
SENATE COMMITTEE ON PUBLIC SAFETY

Senator Steven Bradford, Chair
2021 - 2022 Regular

Bill No: SB 742 **Hearing Date:** April 20, 2021
Author: Pan
Version: March 4, 2021
Urgency: Yes **Fiscal:** Yes
Consultant: MK

Subject: *Vaccination sites: unlawful physical obstruction, intimidation, or picketing*

HISTORY

Source: ProtectUS

Prior Legislation: SB 661 (Lieu) Chapter 354, Stats. 2012
SB 888 (Lieu) - Vetoed 2011
AB 279 (Huff) - Failed Senate Judiciary 2007
AB 2702 (Keene) - Failed Senate Public Safety 2006

Support: California Health and Wellness; Health Net; United Farm Workers

Opposition: A Voice for Choice Advocacy; V Is for Vaccine

PURPOSE

The purpose of this bill is to make it a misdemeanor for a person to engage in the physical obstruction, intimidation, or picketing target at a vaccination site.

Existing law, states that Congress shall make no law ... abridging the freedom of speech, or the press; or the right of the people peaceably to assemble.... (U.S. Constitution 1st Amendment.)

Existing law prohibits the passage of any law which restrains or abridges the liberty of speech. (Cal. Const., Art. I, Section 2(a).)

Existing law provides that it is a misdemeanor, except upon private property, for a person to engage in picketing targeted at a funeral during the time period beginning one hour prior to the funeral and ending one hour after the conclusion of the funeral. Picketing means, protest activities engaged in by any person within 300 feet of a burial site, mortuary, or place of worship.(Penal Code Section 594.37)

This bill provides that it is a misdemeanor, except upon private property, for a person to engage in physical obstruction, intimidation, or picketing targeted at a vaccination site during the time period beginning one hour prior to the vaccination services beginning, and ending one hour after the conclusion of the vaccination services. It is punishable by up to six months in jail, a fine not to exceed \$1,000, plus penalty assessments, or both.

This bill defines “intimidation” as placing a person in reasonable apprehension of bodily harm to themselves or to another.

This bill defines “physical obstruction” as rendering ingress to or egress from a vaccination site, or rendering passage to or from a vaccination site, unreasonably difficult or hazardous to another person.

This bill defines “picketing,” as protest activities engaged in by a person within 300 feet of a vaccination site.

This bill defines “targeted at” as directed at or toward a person seeking, receiving, or providing vaccination services.

This bill defines “vaccination services” as the medical service of administering to an individual a dose of vaccine or other immunizing agent.

This bill defines “vaccination site” as the physical location where vaccination services are provided, including, but not limited to, a hospital, physician’s office, clinic, or any retail space or pop-up location made available for vaccination services.

COMMENTS

1. Need for This Bill

According to the author:

SB 742 will resolve the problem of insufficient protection for individuals receiving care at vaccination sites. The scope of COVID-19 vaccination efforts has required the use of spaces such as stadiums, fairgrounds, and pop-up sites not traditionally utilized for healthcare distribution. Current laws do not adequately balance the rights of individuals seeking healthcare with the First Amendment rights of protesters. In incidents at Dodger Stadium (<https://www.latimes.com/california/story/2021-01-31/protest-dodger-stadium-vaccination-site-angers-city-leaders-security-questions>) and demonstrations from groups like “V4V” (<https://namelyliberty.com/v4v-global-demonstration-announcement/>) have resulted in disruptions of vaccine distribution and infringed on individuals’ right to essential healthcare. The publicity and lack of consequences for anti-vaccine protesters in these incidents has only emboldened these groups to attempt similar disruptions in the future. It is imperative that we provide law enforcement with the tools to ensure the uninterrupted distribution of vaccines while ensuring protestors’ right to free speech is maintained.

