UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----------X

People of the State of New York, by ERIC T. SCHNEIDERMAN, Attorney General of the State of New York,

Plaintiff,

v.

Kenneth Griepp, Ronald George, Patricia Musco, Randall Doe, Osayinwense N. Okuonghae, Anne Kaminsky, Brian George, Sharon Doe, Deborah M. Ryan, Angela Braxton, Jasmine LaLande, Dorothy Rothar, Prisca Joseph, and Scott Fitchett, Jr.,

Defendants.

----------X

Case No. 17-cv-3706-CBA

DEFENDANT SCOTT FITCHETT, JR.'S RESPONSE IN OPPOSITION TO PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION

INTRODUCTION

It has been established by other Defendants that Plaintiff, Attorney General Schneiderman, abhors the Christian viewpoints against abortion expressed variously by Fitchett and the twelve other Defendants.[1] The other Defendants have shown the Court the high standard which must be met by the Attorney General to obtain the extraordinary remedy of enjoining Defendants' speech, and Fitchett will not rehearse those standards here.[2] It bears repeating, however, that Attorney General Schneiderman must prove his case against each individual Defendant he seeks to enjoin, including Fitchett. *See New York v. Operation Rescue Nat'l*, 273 F.3d 184, 199-200 (2d Cir. 2001).

---

[1] Fitchett adopts, and incorporates herein by this reference, the arguments of the other Defendants in the Memorandum in Opposition to Proposed Preliminary Injunction and supporting materials filed by Defendants Braxton and LaLande (ECF 99, *et seq.*), and The Griepp Defendants' Response in Opposition to Plaintiff's Motion for Preliminary Injunction and supporting materials (served Sept. 28, 2017, and to be filed pursuant to the Court's Order, ECF 105), to the extent not inconsistent with Fitchett's arguments herein.

[2] *See supra* note 1.

The Attorney General cannot carry his burden with respect to Defendant Fitchett because the "conduct" targeted is Fitchett's speech protected by the First Amendment.

FACTS SPECIFIC TO DEFENDANT FITCHETT

A. Background and Expressive Activities Outside Choices.

Fitchett is a 37-year-old resident of Jamaica, New York, the same community where Choices Women's Medical Center is located. (Decl. Def. Scott Fitchett, Jr. ("Fitchett Decl."), ¶¶ 1, 2; Pl.'s Mem. Law Supp. Mot. Prelim. Inj. ("PI Mem."), ECF 2-1, at 1.) Fitchett holds a Bachelor of Fine Arts degree in Communication Arts, and has been a pre-K teacher in Long Island for seven years. (Fitchett Decl., ¶ 2.)

Beginning in 2014, and on average two Saturdays per month, Fitchett has engaged in verbal expression of his Christian beliefs about God and abortion on the public sidewalk adjacent to the entrance of Choices. (Fitchett Decl., ¶ 3.) The goals of Fitchett's expressive activities are to persuade women to change their minds about seeking an abortion by communicating the Gospel of Jesus Christ—that God offers forgiveness of sins and salvation from His wrath through faith in the death and resurrection of His Son Jesus Christ, and that abortion is sinful because it is the murder of an innocent human life. (Fitchett Decl., ¶ 4.) Fitchett has never attempted or intended to force or intimidate any woman to change her mind about seeking an abortion. (Fitchett Decl., ¶ 4.)

Fitchett has communicated his message primarily by standing in place on or near the edge of the sidewalk, carrying a sign displaying the text, "Christ Died for Sin," and intentionally projecting his voice loudly enough to be heard by passers-by on the sidewalk, but without screaming or shouting. (Fitchett Decl., ¶ 5.) Occasionally Fitchett has worn a GoPro video camera while engaging in his expressive activities outside Choices. (Fitchett Decl., ¶ 6.) On the few occasions that Fitchett used the GoPro to record events outside Choices, he did so to safeguard his own First Amendment rights by creating a record of his activities and interactions. (Fitchett Decl.,

¶ 6.) Fitchett has never posted online or otherwise published any video recording made outside Choices. (Fitchett Decl., ¶ 6.)

In connection with Fitchett's expressive activities outside Choices, he has never chased, followed, or approached any person; he has never obstructed or interfered with any person's entry into or exit from Choices, or any person's movement on any sidewalk or roadway; he has never used force or threatened force against any person; he has never trespassed on private property; and he has not violated any laws. (Fitchett Decl., ¶ 7.) As a long-time street preacher and pro-life advocate, Fitchett is always careful to obey all applicable laws and to limit his expressive activities to public ways. (Fitchett Decl., ¶ 7.) Fitchett has never been arrested or subject to an injunction. (Fitchett Decl., ¶ 7.)

