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MEMORANDUM

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Demonstrating & Abortion Protests

Those who oppose abortion and persuade others that abortion is wrong often have their free speech rights violated in ways that would be unthinkable if their speech involved other subjects. The ACLJ is fighting against "abortion distortion"—the disturbing tendency among liberal groups and many federal judges to undermine the free speech rights of abortion protestors.

The following addresses the right to demonstrate in the specific context of the abortion industry. However, other citizen-activist groups can apply the principles discussed (for example, as they consider expressing their opposition to the sales and distribution of pornographic materials).

May citizens express their opposition to abortion and offer alternatives to it by going personally to the public areas around where the abortion clinic is located?

Yes, people may legally express their views about abortion while in the vicinity of abortion businesses. There are, however, some important points to bear in mind when engaged in such activities.

Remember that there is a legal difference between the streets, sidewalks and parks of a community, and the private property owned by another citizen. A key difference is that streets, sidewalks and parks, including those located near abortion clinics, have historically been a place where citizens gather to discuss and debate issues of public importance. The Supreme Court has

said that streets, sidewalks and parks "have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." *Hague v. Comm. for Indus. Org.*, 307 U.S. 496, 515 (1939). So, to stay within the bounds of the law, your activities must occur on or in the publicly owned streets, sidewalks and parks.

Remember that your city council or county commission can regulate, in certain narrow and specific ways, the time, place, and manner of such activities. For example, a city may enforce a rule against obstructing passage on a public sidewalk or against excessive noise. The Supreme Court has said that the right to engage in expressive activities in public places is not an absolute right and that it "must be exercised in . . . peace and good order." *Id.* at 516. Because rights to freedom of speech, press, and assembly are supremely precious, even such laws as those barring obstructions or excessive noise are closely reviewed by courts to ensure that "in the guise of regulation" the government does not seek to "abridge or deny" such rights. *Id.*

Does a group need to obtain a permit to march around the city block where an abortion clinic is located?

Perhaps. As noted above, cities can impose reasonable regulations of time, place and manner on speech activities. The Supreme Court has held that the requirement of a permit for a parade or march can be just such a reasonable regulation of speech. At the same time, the Supreme Court has held that governments which impose a requirement of prior permission have imposed a "prior restraint" on speech. Cities that impose such "prior restraints" bear a heavy burden to justify their use. For example, in one recent case, the Supreme Court struck down a parade permit rule because the rule allowed the city to impose greater costs on marches by persons expressing unpopular views. *Forsythe Cnty. v. Nationalist Movement*, 505 U.S. 123, 133–34 (1992).

You should check with the police department or the city manager's office for information on, and a copy of, any ordinance affecting the right to conduct a demonstration or march. If the requirements set out in such ordinances seem burdensome or inappropriate, seek out legal counsel on whether the ordinance is constitutional.

Do pro-life demonstrators have the right to distribute pro-life literature while we are on public streets and sidewalks?

Yes, pro-life demonstrators have the right, in almost every circumstance conceivable, to distribute written materials which express their views on any issue, including abortion. Some misguided bureaucrats may presume that, by calling the distribution of pamphlets "solicitation," they will be able to undermine your right to leaflet. But the Supreme Court has treated leafleting as an activity distinct from solicitation. Leafleting is a well-established model of protected expression. It is a constitutional axiom that distributing written materials in public is a protected exercise of the rights of freedom of speech and press. *See Lovell v. City of Griffin*, 303 U.S. 444, 451 (1938). The Supreme Court has said that, unlike other activities such as oral solicitations for money or business, the distribution of literature is an unobtrusive form of communication. *United States v. Kokinda*, 497 U.S. 720, 733–34 (1990).

If you have experienced evangelistic or political literature distribution, then you know, as do thousands of "residents of metropolitan areas[, that] . . . confrontation by a person asking for money disrupts passage and is more intrusive and intimidating than an encounter with a person giving out information." *Id.* at 734. Leafleting is unobtrusive because the recipient "need not ponder the contents of a leaflet or pamphlet in order mechanically to take it out of someone's hand . . . ." *Id.*

Nor may a city justifiably treat leafleting as a crime. Long ago, the Supreme Court declared unconstitutional a city ordinance which prohibited leafleting in order to prevent the problems associated with litter. *Schneider v. State*, 308 U.S. 147 (1939). A city's desire to keep the streets clean and the sewers unclogged, the Supreme Court has said, "is insufficient to justify an ordinance which prohibits a person rightfully on a public street from handing literature to one willing to receive it." *Id.* at 162. Rather than silencing those who are exercising the constitutional rights to freedom of speech and of the press, a city must address its fears about litter by punishing those who litter, not those who leaflet.

Finally, it is important to note that while the Supreme Court struck down speech free "floating buffer zones," it upheld the constitutionality of so-called "fixed buffer zones" that prevent pro-life demonstrators from coming within a certain number of feet of an abortion clinic. *Schenck v. Pro-Choice Network*, 519 U.S. 357 (1997); *see also Hill v. Colorado*, 530 U.S. 703 (2000); *McCullen v. Coakley*, 134 S. Ct. 2518, 2522–24 (2014) (striking down a fixed buffer zone because it burdened more speech than necessary to achieve significant government

interests). However, these public safety restrictions must allow pro-life demonstrators to communicate their message within earshot of those entering the facility. Moreover, in upholding this type of restriction on free speech, the Supreme Court made clear that the restrictions must be limited in scope, stating:

> Although the statute prohibits speakers from approaching unwilling listeners, it does not require a standing speaker to move away from anyone passing by. Nor does it place any restriction on the content of any message that anyone may wish to communicate to anyone else, either inside or outside the regulated areas.

Hill, 530 U.S. at 707–08.

Accordingly, pro-life "sidewalk counselors" are constitutionally permitted to approach abortion clinic patients on public property to convey their pro-life message, as long as they do so within the bounds of any such limited public safety restrictions.