2. First Amendment Guarantees Generally

Both the U.S. and California Constitutions guarantee the rights of free speech and assembly. Those rights, however, are not absolute. Both the U.S. Supreme Court and the California courts have held that government may impose reasonable restrictions on the time, place, and manner of protected speech, even in a public forum, so long as restrictions (1) are content neutral, (2) are narrowly tailored to serve a significant governmental interest, and (3) leave open ample

alternative channels for communicating the restricted speech. (*Ward v. Rock Against Racism* (1989) 491 U.S. 781; *Clark v. Community for Creative Non-Violence* (1984) 468 U.S.288; *Madsen v Women's Health Center* (1994) 512 U.S. 753.) California courts have generally followed this same test in evaluating the constitutionality of content-neutral speech. (See e.g. *Planned Parenthood Shasta-Diablo Inc. v. Williams* (1995) 10 Cal. 4th 1009; *City of San Jose v. Superior Court* (1995) 32 Cal. App. 4th 330; *Savage v. Trammel Crow Co.* (1990) 223 Cal. App. 3d 1562; *Dulaney v. Municipal Court* (1974) 11 Cal. 3d 77.) Even reasonable and well-intended regulations of expression must pass constitutional muster, and the mere offensive nature of the expression does not justify its prohibition. One of the primary purposes of the First Amendment is to protect speech that is offensive and objectionable to the majority, since no one is usually opposed to the expression of pleasantries or statements with which everyone agrees. It is a fundamental tenant of First Amendment law that speech cannot be prohibited merely because someone justifiably finds it offensive and objectionable. (See e.g. *Cohen v. California*, (1971) 403 U.S. 15, 22; *Virginia v Black* (2003) 538 U.S. 343, 358.)

a) Content Neutrality

The Supreme Court has declared that the very core of the First Amendment is that the government cannot regulate speech based on its content. In *Police Department of Chicago v. Mosley*, the Court said, "Above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter or its content." (408 U.S. 92, 95-96 (1972).) Generally, laws that are content neutral face intermediate scrutiny, while laws that are content based are presumptively invalid and face strict scrutiny, a higher standard. (*Turner Broadcasting System v. Federal Communication Commission*, 512 U.S. 622 (1994).) However, in *Hill v. Colorado*, 530 U.S. 703 (2000) the ruled that the First Amendment right to free speech was not violated by a Colorado law limiting protest, education, distribution of literature, or counseling within eight feet of a person entering a healthcare facility. If found that the regulation was content neutral because it does not regulate speech, just one arena for speech. No matter what message a person is trying to convey, the statute would apply. The legislation is not viewpoint-based simply because it was enacted in response to issues being raised by a certain viewpoint. .

This bill may be found to restrict speech on the basis of the content of the speech. This bill prohibits picketing "targeted at" a person giving, receiving, or providing vaccination services. However, it could be argued that it could be any information targeted at a person receiving vaccine, not just those who disagree with vaccinations. Arguably this could apply to a health plan trying to get people to join their plan if they restricted the access or made people apprehensive.

b) Compelling State Interest that is Narrowly Tailored

If this bill is found to not be content neutral, it must be narrowly tailored to meet a compelling state interest. In his background materials, the author sets for some of the reasons for the compelling state interest of this bill.

The COVID-19 pandemic has infected nearly 30 million Americans and killed more than 500,000 people in this nation.⁵ While estimates vary, scientists believe it will take between 70-80% of the population being vaccinated in order to reach "community immunity", suppressing the pandemic and protecting

against COVID-19 outbreaks.⁶ In order to protect against this virus, millions more Americans need to be vaccinated.

Vaccinations occur at a variety of vaccination sites, such as hospitals, physician offices, clinics, and other retail spaces and pop-up locations. The unprecedented scope of COVID-19 vaccination efforts has required the use of unconventional venues such as fairgrounds or stadiums for vaccination sites. However, the legal code has not yet evolved to account for these changes, and current laws do not adequately empower law enforcement to balance the first amendment rights to free speech with the right to receive healthcare at vaccination sites.

Additionally, individuals may wish to keep their presence at vaccination sites private, fearing harassment or retaliation from anti-vaccine protesters. The presence of protestors at a vaccination site can be intimidating and obstructive, and prevent people from getting their needed vaccination. Maintaining a reasonable physical distance between anti-vaccine protestors and individuals receiving care at vaccination sites would guarantee protestors' right to free speech does not infringe on individuals' right to essential healthcare.

There is arguably a state interest in getting people vaccinated against COVID-19. If that is the case, is the bill narrowly tailored? It limits the prohibition to during and an hour before and an hour after the vaccination hours. It prohibits blocking access to the site. It limits protesting within 300 feet of the vaccination site. Are these limits narrowly tailored to still allow a person's first amendment right protest while protecting the state interest in vaccinating people against COVID-19 or some other deadly disease in the future? Is 300 feet too far, does that work for smaller sites? What about including banning of picketing?

