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Re: Free Speech Rights of Life Chain Participants

To Whom It May Concern:

The purpose of this letter is to provide guidance to participants of Life Chain as they exercise their First Amendment right to freedom of expression in public. This letter is meant to address general principles of free speech jurisprudence as every situation may have factual nuances not previously addressed by the courts of applicable jurisdiction.

The exercise of free expression enjoys the most protection when it takes place on public sidewalks, streets and parks, as the United States Supreme Court has repeatedly held these areas to be "traditional public forums."[1] Regarding sidewalks, they are usually considered "public" if they are adjacent to a public street and/or act as the perimeter of a public building. Participants of Life Chain should have every right to stand on any public sidewalk that runs along a public street and hold a sign that expresses their beliefs regarding abortion, subject to very few exceptions.[2] Participants have every right to peacefully pray while they are holding their signs. Participants' free speech may not be regulated based on the content of their speech, including abortion, while on a public sidewalk, street, or park, with few exceptions.[3] Participants have every right to have their views expressed even though others disagree with their opinion on abortion and claim they are being disruptive.[4] However, participants should take extra care to not obstruct the use of the sidewalks by others (i.e. allow people to board city bus without obstruction) and should not aggressively force the sign into the view of others.

Regarding free speech activity in front of abortion clinics, the Supreme Court has made some fine line distinctions. Protestors are allowed the most freedom when they stand still with their sign, without approaching those entering the clinic.[5] This type of "standing still," silent expression by way of small signs appears to be the most common approach by those involved in the Life Chain activities and should be permissible on a public sidewalk that runs in front of an abortion clinic.

The Supreme Court has also addressed the proper use of signs as a form of expression. Content restrictions regarding signs are generally unconstitutional as well.[6] The size of the signs typically used by LifeChain participants and standing of each participant some ten feet away from each other is generally permissible. Additionally, the Life Chain participants could stand closer to each other if desired. Based on the Life Chain Code of Conduct, the size of such signs and the number of signs used by participants should be permissible.[7] Please note, though, that a federal appeals court recently ruled against pro-life protestors because of safety issues related to their acts of holding up a sign above a freeway overpass, targeting the cars passing below.[8] However, the court did state that "as for ample alternative avenues for communication, **the policy affects only highway overpasses:**…there are 'hundreds of miles of sidewalks and thousands of acres of parks and other public fora to present…views and ideas to the public.'"[9]

Please be aware, the First Amendment right to freedom of expression is only applicable to regulations or action taken by the government, and it is not generally extended to create free speech rights on the private property of others, such as a person's driveway of their residence. It is also imperative that a person exercising any such expression does so in a peaceful, nonconfrontational and unobstructive manner, no matter where such expression takes place.

Please feel free to contact our office or my cell phone if you have any questions or concerns, particularly on any day in which a National Life Chain is taking place.

Sincerely,

Jonathan M. Saenz
Staff Attorney
Liberty Legal Institute

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[1] ***Hague v. Committee For Indus. Org***., 307 U.S. 496 (1939)("Wherever the title of streets and parks may rest, they 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. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens.") See also ***Frisby v. Schultz***, 487 U.S. 474, 481 (1988); ***International Soc'y for Krishna Consciousness v. Lee,*** 505 U.S. 672, 679 (confirming public street is a public forum); ***Schenck v. Pro-Choice Network,*** 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, and speech in public areas is at its most protected on public sidewalks, a prototypical example of a traditional public forum"); and ***United States v. Grace***, 461 U.S. 171, 177 (1983).

[2] The right to free expression is not absolute and can be regulated based on when the expression occurs, where it occurs, and in what form the expression takes place. See ***Grace***, 461 U.S. at 177 ("[A]ny permit scheme controlling the time, place, and manner of speech must not be based on the content of the message, must be narrowly tailored to serve a significant governmental interest, and must leave open ample alternatives for communication"). In the unusual circumstance that you are seeking to hold a sign NOT on a public sidewalk, street, or park, free speech rights can change. ***Chiu v. Plano Indep. Sch. Dist.***, 260 F.3d 330, 346-7 (5th cir 2001), citing ***Ark. Educ. Television Comm'n v. Forbes***, 523 U.S. 666, 677 (1998)("Designated public fora, . . . are created by purposeful governmental action."). For example, if the government opens up parts of a secondary school or university campus to the public for speech, it is not required to allow persons to engage in every type of speech and may be justified 'in reserving [its forum] for certain groups or for the discussion of certain topics.'" ***Good News Club***, 533 U.S. 98, 106(2001)(citations omitted). The government must not discriminate against speech on the basis of the speaker's opinion on a particular subject, ***Rosenberger v. Rector and Visitors of Univ. of Va.***, 515 U.S. 819, 829 (1995), 515 U.S. at 829, and the restriction must in some way be connected to the purpose of the forum, as in to prevent disruption of classes during the school day by loud, aggressive protestors." ***Cornelius***, 473 U.S. at 806.

