

Agenda Item R 5 H - March 13, 2024 City Commission Agenda

Statement of the South Florida Chapter of the National Lawyers Guild

Pursuant to Agenda Item R 5 H on the March 13, 2024 Commission Agenda, the City Commission is conducting a second reading on the proposed new Section 70-46 of the Miami Beach Code. The South Florida Chapter of the National Lawyers Guild opposes enactment of Section 70-46 on First Amendment grounds.

Section 70-46 by its terms is content-neutral, but nonetheless this ordinance raises considerable First Amendment concerns. First, the proposed ordinance is also referenced in the fifth and sixth WHEREAS clauses of the resolution being considered by the Commission on this date pursuant to Agenda Item R 7 I. The second WHEREAS clause of the R 7 I resolution refers to the City's objective of supporting the State of Israel, and refers to no other nation by name. Against the backdrop of highly visible protests in recent months concerning the Israel-Gaza conflict, we are concerned that the City is sending a message to its law enforcement personnel to treat protests critical of the actions of Israel differently than other protests.

Moreover, Section 70-46 fails the test for content-neutral ordinances under First Amendment jurisprudence. A content-neutral ordinance must be narrowly tailored to serve a significant governmental interest, and leave open ample alternative channels of communication. In 2014, in McCullen v. Coakley, 573 U.S. 464, the Supreme Court held that to show a content-neutral law was narrowly tailored, the government has to show that it seriously undertook to address the problem with less intrusive tools readily available to it and considered different methods that other jurisdictions have found effective.

The City Attorney's March 13, 2024 memo to the Commission for the second reading of the ordinance indicates that "any person" is guilty of violating the ordinance if the person "stands, sits, lies, or places an object in such manner as to block passage by another person or to require another person to take evasive action to avoid physical contact, or who, after being ordered to move by law enforcement officers, remains in or on any public sidewalk, street, alley, beach walk, or beach entrance in such a manner as to block or impair movement of vehicles or pedestrians." Pedestrian traffic safety is among the justifications asserted in the preamble WHEREAS clauses of the ordinance.

While courts have recognized that traffic safety is a significant governmental interest, the provisions of the ordinance are not narrowly tailored to meet this objective. The ordinance language appears to allow law enforcement officers to order persons to move even if they are not obstructing passage for others. In particular, the fact that the ordinance applies if "another person" is required "to take evasive action to avoid physical contact" means that law enforcement can force almost any protesters off a sidewalk, even if they are not occupying the entire sidewalk and there is room for others to pass, since sidewalks are frequently not wide enough to allow two persons simply walking

in opposite directions to pass each other without one taking arguably "evasive action" to avoid physical contact with the other. Indeed, the portion of Section 70-46 defining the offense (subsection (a)) is not limited to protesters, though we are concerned it is most likely to be enforced mainly against protesters and not against pairs of friends walking side by side along a sidewalk. There is no indication that the City considered less intrusive measures to promote safety. The broad nature of these provisions reflects that they are not narrowly tailored and therefore do not pass muster under the First Amendment.

Additionally, the ordinance also fails the ample alternative channels of communication First Amendment requirement. The City Attorney's memo indicates that a person can be guilty of violating the ordinance if "a nearby adequate and available alternative forum is offered and provided, to which the subject or subjects refuse to move." In 1994, in City of Ladue v. Gilleo, 512 U.S. 43, the Supreme Court held that an alternative channel of communication is not adequate if it is not likely to reach the desired audience or will convey a different message from the intended one. Nothing in the proposed ordinance requires law enforcement to consider these factors in determining whether the alternative forum being offered is constitutionally adequate.

For the reasons stated, the City Commission should reject the proposed Section 70-46 as it will violate the First Amendment.