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### Walter Hoye in front of feds

*Why pro-aborts can talk and pro-lifers can't*

On June 26, U.S. District Court Judge Charles Breyer heard arguments in the federal lawsuit challenging the constitutionality of a “Mother May I” law enacted by the city of Oakland in response to the peaceful sidewalk counseling activity of Rev. Walter Hoye. The city ordinance prohibits approaching without consent within 8 feet of any person seeking to enter an abortion clinic, for the purpose of leafleting or engaging in “protest, education, or counseling” of that person.



Walter Hoye and friends

Rev. Hoye’s motion for summary judgment, raising both facial and as-applied challenges, pointed to several factors illustrating the content- and viewpoint-based nature of the Ordinance. First, unlike the Colorado statute at issue in *Hill*, which applied to all medical facilities, the Ordinance applies only to speech outside abortion clinics. Under the Ordinance, only those facilities that provide or counsel on abortion are covered.

Second, under the City’s enforcement policy, as revealed in the deposition of a captain in the Oakland Police Department, pro-abortion activist-escorts are immune from the Ordinance whenever they are “facilitating” access to the clinic. In the course of “facilitating access,” they can tell women not to listen to Mr. Hoye, not to take his literature because it is misleading and only intended to harm them, and that the women have a right to have an abortion.

The motion also argued that, combined with the physical interference of the escorts – whose activities are explicitly sanctioned by the City – the Ordinance completely precludes Rev. Hoye from communicating his message to his target audience. The Ordinance prohibits him from approaching without consent, yet the pro-abortion activists’ noise and blocking preclude him from either getting consent to approach or being able to communicate from eight or more feet away. Thus, as applied to the conditions present at the clinic, the Ordinance operates to preclude effective communication.

Arguing for the constitutionality of the Ordinance, the City claimed that the Ordinance was necessitated by decades of “harassment” and violence by pro-life advocates. In a transparent attempt to prejudice the court, the City recounted tales of shootings, threats, and vandalism, and warned the court darkly of its responsibility should the court enjoin the Ordinance and someone was then “hurt or even killed” at the clinic.

As to the activity of the pro-abortion “escorts,” the City claimed that these activists were not violating the Ordinance because they were not “advocating” a position on abortion. According the City’s definition, Rev. Hoye saying, “Can I talk to you about alternatives to the clinic?” is a violation because that is advocacy, but pro-abortion escorts saying, “Don’t listen to him; you have a right to an abortion,” is not advocacy.

At the June 26 hearing on the motion, Judge Breyer was initially very dismissive of Rev. Hoye’s facial challenge to the Ordinance and wanted to immediately move to the as-applied challenge. However, attorneys Michael Millen and Katie Short of Life Legal Defense Foundation argued that the facial challenge was more important than ever in light of the City’s admissions, both in discovery and in its own briefs, that it interpreted the Ordinance to exclude statements – any statements – by the pro-abortion “escorts.” The City’s own viewpoint-based interpretation spelled the demise of the Ordinance on its face under applicable Supreme Court and Ninth Circuit precedent. Judge Breyer conceded that he had not considered the matter in that light, and would have to reconsider the issue.

Judge Breyer then asked what evidence there was that the “escorts” were actually engaging in “advocacy.” Katie Short pointed to testimony from the escort coordinator Barbara Hoke in which she clearly stated that she instructs escorts to tell women that the literature is "inaccurate," "invasive of their privacy," etc. Apparently troubled (and somewhat surprised) by this, Judge Breyer asked the attorney for the City to explain the City's position. The attorney attempted to justify allowing the escorts greater leeway in what they said in order to make women feel "safe" entering the clinic, but the judge did not appear to agree with the City's reasoning.

The discussion then shifted to the impact of the speech restrictions on Rev. Hoyer. The judge initially indicated that he couldn't see how a mere 8-foot separation would prevent communication. But Millen emphasized -- indeed, demonstrated -- the actions of the pro-abortion escorts in deliberately thwarting Rev. Hoyer's attempts to communicate with patients. These actions were fully documented not just in sworn testimony from the escorts themselves but in the videotapes that Rev. Hoyer's attorneys submitted as evidence. (Unfortunately, the judge indicated he had not yet watched these videos.) Again, the court asked for a response from the City. The City claimed that, in spite of the interference, Rev. Hoyer was still able to make contact with some women entering the clinic, and that was all the First Amendment required.

The court took the matter under submission, and a written ruling is expected within the next few weeks.

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