In a nonpublic forum, the government ***can*** enforce content-based restrictions. ***Forbes***, 523 U.S. 677-78. However, the government does not have "unfettered power to exclude any [person] it wish[es]." ***Id***. at 681. Also, the exclusion of a speaker from a

nonpublic forum must not be based on the speaker's viewpoint and must otherwise be reasonable in light of the purpose of the property. ***Id.***, citing ***Cornelius***, 473 U.S. at 800.

For example, the government may regulate such things as the use of amplification devices, and may protect others from "violent" acts and "fighting words" used by protestors. A sidewalk's main purpose is for use by the public, and the government may enact regulations to ensure such use is protected. ***Id***. at 515-16. "The privilege of a citizen of the United States to use the streets and parks for communication of views on national questions may be regulated in the interest of all; it is not absolute, but relative, and must be exercised in subordination to the general comfort and convenience, and in consonance with peace and good order; but it must not, in the guise of regulation, be abridged or denied. See also ***Ward v. Rock Against Racism***, 491 U.S. 781, 791 (1989); ***Hill v. Colorado***, 530 U.S. 703 (2000).

[3] Government regulations may not be based on the fact that people are expressing their views about abortion. ***Hurley v. Irish-American Gay, Lesbian & Bisexual Group,*** 515 U.S. 557, 579 (1995)("Our tradition of free speech commands that a speaker who takes to the street corner to express his views in this way should be free from interference by the State based on the content of what he says"); ***Reno v. ACLU***, 521 U.S. 844, 885 (1996) ("As a matter of constitutional tradition, in the absence of evidence to the contrary, we presume that governmental regulation of the content of speech is more likely to interfere with the free exchange of ideas than to encourage it. The interest in encouraging freedom of expression in a democratic society outweighs any theoretical but unproven benefit of censorship").

[4] Further, any regulation of speech cannot be restricted because of a "heckler's veto." ***Perry Educ. Assn. v. Perry Local Educators' Assn.,*** 460 U.S. 37, 44-45 (1983).An unconstitutional heckler's veto occurs when the government restricts speech based on the reaction of others to the speaker's message, i.e. because a passer by claims they were offended or they respond to a peaceful message with violence and/or hostility. ***Forsyth County v. Nationalist Movement***, 505 U.S. at 133-36, 141-42 (1992)(unconstitutional for government to restrict expressive activities because of anticipated hostile reaction to such expression by the public and also amounts to an impermissible content based restriction); ***Coates v. City of Cincinnati***, 402 U.S. 611, 616 (1971)(violates free speech to prohibit conduct that "annoying to person passing by").

[5] ***Hill v. Colorado***, 530 U.S. 703 (2000).

[6] ***Hill,*** 530 U.S. at 715-16 (In particular, although a law may restrict how close a protestor is to a health care facility when that person "knowingly approaches a passer by," it may not enforce such a restriction against a silent protestor who is "standing still" as another person approaches); See also ***Police Department of City of Chicago v. Mosley***, 408 U.S. 92, 95 (1972); ***Cannon***, 998 F.2d 867, 873-74 (10th Cir. 1993)(court held it unconstitutional to ban sign that read "The Killing Place" in front of abortion clinic…"although the words "killing" or "murder" are certainly emotionally charged, it is difficult to conceive of a forceful presentation of the anti-abortion viewpoint which would not assert that abortion is the taking of human life").

[7] This should not be an issue for Life Chain participants, but please be aware the government ***may*** be allowed to restrict how large the sign is (three square feet rule permissible by one court) and how many signs are used in one place by one person as long as such restrictions do not in effect equal a total ban. ***City of Ladue v. Gilleo***, 512 U.S. 43, 58-9 (1994)(Supreme Court held unconstitutional to ban on all signs); ***Foti v. City of Menlo Park***, 146 F.3d 629, 634 (9th Cir. 1998)(one court upheld size limit of picket sign to "three square feet").

[8] ***Faustin v. City & County of Denver***, 2005 U.S. App. LEXIS 19834 (10 Cir. September 15, 2005).

[9] ***Id***.