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“Epitome of a content-based speech restriction”

Rev. Walter Hoye wins important victory for pro-lifers in federal appeals court

In a case brought by California pro-life champion Rev. Walter Hoye, a three-judge panel of the Ninth U.S. Circuit Court of Appeals has unanimously ruled that the city of Oakland violated Hoye’s First Amendment rights in the way it enforces a so-called “bubble law” outside abortion clinics.



Judge Berzon

“We agree with Hoye that there are grave constitutional problems with the manner in which the City has understood and enforced its Ordinance,” wrote Judge Marsha Berzon in a 48-page opinion issued July 28. She was joined by judges Stephen Reinhardt and Louis Pollack.

While the appellate court stopped short of declaring the Oakland ordinance unconstitutional on its face, it sent the case back to U.S. district court with orders that the situation be remedied.

What the appellate justices found objectionable was the uneven way in which the law was being applied by Oakland – silencing pro-lifers, while giving free rein to abortion supporters like clinic “escorts.”

“The City’s policy of distinguishing between speech that facilitates access to clinics and speech that discourages access is not content-neutral,” said the court. “It is the epitome of a content-based speech restriction.”

The way Oakland enforces the “bubble law,” said the appellate court, “is a constitutionally invalid, content-based regulation of speech. By adopting that policy, Oakland has taken sides in a public debate in a manner that... the Constitution does not permit.”

The lower court must now “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,” said the appellate court.

“Throughout our nation’s history, Americans have counted on the First Amendment to protect their right to ask their fellow citizens to change their mind,” said the Ninth Circuit decision. “Abolitionists, suffragists, socialists, pacifists, union members, war protestors, religious believers, civil rights campaigners, anti-tax activists, and countless others have appealed to the principle, enshrined within the First Amendment, that in a democracy such as ours, public debate must be robust and free and that, for it to be so, the Constitution’s protection of the freedom of speech must extend to the sidewalk encounter of the proselytizer and his prospective convert.”

“While Pastor Hoye has scrupulously followed the law, he has suffered arrest, prosecution and imprisonment due to the City’s determination to shut out his message,” said Life Legal Defense Foundation, which represented Hoye, in a statement following the court’s ruling. “On the other hand, clinic escorts routinely break the law as written, yet have never faced prosecution.”

“Pastor Hoye stands on the public sidewalk outside Oakland abortion clinics to offer hope to women,” said the LLDF statement. “His sign reads, ‘Jesus loves you and your baby. Let us help.’ One of the problems Hoye has faced in reaching women stems from the activities of clinic ‘escorts.’ These clinic volunteers will surround Hoye, block his sign with blank posters, and drown out his voice, making it impossible for Hoye to reach his intended audience.”

If Oakland does not enforce the law even-handedly, applying it to clinic ‘escorts’ and other abortion supporters in the same way it does to pro-lifers, the appellate court left open the possibility it could strike down the law in its entirety. “If, on further hearing, Pastor Hoye can show that the ordinance leaves him without ample alternatives for

reaching his audience, this would be grounds for striking down the law, the Court said,” according to the LLDF statement.

“In evaluating a constitutional challenge to a bubble law like this, courts will not turn a blind eye to the challenges facing pro-lifers in communicating their message, including when those challenges come from the bad behavior of clinic escorts,” said LLDF legal director Katie Short in a prepared statement.

The Ninth Circuit’s decision, said Short, leaves open the possibility that a 2000 U.S. Supreme Court ruling (*Hill v. Colorado*) which upheld so-called ‘bubble ordinances,’ might be narrowed because of the peculiar situation presented in the Oakland case.

The appellate court’s ruling is not Hoye’s first legal victory. In 2010, the Appellate Division of the Alameda Superior Court overturned his criminal convictions on two counts of violating Oakland’s ‘bubble law’ and ordered a new trial. The district attorney later decided not to pursue the case and all charges were dropped.

Even though later vindicated, Hoye was still jailed following his arrest outside Family Planning Specialists Medical Group in Oakland on May 13, 2008. On March 20, 2009, Alameda Superior Court Judge Stuart Hing sentenced Hoye to 30 days in jail and fined him \$1,130 for violating the ‘bubble law.’ Hoye served 18 days of the sentence before being released for “good behavior” and given credit for time served while in police custody.

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