Office of
The City Attorney
City of San Diego

MEMORANDUM
MS 59

(619) 533-5800

DATE: May 16, 2024

TO: Honorable Mayor and Councilmembers

FROM: City Attorney

SUBJECT: Adoption of Buffer Zones at Health Care Facilities, Places of Worship, and Schools

INTRODUCTION

The Office of the City Attorney is proposing amendments that update the buffer zone at health care facilities, places of worship, and school grounds (Covered Facilities). Buffer zones are specifically defined public areas surrounding locations where demonstrations or other First Amendment activities are restricted or limited. Currently, San Diego Municipal Code (Municipal Code) section 52.1001 provides a fixed 15-foot buffer zone around entrances and exits from Covered Facilities. It requires demonstrators to withdraw 15 feet away from an entrance or exit of a Covered Facility if a person asks the demonstrator to do so. Violations of the current ordinance may be enforced through criminal penalties or a private civil action. SDMC §§ 12.0201, 52.1001, 52.1002. This memorandum provides an update on important changes in legal authority related to buffer zones since the original ordinance was adopted in 1997.

BACKGROUND

In 1997, this Office issued a memorandum concluding that the City's then existing 8-foot floating buffer zone within a 100-foot fixed zone would not survive legal challenge based on a Ninth Circuit Court of Appeals ruling earlier that year. 1997 City Att'y MOL 304 (97-19; July 17, 1997), Attachment A. The Ninth Circuit held that a City of Phoenix floating 8-foot buffer zone[1] was not narrowly tailored to serve its legitimate governmental interest and thus unconstitutional under First Amendment protections. *Sabelko v. City of Phoenix*, 120 F.3d 161 (9th Cir. 1997). As a result, the City Council approved amendments to Municipal Code section 52.1001 to replace San Diego's floating 8-foot buffer zone with the 15-foot fixed buffer zone it has today.

[1] Floating buffer zones follow individual people, including while they are in transit.

In 2014, this Office again reviewed Municipal Code section 52.1001 in light of the United States Supreme Court's decision that year in *McCullen v. Coakley*, 573 U.S. 464 (2014). In *McCullen*, the Court held that Massachusetts' fixed 35-foot buffer zone surrounding reproductive health care facilities violated the First Amendment because it was not narrowly tailored to serve the government's significant interest. When applied, the buffer zone expanded beyond the actual 35 feet.[2] *Id*. at 493. This Office concluded the City's 15-foot fixed buffer zone was still valid since it was far less restrictive, in distance and application, than the invalidated 35-foot buffer in the Massachusetts case. 2014 City Att'y MOL 104 (2014-8; Aug. 14, 2014), Attachment B.

The City's 15-foot fixed buffer zone ordinance has not been amended since 1997 despite developments in case law and legal trends. As a result, the City of San Diego's laws protecting access to Covered Facilities are outdated and do not sufficiently protect individuals from harassment and abuse.

I. REQUIREMENTS FOR CONSTITUTIONALLY VALID ORDINANCE REGULATING OR RESTRICTING SPEECH

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*, 573 U.S. at 476. For a buffer zone ordinance to survive constitutional challenge, it must be content neutral and narrowly tailored to serve its legitimate governmental interest in protecting individuals from "unwanted encounters, confrontations, and even assaults." *Hill*, 530 U.S. at 729.

A. Content Neutral

The standard applied to government regulation of speech depends on whether the regulation is content based or content neutral. Under the First Amendment, the government "has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Reed v. Town of Gilbert, Ariz.*, 576 U.S. 155, 163 (2015) (quoting *Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 95 (1972)). To determine whether a law is content based, courts consider "whether a regulation of speech 'on its face' draws distinctions based on the message a speaker conveys." *Id.* (citation omitted). "Government regulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed." *Id.*

An ordinance is content neutral if it does not place restrictions upon a particular viewpoint or subject matter and instead establishes a narrow time, place, or manner restriction on a wide array of communications, applied equally irrespective of viewpoint. *Hill*, 530 U.S. at 719. An ordinance is not content based if it applies to specific locations and incidentally affects speech topics related to those locations. To the contrary, facially neutral restrictions applied only to reproductive health care clinics have been upheld as content neutral. *Id.* at 725 (upholding a floating 8-foot buffer zone around health care facilities).

[2] For example, it excluded one petitioner from 56 feet surrounding an abortion clinic. *Id*. at 473. The buffer zone outside another clinic excluded a different petitioner from over 93 feet of the sidewalk and driveway outside the clinic. *Id*. at 474.

