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Priests for Life
PO Box 236695
Cocoa, Florida 32923

Re: Pro-life Advocacy and Sidewalk Counseling

Dear Pro-life Leaders and Advocates:

It is clearly established that holding pro-life signs (including signs displaying the graphic and violent nature of abortion), distributing pro-life literature, and engaging in civil discussions about pro-life issues in public fora are fully protected by the First Amendment. *Hill v. Colo.*, 530 U.S. 703, 714-15 & 710 n.7 (2000) (recognizing that petitioners' "leafletting, ['bloody fetus'] sign displays, and oral communications are protected by the First Amendment"); *Schenck v. Pro-Choice Network of W. N.Y.*, 519 U.S. 357, 377 (1997) ("Leafletting and commenting on matters of public concern are classic forms of speech that lie at the heart of the First Amendment").

The U.S. Supreme Court has long held that "speech on public issues," such as pro-life speech, "occupies the 'highest rung of the hierarchy of First Amendment values,' and is entitled to special protection." *Connick v. Myers*, 461 U.S. 138, 145 (1983) (citations omitted).

The right to freedom of speech is particularly protected when the speaker is in a public forum. Public streets and sidewalks are traditional public fora. *Frisby v. Schultz*, 487 U.S. 474, 480-81 (1988) ("[A]ll public streets are held in the public trust and are properly considered traditional public fora.") (internal citation omitted); *see also Saieg v. City of Dearborn*, 641 F.3d 727, 734 (6th Cir. 2011) ("Public streets and sidewalks are quintessential public forums for free speech.") (internal quotations and citations omitted).

“In general, then, the government’s ability to permissibly restrict expressive conduct on public streets and sidewalks *is very limited.*” *Id.* (internal quotations and citation omitted) (emphasis added); *Am.-Arab Anti-Discrimination Comm. v. City of Dearborn*, 418 F.3d 600, 605 (6th Cir. 2005) (striking down a city ordinance and stating, “[c]onstitutional concerns are heightened further where, as here, the [challenged ordinance] restricts the public’s use of streets and sidewalks for political speech”).

Questions often arise about “bubble/buffer zone” restrictions. Such restrictions must be reviewed on a case-by-case basis as there is no general or federal “bubble/buffer zone” restriction applicable to every abortion facility in the country. Individual states or municipalities *may* have such ordinances or statutes. But even these ordinances/statutes are susceptible to challenge under the First Amendment, as explained further below.

Additionally, the Freedom of Access to Clinic Entrances Act (“FACE”) does not preclude protected speech nor does it create a federal “bubble/buffer zone” around abortion facilities. This federal statute proscribes certain “prohibited activities.” Per the statute: whoever “by force or threat of force or by physical obstruction, intentionally injures, intimidates or interferes with or attempts to injure, intimidate or interfere with any person because that person is or has been, or in order to intimidate such person or any other person or any class of persons from, obtaining or providing reproductive health services” or “intentionally damages or destroys the property of a facility, or attempts to do so, because such facility provides reproductive health services” is subject to penalty. 18 U.S.C. § 248. Thus, FACE does not prohibit constitutionally protected activity, such as public sidewalk counseling or holding pro-life signs, so long as the person doing so is not physically obstructing or engaging in any other proscribed conduct. In short, FACE does not prohibit peaceful free speech activity on public sidewalks outside of abortion facilities.

In 2014, the U.S. Supreme Court decided *McCullen v. Coakley*, 573 U.S. 464 (2014). At issue in this case was a Massachusetts statute that made it a crime to knowingly stand on a “public way or sidewalk” within 35 feet of an entrance or driveway to any place, other than a hospital, where abortions are performed. The pro-life challengers were individuals who approached and talked to women outside such facilities, attempting to dissuade them from having abortions. The statute prevented the pro-lifers from doing so on the public sidewalks near the facilities’ entrances. The question presented was whether the statute violated the First Amendment. The Court unanimously (9-0) held that it did.

The Court noted that the buffer zones served the State’s legitimate interests in maintaining public safety on streets and sidewalks and in preserving access to adjacent reproductive healthcare facilities. At the same time, however, the Court noted that the buffer zones imposed serious burdens on the pro-lifers’ speech, depriving them of their two primary methods of communicating with arriving patients: close, personal conversations and distribution of literature. Those forms of expression have historically been closely associated with the transmission of ideas. While the statute may have allowed pro-lifers to “protest” outside the buffer zones, the challengers were not “protestors”; they did not seek to merely express their opposition to abortion, but to engage in personal, caring, consensual conversations with women about various alternatives to abortion. Consequently, per the Court, it was no answer to say that the pro-lifers could still be seen and heard by women within the buffer zones. If all that the women could see and hear were vociferous opponents of abortion, then the buffer zones have effectively stifled the pro-lifers’ message. Accordingly, the Court held that the buffer zones burdened substantially more speech than necessary to achieve the State’s asserted interests in violation of the First Amendment.

I strongly encourage pro-lifers to engage in their sidewalk counseling and other free speech activity in groups. If you can avoid it, do not go out alone. Also, it is important to have at least one member of the group assigned to video record any interactions with abortion center workers or volunteers or police officers. Having a record of any such contact is necessary to challenge false accusations. If the police instruct you to depart, I would encourage you to confirm with the officer (and record this) that unless you depart, you will be arrested. If confirmed, then depart without getting arrested. This will give you the opportunity to go on the offensive and pursue a legal challenge in federal court. If you get arrested, you will have to raise any constitutional defenses in the context of a criminal case in a local state court that is less equipped to address constitutional issues. And it is more likely that local judges personally know the police officers and are more inclined to believe them than you.

In closing, effective sidewalk counseling and pro-life advocacy are more important than ever. While *Roe v. Wade* was reversed, many states have now passed laws (or are considering such laws) that provide broader protection for abortion than *Roe*. To ultimately succeed in this fight for life, we must change hearts and minds. And if we do, women will choose life even where abortion remains legal. As set forth above, your right to sidewalk counsel and publicly oppose abortion is fully protected by the First Amendment. We need to exercise these rights if we are to defeat abortion. And if the police attempt to stop you, contact the American Freedom Law Center at info@americanfreedomlawcenter.org.

Sincerely,

AMERICAN FREEDOM LAW CENTER

A handwritten signature in black ink, appearing to be 'R. Muise', with a stylized flourish extending to the right.

Robert J. Muise, Esq.

Co-Founder & Senior Counsel