3. Regulating protests at other sites

a. Protesting at funerals

Starting in 1998, the Westboro Baptist Church started picketing funerals, initially of people they believed to be homosexual and then starting in 2005, the funerals of members of the military killed in the Iraq war. In response to these protests, a number of states, including California, enacted statutes limiting or restricting protests at funerals.

Ohio has had laws regulating protests at funerals since 1957, but amended those laws in 2006 to prohibit all demonstrations within 300 feet of a funeral or funeral procession for a time period beginning one hour before the funeral to one hour after the funeral. (Ohio Rev. Code Ann. Section 3767.30.) Shirley Phelps-Roper, a member of Westboro Baptist Church, filed suit in federal district court to enjoin the enforcement of the statute, arguing that it was an unconstitutional restriction on her speech. (*PhelpsRoper v. Strickland*, 539 F.3d 356 (2008).) The court upheld the content-neutral prohibition of demonstrations of a funeral, but struck down the provision prohibiting demonstrations of a funeral procession, holding that such a prohibition is overly broad. (Id. at 360.)

In 2017, the 8th U.S. Circuit Court of Appeals upheld Nebraska's funeral protest law against First Amendment challenge by the Westboro Baptist Church. The appeals court in *Phelps-Roper v. Ricketts* (8th Cir. 2017) reasoned that the law was content neutral, left open

alternative means of communication, and was narrowly drawn. The US Supreme Court declined to hear Westboro’s appeal of the 8th circuit decision. The Nebraska statute upheld defined picketing as ‘protest activities . . . within three hundred feet of a cemetery, mortuary, church, or other place of worship during a funeral.’ (Neb. Rev. Stat. § 28-1320.02(2) (2006)).

b. Protesting at health clinics

Hill v. Colorado, 530 U.S. 703 (2000) established the constitutional standard for ordinances restricting protesting around health clinics that provide abortions. The Hill decision upheld a Colorado ordinance that created an eight-foot no-approach bubble zone around any person within a buffer zone stretching 100 feet from a health care facility, and made it a misdemeanor to obstruct entry to or exit from a health care facility.

McCullen v. Coakley, 573 U.S. 464 (2014) without overruling *Hill* and applying the same standard, found that the 35 foot buffer zone in Boston was broader than needed to keep the entrance of health clinics free of obstruction.

After *McCullen* it was unclear what would happen with ordinances restricting protesting at healthcare facilities offering abortions but in July 2020 the US Supreme Court declined to hear cases upholding “buffer zones” limiting protests at abortion clinics. Which left place policies in Chicago and Pennsylvania’s capital Harrisburg that place limits on anti-abortion activists gathered outside abortion clinics. The Chicago policy bars activists from coming within eight feet (2.4 meters) of someone within 50 feet (15 meters) of any healthcare facility without their consent if they intend to protest, offer counseling or hand out leaflets. The Harrisburg measure bars people from congregating or demonstrating within 20 feet (6 meters) of a healthcare facility’s entrance or exit. (<https://www.reuters.com/article/us-usa-court-abortion-zones/u-s-supreme-court-rebuffs-abortion-clinic-protest-zone-challenges-idUSKBN2432CD>)

In January 2021 the Supreme Court again refused to take up a “buffer zone” case in which the 3rd circuit found that the Pittsburg ordinance did not regulate speech based on its purpose or function, but instead prohibits congregating, patrolling, picketing, or demonstrating outside of health care facilities for any purpose.

4. Misdemeanor

This bill makes it a misdemeanor to engage in physical obstruction, intimidation, or picketing targeted at a vaccination site during the time period beginning one hour prior to the vaccination services beginning, and ending one hour after the conclusion of the vaccination services. Is this an appropriate penalty? Should there be a knowledge requirement—that the person knew it was a vaccination site?

5. Argument in Support

PotectUS, the sponsor of this bill, states:

We are writing to urge the Senate Public Safety Committee to support our sponsored bill SB 742 (Pan) the Right to Healthcare and Free Speech Act. Almost 60,000 Californians have died from COVID-19 and millions of families and

businesses have suffered major loss through the pandemic, but now because of decades of virology and immunology research, scientists were able to create safe, highly effective COVID-19 vaccines within a year. However, if we do not act quickly to ensure safe and effective vaccine distribution, our efforts to protect the public may be for not.

