

October 9, 2007

Mr. Cecil Thomas, Chair
Law & Public Safety Committee
801 Plum Street, Room 348
Cincinnati, Ohio 45202

Re: First Amendment Right to Oppose Abortion with Signs

Dear Mr. Thomas:

By way of introduction, the Thomas More Law Center (www.thomasmore.org) is a national, not-for-profit, public interest law firm based in Ann Arbor, Michigan. As part of the Thomas More Law Center's mission, we promote and defend the sanctity of all human life. To that end, we defend the First Amendment rights of those who speak out against abortion. We do not charge our clients for our services.

It has come to our attention that the Law & Public Safety Committee, at the request of Planned Parenthood and others, might be considering a new sign ordinance that would restrict Mr. Raymond Loebker's fundamental right to express his opposition to abortion on the public sidewalk outside of an abortion facility. We suggest that you carefully consider any regulations that would violate a citizen's civil rights and expose the City of Cincinnati to a costly legal battle. Mr. Loebker has a right to express his political message in opposition to abortion free from government interference.

The First Amendment clearly protects a private citizen's right to display signs, including signs depicting graphic images of abortion, on the public streets and sidewalks of Cincinnati. *See, e.g., Hill v. Colorado*, 530 U.S. 703, 714-15 (2000) (recognizing that petitioners' "leafletting, sign displays, and oral communications are protected by the First Amendment").

The United States Supreme Court "has recognized that expression on public issues 'has always rested on the highest rung of the hierarchy of First Amendment values.' '[S]peech concerning public affairs is more than self-expression; it is the essence of self-government.'" *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 913 (1982) (citations omitted) (emphasis added).

Furthermore, the Supreme Court has long recognized that all public streets and sidewalks are properly considered traditional public fora, including those streets and sidewalks adjacent to an abortion facility. *Frisby v. Schultz*, 487 U.S. 474, 481 (1988) (noting that "all public streets are held in the public trust and are properly considered traditional public fora"). Public streets and sidewalks "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. CIO*, 307 U.S. 496, 515 (1939). The Supreme Court has emphasized that "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 v. New Jersey*, 308 U.S. 147, 163 (1939).

Moreover, “[i]t is axiomatic that the government may not regulate speech based on its substantive content or the message it conveys.” *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 828 (1995). Indeed, the government may not “impose special prohibitions on those speakers who express views on disfavored subjects” or on the basis of “hostility—or favoritism—towards the underlying message expressed.” *R.A.V. v. St. Paul*, 505 U.S. 377, 386-92 (1992); see *Police Dept. of the City of Chicago v. Mosley*, 408 U.S. 92, 96 (1972) (holding that the government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express more controversial views).

In *Terminiello v. City of Chicago*, 337 U.S. 1 (1949), for example, the Court did not allow convictions to stand because the trial judge charged that the defendants’ speech could be punished as a breach of the peace “if it stirs the public to anger, invites dispute, brings about a condition of unrest, or creates a disturbance, or if it molests the inhabitants in the enjoyment of peace and quiet by arousing alarm.” *Id.* at 3. In finding such a position unconstitutional, the Supreme Court stated,

[A] function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea. That is why freedom of speech . . . is . . . protected against censorship or punishment. . . . There is no room under our Constitution for a more restrictive view.

Id. at 4.

Therefore, the fact that Mr. Loebker’s speech may actually offend some persons or create a visceral reaction in others does not lessen its constitutionally protected status; it enhances it. “The fact that society may find speech offensive is not a sufficient reason for suppressing it. Indeed, if it is the speaker’s opinion that gives offense, that consequence is a reason for according it constitutional protection.” *Simon & Schuster, Inc. v. Members of New York State Crime Victims Bd.*, 502 U.S. 105, 118 (1991) (editing marks and citations omitted); *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 135 (1992) (noting that speech cannot be “punished or banned, simply because it might offend a hostile mob”); *Hill*, 530 U.S. at 715 & 710, n.7 (“The fact that the messages conveyed by [the signs, which included “bloody fetus signs,”] may be offensive to their recipient does not deprive them of constitutional protection.”).

Indeed, “the Constitution does not permit government to decide which types of otherwise protected speech are sufficiently offensive to require protection for the unwilling listener or viewer.” *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 210 (1975). Rather than censoring the speaker, the burden rests with the viewer to “avoid further bombardment of [his] sensibilities simply by averting [his] eyes.” *Cohen v. California*, 403 U.S. 15, 21 (1971). As the *Cohen* Court noted, “[W]e cannot indulge the facile assumption that one can forbid particular words [or

pictures, as in this case] without also running a substantial risk of suppressing ideas in the process. Indeed, government might soon seize upon the censorship of particular words [or pictures] as a convenient guise for banning the expression of unpopular views.” *Id.* at 26.

Consequently, any restriction, such as a city sign ordinance, that would have a chilling effect on the exercise of First Amendment rights is subject to challenge in federal court. As the Supreme Court has long held, “The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.” *Elrod v. Burns*, 427 U.S. 347, 373 (1976); *see also Newsom v. Norris*, 888 F.2d 371, 378 (6th Cir. 1989) (stating “that even minimal infringement upon First Amendment values constitutes irreparable injury sufficient to justify injunctive relief”) (citing *Elrod*); *see generally NAACP v. Button*, 371 U.S. 415, 433 (1963) (noting that First Amendment “freedoms are delicate and vulnerable, as well as supremely precious in our society”).

Please know that the Thomas More Law Center will be closely monitoring this situation and will not stand idly by if the City of Cincinnati decides to enact a sign ordinance at the behest of Planned Parenthood that violates the fundamental rights of pro-life demonstrators such as Mr. Loebker.

Sincerely,

THOMAS MORE LAW CENTER



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