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City Chastised for Taking Sides in Abortion Debate

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(CN) - Oakland discriminated against anti-abortion protesters by selectively enforcing a law that prohibits contact with patients outside of reproductive clinics, the 9th Circuit ruled Thursday.

Though the city lets independent "escorts" help women enter clinics unmolested, it fined a man under the so-called "bubble ordinance" for trying to counsel the same women against having an abortion, the federal appeals court found. The ordinance creates a metaphorical 100-foot bubble around persons entering abortion clinics, making it a crime for others to approach them within 8 feet for the purposes of protest or even conversation.

Walter Hoye, a minister and self-described "sidewalk counselor," opposes abortion and seeks to convince women to eschew the procedure. After being convicted of two separate violations of the ordinance, he filed a federal complaint alleging violations of his free-speech and due-process rights.

While courts subsequently reversed Hoye's two convictions on procedural grounds, U.S. District Judge Charles Breyer dismissed the minister's civil rights complaint, finding that the Oakland's ordinance is content-neutral and therefore constitutional.

A three-judge appellate panel sitting in San Francisco agreed, but only partly.


While the ordinance, modeled after a Colorado law upheld by the U.S. Supreme Court more than a decade ago in *Hill v. Colorado*, is constitutional, Oakland failed to enforce it properly, the 9th Circuit found.

The appellate judges cited the testimony of an Oakland police officer who said that the ordinance is generally applied "only to efforts to persuade women approaching reproductive health clinics not to receive abortions or other reproductive health services, and not to communications seeking to encourage entry into the clinic for the purpose of undergoing treatment."

Hoye also alleged that the "escorts" often tell women not to listen to him or take his literature, and they attempt to block his message by putting up barriers and making noise, the ruling states.

"The city's policy of distinguishing between speech that facilitates access to clinics and speech that discourages access is not content-neutral," Judge Marsha Berzon wrote for the unanimous panel. "It is the epitome of a content-based speech restriction."

The panel affirmed the lower court's grant of summary judgment to the city on Hoye's challenge to the ordinance itself, but remanded the case and directed the District Court to "craft a remedy that ensures that Oakland will adopt and henceforth apply a policy that enforces the ordinance as written, that is, in an evenhanded, constitutional manner."

"We hold that Oakland's enforcement policy is a constitutionally invalid, content-based regulation of speech," Berzon wrote. "By adopting that policy, Oakland has taken sides in a public debate in a manner that ... the Constitution does not permit." 

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