B. Legitimate Government Interests

Ordinances that promote public safety and protect constitutional rights are typically found to be legitimate government interests. *Schenck v. Pro-Choice Network*, 519 U.S. 357, 376 (1997); *see also Madsen v. Women's Health Center, Inc.*, 512 U.S. 753, 767-68 (1994). The United States Supreme Court found that buffer zones "clearly serve these [legitimate government] interests" because they promote public safety, patient access to healthcare, and unobstructed use of public sidewalks and roadways. *McCullen*, 573 U.S. at 487. Likewise, in *Hill*, the Supreme Court found the protection of persons who are attempting to enter health care facilities from "unwanted encounters, confrontations, and even assaults" to be legitimate interests properly protected by Colorado's "modest" floating 8-foot buffer zone. *Hill*, 530 U.S. at 729. The right to medical privacy, to freely gain access to reproductive health care and educational services, and to practice religion are fundamental rights under the state constitution and preservation of those rights are generally legitimate government interests. *See* Cal. Const. art. I, §§ 1, 1.1, 4; Cal. Const. art. IX, §§ 1, 5; *Madsen*, 512 U.S. at 767-68.

C. Narrowly Tailored

The Supreme Court has upheld floating buffer zones as narrowly tailored regulations where they are content-neutral and are not substantially broader than necessary to achieve the government's interest. *Ward v. Rock Against Racism*, 491 U.S. 781, 800 (1989). In *Hill*, the Court held that Colorado's floating 8-foot buffer zone was sufficiently narrowly tailored to address the state's concerns of unwanted encounters, confrontations, and assaults. *Id*. at 726-27. The statute allowed the speaker to remain in one place, and other individuals could pass within eight feet of the speaker without causing the speaker to violate the statute. *Id.* Colorado's law protected speakers who inadvertently violated the statute by requiring knowledge of the violation, and the Court considered eight feet to be a normal conversational distance. *Id.* (citation omitted). Accordingly, a floating 8-foot buffer zone can be implemented in a manner that does not violate the First Amendment under current case law if it sufficiently mirrors the statute's relevant language in *Hill,* including its knowledge requirement.

D. Ample Alternate Channels for Communication of Information

It is imperative that government regulations allow ample opportunity for communications protected by the First Amendment. In *Hill*, the Court determined that an 8-foot floating buffer zone allowed protestors to display signs, leaflet, and exercise oral speech. *Id.* at 726. The Court in *Hill* reasoned that even though a 15-foot floating buffer zone might preclude demonstrators from expressing their views from a normal conversational distance, eight feet was sufficient to protect such speech while serving the government's interest in protecting the public. *Id*. at 726-27. A floating 8-foot buffer zone in the City's ordinance would similarly meet this requirement.

II. CONTROLLING LEGAL AUTHORITY ON BUFFER ZONES

Hill is the controlling legal authority on buffer zones. *Hill* has been upheld and provides authority for a facially constitutional 8-foot buffer zone ordinance. It is also notable that the

Supreme Court recently declined to consider a case from New York challenging a similar 8-foot floating buffer zone, which means that *Hill* remains the controlling law on buffer zones. *Vitagliano v. Cnty. of Westchester*, 71 F.4th 130 (2d Cir. 2023), *cert. denied*, 144 S. Ct. 486 (2023).

While *Hill* provides authority for facially constitutional floating 8-foot buffer zone ordinances, the court in *Hoye v. City of Oakland*, 653 F.3d 835 (9th Cir. 2011), found a similar ordinance constitutionally invalid because its *enforcement* resulted in content-based regulation of speech. *Hoye v. City of Oakland*, 653 F.3d 835, 852 (9th Cir. 2011). Thus, although the ordinance mirroring the *Hill* language was held facially constitutional as content neutral, the court determined that the City of Oakland only enforced the ordinance against those who opposed abortion, and not those volunteers assisting patient access to clinics. *Id*. The *Hoye* ordinance, although mirroring the language of *Hill* in all meaningful senses and which was otherwise facially constitutional, thus had a disparate and unconstitutional impact on individuals based on the content of their message. *Id*. at 849. Accordingly, any City ordinance must be enforced equally regardless of the viewpoints expressed to survive a challenge based on its enforcement.

CONCLUSION

The City may adopt reasonable regulations on speech in public fora (such as streets and sidewalks around the entrances to Covered Facilities, as Municipal Code section 52.1001 does), so long as the regulations are content neutral; narrowly tailored to serve a significant governmental interest; and leave open ample alternative channels for communication of the information. *Ward,* 491 U.S. at 800. The proposed amendments to Municipal Code section 52.1001 modeled after Colorado's buffer zone statute in *Hill* meet that constitutional standard because they are content neutral and narrowly tailored to serve the City's legitimate interest in preventing unwanted encounters, confrontations, and assaults while preserving constitutional rights to peacefully assemble and express opinions. In addition, the ordinance must be enforced equally regardless of the viewpoints expressed.

MARA W. ELLIOTT, City Attorney

By_____*/s/ Eric LaGuardia*_____
Eric LaGuardia
Deputy City Attorney

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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.

CASEY GWINN, City Attorney

By
Leslie E. Devaney
Executive Assistant City Attorney

By
Theresa C. McAteer
Deputy City Attorney

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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

ATTACHMENT B

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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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