SB 742 will work to protect people who are getting vaccinations from facing intimidation and obstruction by providing law enforcement tools to act swiftly and decisively to protect the rights and freedoms of people who choose to get vaccinated while also preserving the protestors' critical First Amendment right to peacefully assemble at a safe distance. These changes will help Californians who want to get vaccinated to do so safely, thereby helping to bring an end to this deadly pandemic.

In the most publicized incident, Californians simply seeking the COVID-19 vaccine at Dodger Stadium were stopped by a mob of extremists that brought the facility to a halt. Endangering patients and health care workers for nearly an hour, anti-vaxxers worked to intimidate and harass a relatively captive audience. Some participants were in fear during the chaos, as they were in vehicles, unsure of what was happening as they were being yelled at by anti-vaxxers (none of whom were following any CDC COVID-19 safety guidelines).

Around the state, these extremists are continuing to cause chaos and intimidate patients and health care workers. In public videos, they dress to appear to be official participants in the vaccine clinic and refuse to use the designated areas for protest citing that it is not legal. SB 742 will ensure that all jurisdictions have clear ability to set up and create a safe space to express free speech as well as ensure patients and health care workers are safe from anti-vaxx extremists.

6. Argument in Opposition

V for Vaccine opposes this bill stating:

The impetus for SB742 appears to be the temporary closure of a COVID-19 vaccination clinic at Dodger Stadium, at the same time an activist group was conducting a demonstration at the location. This demonstration was not held by our organization and we are unfamiliar with the individuals who conducted it. However, the testimony of persons involved with that demonstration indicates that they did not engage in any illegal activities, they did not obstruct traffic or the gate, and they did not inhibit the functioning of the vaccination clinic in any way. Reports and statements from the LA Times, the Los Angeles Police Dept. and Chief of Police Michael Moore corroborate this.

Aside from this highly publicized, yet legal, demonstration by the demonstrators at Dodger Stadium, our organization is virtually the only other group that has been conducting what we refer to as "education demonstrations" near COVID-19 vaccination sites. Our demonstrations are not "protests" against vaccination. Nor is our aim to prevent people from getting vaccinated. We simply present to the public factual and referenced information regarding vaccination and associated risks, as

we believe every individual has the right to make fully informed medical decisions. We have never interfered with, or attempted to interfere with, anyone getting vaccinated or the functioning of a vaccination site. SB742 provides that physical obstruction, intimidation or “picketing” targeted at a vaccination site during the time period beginning one hour prior to vaccination services and one hour after the conclusion of services would be unlawful. The bill defines “picketing” as protest activities within 300 feet of a vaccination site and defines “vaccination site” as any physical location where vaccination services are provided, including, but not limited to, a hospital, physician’s office, clinic, or any retail space or pop-up location made available for large-scale vaccination services

“Physical obstruction” and ‘intimidation” are already defined as illegal activity. By definition, this bill is an attempt at content-based restriction on free speech. It is targeting only one type of speech by specifically prohibiting protests from certain locations. And while we feel this legislation is very much directed at our organization and others like ours, we would not be the only groups affected by this bill. SB742 is breathtakingly overboard. This bill would prevent peaceful demonstration within the proximity of well over 10,000 locations across California. This bill is not specific to the COVID-19 vaccine or COVID-19 vaccination clinics. It encompasses any location where vaccination services of any kind are provided. This is setting the scene for any and all demonstrations on any issue (e.g. BLM, climate change, LGBTQ, human rights, etc.) to be breaking the law without their knowledge or intent, simply because they did not know a vaccination site was within “x” number of feet of their demonstration. Vaccinations are given in doctor’s offices, clinics, hospitals, pharmacies, drugstores, Target stores, Wal Mart stores, Costcos, schools, universities etc. This bill, if passed, will silence all speech, for any reason, out of fear of arrest.

As no demonstration by our organization, or any other group, has violated any laws or interfered with the ability of people to receive vaccinations, we absolutely believe there is no justification or compelling state interest for this bill. It does not provide any necessary protections that aren’t already in place and enforceable by law. The law as it exists already protects those seeking vaccination. And no justification exists to pass a bill that will violate Californians’ Constitutional rights.

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