No. 09-16753

IN THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

WALTER B. HOYE, II,

Plaintiff-Appellant,

v.

CITY OF OAKLAND,

Defendant-Appellee.

On Appeal from the United States District Court
for the Northern District of California

AMICUS BRIEF OF THE AMERICAN CENTER FOR LAW AND JUSTICE IN SUPPORT OF APPELLANT AND URGING REVERSAL

JAY ALAN SEKULOW
STUART J. ROTH
WALTER M. WEBER
Lead Counsel
AMERICAN CENTER FOR LAW & JUSTICE
201 Maryland Ave., N.E.
Washington, DC 20002
(202) 546-8890

Attorneys for Amicus

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Pursuant to Rule 26.1, Fed. R. App. P., amicus the American Center for Law and Justice states that it has no parent corporation, and no publicly held corporation holds 10% or more of its stock.

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INTEREST OF AMICUS

The American Center for Law and Justice (ACLJ) is an organization dedicated to the defense of constitutional liberties secured by law. The ACLJ has long defended the free speech rights of pro-life individuals. For example, ACLJ attorneys appeared as counsel for parties in *Schenck v. Pro-Choice Network of Western New York*, 519 U.S. 357 (1999), and *Hill v. Colorado*, 530 U.S. 703 (2000).

At issue in this case is an extreme and unconstitutional restriction on such basic, fundamental free speech activities as leafletting, speaking, and carrying signs. The ACLJ files this brief to identify one particularly glaring constitutional flaw in the Oakland ordinance (either as written or as enforced), namely, its ban on leafletting on public sidewalks.

This brief is being filed with the consent of the parties.

ARGUMENT

The Oakland ordinance, as interpreted and enforced by the city, forbids an individual from standing on a public sidewalk and offering leaflets to passersby. Such a prohibition is flatly unconstitutional under numerous Supreme Court precedents and -- significantly -- finds no

shelter under *Hill v. Colorado*, 520 U.S. 703 (2000). Thus, the ordinance is either unconstitutional on its face -- if the city has interpreted its own ordinance correctly -- or at least unconstitutional as applied by the city.

I. BANS ON LEAFLETTING ARE UNCONSTITUTIONAL.

The Supreme Court has long held that bans on leafletting violate the First Amendment. *Lovell v. City of Griffin*, 303 U.S. 444 (1938) (prohibition on distribution of literature without city permission is facially unconstitutional); *Schneider v. State*, 308 U.S. 147 (1939) (Los Angeles ban on leafletting pedestrians on streets or sidewalks or occupants of vehicles, Milwaukee ban on leafletting on streets or sidewalks, and Worcester ban on leafletting on "any street or way," are each facially unconstitutional; Town of Irvington ban on door-to-door leafletting without police permit is unconstitutional as applied to such leafletting); *Jamison v. Texas*, 318 U.S. 413 (1943) (ordinance construed to ban leafletting on public sidewalks is unconstitutional "as construed and applied"); *Organization for a Better Austin v. Keefe,* 402 U.S. 415 (1971) (injunction prohibiting leafletting is unconstitutional); *United States v. Grace,* 461 U.S. 171 (1983) (ban on leafletting on grounds of Supreme

Court is unconstitutional as applied to public sidewalks surrounding that building); *McIntyre v. Ohio Elections Comm'n,* 514 U.S. 334 (1995) (ban on anonymous leafletting on electoral matters is unconstitutional).

Notably, this rule holds even when the ban is not geographically absolute. It is unconstitutional to ban leafletting just on the sidewalks of one particular building, as *Grace* illustrates. Indeed, this proposition is well-established:

> It is suggested that the . . . ordinances are valid because their operation . . . leaves persons free to distribute printed matter in other public places. But, as we have said, the streets are natural and proper places for the dissemination of information and opinion; and one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place.

Schneider, 308 U.S. at 163.

Nor need the ban be unconditional; requiring prior permission to offer the material is likewise invalid. *Lovell*; *Schneider*. (Of course, the leafletter cannot force anyone to *accept* the flyer.)

