



ARCHDIOCESE OF NEW YORK
PUBLIC POLICY

To: Sr. Virginia Joy, SV
From: Edward T. Mechmann, Esq.
Date: March 16, 2021
Re: Court Decision on Sidewalk Counseling

There has been a very important decision relating to sidewalk counseling by the United States Court of Appeals for the Second Circuit. The case is *People of the State of New York v. Kenneth Gripp, et al.*¹ It arose out of a lawsuit filed by the Attorney General of New York State in 2017 against a group of people who regularly protested and did sidewalk counseling outside of the Choices abortion facility in Queens. The case involves the application of federal, state and New York City clinic access laws.²

The decision is based on a very specific analysis of the facts of the case. Nevertheless, the court "embarked on a careful fact-based review to provide guidance on where district courts should draw lines in this challenging area of the law." Majority Opinion, at 59. As a result, we should take this decision as a primer on what kinds of actions cannot be done by sidewalk counselors. It is very important that this information be given to sidewalk counselors so they can ensure that they are acting within the law.

The court's decision discussed three general areas of activities that are prohibited under the statutes and made specific factual findings as to what conduct would be violations:

Obstruction or Interference

- Standing in front of a patient, even for a minimal time, that causes her to alter her path.
- Delaying patients, even for a brief amount of time.
- Holding signs that narrow the sidewalk, even if sufficient walking room is left and no patients are present.

¹ 2021 WL 900682 (2nd Cir. March 10, 2021).

² Federal Freedom of Access to Clinic Entrances Act, 18 U.S.C. § 248; New York Clinic Access Act, N.Y. Penal Law § 240.70; and New York City Clinic Access Act, N.Y.C. Admin. Code § 10-1003.

- Crowding a patient directly or indirectly with bodies or signs.
- Touching or leaning into the window or open door of the car of a person leaving the facility.
- Similar obstructive behavior towards clinic escorts or staff.

Threats of Force

- Whether statements are "true threats" (and thus not protected under the First Amendment) depends on the context and on how a "reasonable recipient" would interpret them.
- Impermissible conduct, depending on context, may include references to past events of violence, both regarding abortion facilities and more generally.
- Even vague or general references to death (e.g., "you never know when you're going to die" or comments on the brevity of life) may constitute threats of force in context.
- Considering the context of an equivocal statement may include how the recipient subjectively interprets it.
- An innocent intent by the speaker or a non-threatening tone are not enough to render a statement permissible if it is otherwise reasonably interpreted as a threat.

Use of Force

- Incidental contact with a patient or escort may constitute unlawful "force".
- Whether incidental contact constitutes "force" depends on whether the actor "intends to commit the act and is aware of the natural and probable consequences."
- An example given by the court is when a sidewalk counselor reaches out to hand a pamphlet to a patient and incidentally collides with the patient or an escort.

Following and Harassment

- Harassment will be determined by reference to the New York Penal Law and court decisions interpreting it.
- Intent to harass, annoy and alarm will be inferred from the person's conduct and the surrounding circumstances.
- Unlawful intent can be inferred from ignoring a patient's requests to be left alone and continuing to follow her at a close distance "while continually seeking to press their own ideals upon them".
- Unlawful intent can also be inferred when a sidewalk counselor makes multiple attempts to engage with a patient after she asks to be left alone.

- A "tag team" approach, where one counselor desists on request but the patient is then approached by another counselor, would also constitute harassment.
- Once a patient makes an explicit or implicit request to be left alone, the sidewalk counselor's conversation no longer has a "legitimate purpose" and thus loses protection under the First Amendment.
- "Pestering" clinic escorts (e.g., following at a close distance and persistently speaking to them or showing them things) may also be considered harassment.

The court's decision does not establish a fixed "buffer zone" around abortion facilities.³ However, it makes clear that sidewalk counselors will be held to a very rigorous standard, and that conduct that seems minimal or inadvertent may be held to be a violation.

This decision is binding precedent that must be followed by all the federal courts in the Second Circuit (which comprises Connecticut, New York, and Vermont). It will also be given considerable weight by any New York State court that interprets these statutes.

³ The Attorney General is seeking a court-ordered "buffer zone" in a recently filed federal lawsuit. *People of the State of New York v. Bevelyn Beatty and Edmee Chavannes*, Docket no. 21-cv-01159 (S.D.N.Y., filed February 9, 2021).