom of Access to Clinic Entrances Act of 1994 ("FACE")

APPENDIX A