Nor can the controversial nature of the topic of the handbills justify such a restriction. "Indeed, . . . handing out leaflets in the advocacy of a politically controversial viewpoint . . . is the essence of First Amendment

expression." *McIntyre*, 514 U.S. at 347.

The decision in *Hill v. Colorado*, 530 U.S. 703 (2000), did not purport to overrule any of these precedents. And in fact, the *Hill* Court expressly observed that the statute at issue in *Hill* would allow individuals "with leaflets [to] easily stand on the sidewalk at entrances . . . and . . . peacefully hand [out] leaflets [to pedestrians] as they pass by." *Id.* at 729-30.

In short,

> one who is rightfully on a street which the state has left open to the public carries with him there as elsewhere the constitutional right to express his views in an orderly fashion. This right extends to the communication of ideas by handbills and literature as well as by the spoken word.

Jamison, 318 U.S. at 416.

II. THE OAKLAND ORDINANCE UNCONSTITUTIONALLY BANS LEAFLETTING ON PUBLIC SIDEWALKS.

The Oakland ordinance, either on its face or as applied, bans leafletting on public sidewalks. Hence, under controlling Supreme Court precedent, it is unconstitutional.

The ordinance in section 3(b) makes it unlawful, within 100 feet of "the entrance of a reproductive health care facility," to "approach within

eight (8) feet of any person . . . or any occupied motor vehicle . . ., without the consent of such person or vehicle occupant . . . for the purpose of counseling [or] harassing . . ." ER 62; *see also* ER 5-6. The ordinance defines "counseling" to include "distributing literature," ER 6, 61, and defines "harassing" to include approaching for purposes of leafletting, ER 61. The eight-foot stay-away distance is measured, under the ordinance, from "any extension of the body" of both leafletter and intended recipient. ER 6, 61. Hence, according to the city, absent prior permission one cannot reach one's arm out to offer a leaflet close enough for a passerby actually to be in a position to "mechanically take it out of someone's hand," *United States v. Kokinda*, 497 U.S. 720, 734 (1990) (plurality) (describing unintrusiveness of leafletting process). *See* Opening Brief of Plaintiff-Appellant Walter B. Hoye II at 14, 47 (city's enforcement policy considers extending one's arm as an "approach").

The ordinance therefore effectively bans all leafletting on public sidewalks and streets within the 100 foot zone. This ban cannot be squared with the Supreme Court precedents cited earlier.

To be sure, the necessary "permission" to offer a leaflet must be

obtained, not from the government, but from private pedestrians (and, according to the city, accompanying "escorts"). But this makes the permission requirement worse, not better. The government must at least follow non-arbitrary, non-discretionary standards when licensing speech. *Thomas v. Chicago Park Dist.*, 534 U.S. 316, 323 (2002). Private individuals face no such constraints, and thus can be wholly arbitrary, even viewpoint-based, in withholding consent. While this is perfectly acceptable when a private individual is controlling the flow of information into the home, *Rowan v. United States Post Office Dep't*, 397 U.S. 728 (1970), or deciding whether to *accept* a handbill from a leafletter, giving private parties veto power over the mere *offer* of information on a public way is an entirely different matter. Indeed, to subject the right to speak, picket, or leaflet in a public place to veto by unconstrained private parties, under penalty of criminal enforcement, is the quintessence of an unconstitutional heckler's veto.

CONCLUSION

The Oakland ordinance, either facially or as applied, unconstitutionally bans leafletting on public sidewalks. This Court should reverse the judgment of the district court.

Respectfully submitted,

/S/ WALTER M. WEBER
JAY ALAN SEKULOW
STUART J. ROTH
WALTER M. WEBER
Lead Counsel
AMERICAN CENTER FOR LAW & JUSTICE
201 Maryland Ave., N.E.
Washington, DC 20002
(202) 546-8890

November 23, 2009

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/s/ Walter M. Weber
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