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The Impact of the U.S. Supreme Court's *McCullen v. Coakley* Decision on Reproductive Health Clinic Access Laws in New York State

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Laws that seek to protect access to reproductive health clinics are critical to reducing violence and intimidation directed at patients and staff. Often these laws, which vary by state and locality, intersect with the First Amendment free speech rights of anti-abortion protesters and those who seek to “counsel” women entering the clinics. When these laws are challenged, courts undertake a careful analysis to balance free speech rights and access to reproductive health care.

What did the United States Supreme Court decide in *McCullen v. Coakley*?

In *McCullen v. Coakley*, the Supreme Court struck down the Massachusetts Reproductive Health Care Facilities Act, which created a “buffer zone” around reproductive health care facilities, finding that the law violated the First Amendment.¹ The Massachusetts law made it a crime to stand on a public road or sidewalk within 35 feet of a reproductive health care facility’s entrance and driveway.²

What was the Court’s reasoning in *McCullen*?

Given the significant historical role that public sidewalks have held for purposes of the First Amendment, the Court weighed whether the law served a significant governmental interest and whether it restricted more speech than necessary to advance the law’s purpose. While the Court underscored the importance of public safety and access to clinics, it found that by prohibiting the presence of people on sidewalks the law restricts “substantially more speech than necessary” to achieve these interests. In coming to this conclusion, the Court found that the statewide statute, designed to address problems faced by one clinic in particular, was not narrowly tailored. However, the Court offered several alternative approaches the government could take to protect clinic access.

How does *McCullen* affect the Court’s earlier buffer zone decisions?

In the past, the Supreme Court has upheld fixed buffer zones created by courts to protect individual clinics, as well as a “floating” buffer zone created by state law.

In a 1997 decision, *Schenck v. Pro-Choice Network of Western New York*, the Supreme Court upheld 15-foot buffer zones granted by a court to Rochester and Buffalo reproductive health clinics that sought court relief when protester behavior obstructed clinic access and harassed individuals

seeking to enter the clinics.³ The *McCullen* decision does not change a clinic's ability under state and federal protections to seek individualized remedies such as a buffer zone. Once requested, courts evaluate the specific circumstances and grant injunctions tailored to those circumstances.

In its 2000 decision in *Hill v. Colorado*, the Supreme Court also upheld a "floating" buffer zone created by a Colorado statute.⁴ The Colorado "floating" buffer zone requires protesters to stay eight feet from anyone entering or leaving a reproductive health clinic, as long as the person is within 100 feet of the entrance. Importantly, the *McCullen* decision uses the same legal test to analyze the Massachusetts law as it did in *Hill*.⁵ This may indicate that the Court continues to think that the "floating" buffer zone law is constitutional, as the *McCullen* decision does not overrule its prior precedent.

Will the decision in *McCullen* affect New York's clinic access laws?

In New York, protestor activity outside reproductive health clinics is governed by federal, state and local laws.⁶ These laws do not establish fixed buffer zones for all clinics in the state as did the Massachusetts law at issue in *McCullen*. This means that the *McCullen* decision will have no immediate impact on New York's current clinic access laws.

In fact, the Court cited both New York State and New York City clinic access laws as model protections. When providing alternative approaches to protecting clinics, the Court suggested that Massachusetts could pass a law analogous to the federal Freedom of Access to Clinic Entrances Act of 1994 (FACE), which imposes criminal and civil sanctions for obstructing, intimidating or interfering with clinic staff and patients.⁷ New York has passed such a law which provides more avenues for enforcement and allows the attorney general to press charges under state criminal law.⁸ The Court also pointed to New York City's clinic access law as a model that, among its other protections, makes it a crime "to follow and harass another person within 15 feet of the premises of a reproductive health care facility."⁹

For some New York clinics that are subject to relentless protest activity, these protections may not appear to be enough to ensure patient and staff safety. The NYCLU and our partners at New York Family Planning Advocates, NARAL Pro-Choice New York, the National Organization for Women-NYC and local Planned Parenthoods across the state are committed to working to ensure better enforcement of our clinic access laws. This starts with those on the front lines. Clinic security, staff and volunteers are in the best position to document behavior that may cross the line. For more information on the law and how you can get involved, please contact Katharine Bodde with the New York Civil Liberties Union's reproductive rights program at 212.607.3375.

¹ *McCullen v. Coakley*, 12-1168, 2014 WL 2882079 (U.S. June 26, 2014).

² Mass. Gen. Laws, ch. 266, §§ 120E½(a), (b) (West 2012).

³ *Schenck v. Pro-Choice Network of W. New York*, 519 U.S. 357 (1997); see also *Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753 (1994) (upholding provisions of injunction establishing 36-foot buffer zone around clinic entrances and driveway and imposing limited noise restrictions).

⁴ *Hill v. Colorado*, 530 U.S. 703 (2000).

⁵ Courts use different levels of scrutiny when analyzing laws that impact First Amendment speech rights. Laws that target a viewpoint, as opposed to laws that are neutral but limit speech rights, are subject to a higher level of scrutiny and are therefore less likely to survive. When a court determines that a law is “content-neutral” the law is reviewed under a less restrictive test. The Court in *McCullen* and *Hill* found that the clinic access laws at issue were not directed at a viewpoint and applied the less restrictive test to analyze the laws. In both cases, the dissent argued that the laws should be analyzed under a higher level of scrutiny.

⁶ These laws, described in more detail in the NYCLU’s 2011 Memorandum, include the federal Freedom of Access to Clinics Act, New York State’s Clinic Access Act, and New York City’s Access to Reproductive Health Care Facilities Act. See New York City Clinic Access Law Memorandum, Melissa Goodman and Katharine Bodde, NYCLU, February 28, 2011, *found at* <http://www.nyclu.org/files/Clinic%20Access%20Memo.pdf>; see also National Abortion Federation, Freedom of Access to Clinics Act, *found at* https://www.prochoice.org/pubs_research/publications/downloads/about_abortion/face_act.pdf (summarizing federal FACE).

⁷ Freedom of Access to Clinic Entrances Act, 18 U.S.C. § 248.

⁸ Clinic Access Act, N.Y. Penal Law §§ 240.70-240.71.

⁹ Access to Reproductive Health Care Facilities Act, N. Y. C. Admin. Code §8-803(a)(3).