Fitchett engages in his expressive activities independently—he has never entered into any agreement or otherwise coordinated with any other person regarding either the method or the content of his or any other person's expressive activities outside Choices. (Fitchett Decl., ¶ 8.)

B. Attorney General Schneiderman's Deficient Allegations and Proffered Evidence.

The totality of Attorney General Schneiderman's allegations in support of a preliminary injunction against Fitchett is as follows:

> *Defendant Scott Fitchett, Jr.*
>
> - Films patients and clinic escorts walking to the clinic entrance (Brady Decl. ¶ 36); and
>
> - Follows and harasses patients and their minor children within fifteen feet of the facility, as well as clinic escorts, and staff, while yelling at them about murder (Greenberg Decl. ¶ 25); (Brady Decl. ¶ 20).

(PI Mem., ECF 2-1, at 17.) And,

> Defendants [Griepp, Musco, George, Doe], and Scott Fitchett, Jr. openly film patients, clinic escorts, and staff outside the clinic using

> their smartphones or GoPro cameras. (Brady Decl. ¶ 36; Garnick Decl. ¶ 14; Greenberg Decl. ¶ 28; Priegue Decl. ¶ 16; Trasande Decl. Ex. 1 at 12, 36.)

(PI Mem., ECF 2-1, at 23.) Thus, Schneiderman alleges Fitchett (1) "films," and (2) "follows and harasses."

The scant evidence proffered by the Attorney General, however, ostensibly to support the "follows and harasses" allegation, falls far short. The Greenberg Declaration specifies that Fitchett "chanted 'murderer'" at a patient who **approached him**. (Greenberg Decl., ECF 7, ¶ 25 ("Fitchett . . . chanted . . . at a patient approaching . . . .").) The Brady Declaration establishes even less, merely averring that Fitchett "shouted" that a patient is a murderer. Neither declaration supports that Fitchett "follows and harasses" by any measure. Having surveilled and investigated Choices since June 2016, assigning at least eight investigators, Attorney General Schneiderman proffers nothing else in support of his allegations against Fitchett. (PI Mem., ECF 2-1, at 8; ECF 15-19.)

Other evidentiary materials filed by Attorney General Schneiderman, presumably to be authenticated at some point in the future, only support the lawfulness of Fitchett's conduct. Of the still video images filed by Plaintiff at ECF 2-3, ostensibly in support of his PI Motion, Fitchett is depicted on pages 4, 39-42, and 54 of 73. (Fitchett Decl., ¶ 9.) These still images, and the video recordings produced by Plaintiff from which the images are purportedly derived, depict Fitchett's typical position and expressive activity outside Choices—on or near the edge of the sidewalk, carrying a sign displaying, "Christ Died for Sin," and speaking to passers-by without obstructing, chasing, following, approaching, or using or threatening force against any person. (Fitchett Decl., ¶ 9.) They certainly do not depict "following and harassing."

ARGUMENT

I. THE ATTORNEY GENERAL'S PRELIMINARY INJUNCTION MOTION SHOULD BE DENIED AS TO FITCHETT BECAUSE THE ATTORNEY GENERAL CANNOT SUCCEED OR RAISE A SUFFICIENTLY SERIOUS QUESTION ON THE MERITS.

A. Fitchett's Expressive Activities in the Traditional Public Forum outside Choices Is Unquestionably Protected First Amendment Activity Subject to the Highest Form of Protection.

"The right to free speech, of course, includes the right to attempt to persuade others to change their views, and **may not be curtailed simply because the speaker's message may be offensive to his audience**." *Hill v Colorado*, 530 U.S. 703, 716 (2000) (emphasis added). Indeed, such right is at its apex when it occurs in a traditional public forum. *See McCullen v. Coakley*, 134 S. Ct. 2518, 2529 (2014) ("[T]raditional public fora 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."). Areas such as the public streets and sidewalks "occupy a special position in terms of First Amendment protection because of their historic role as sites for discussion and debate." *Id.* (internal quotations omitted). As the Supreme Court just recently recognized, yet again,

> It is no accident that public streets and sidewalks have developed as venues for the exchange of ideas. Even today, they remain one of the few places where a speaker can be confident that he is not simply preaching to the choir. With respect to other means of communication, an individual confronted with an uncomfortable message can always turn the page, change the channel, or leave the Web site. **Not so on public streets and sidewalks. There, a listener often encounters speech he might otherwise tune out**. In light of the First Amendment's purpose to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, **this aspect of traditional public fora is a virtue, not a vice.**

Id. (emphasis added).

Indeed, "[c]onsistent with the traditionally open character of public streets and sidewalks, we have held that the government's ability to restrict speech in such locations is **"very limited**." *Id.* (emphasis added). As such, despite the fact that some people – including Attorney General Schneiderman here – might find speech in such places offensive, "the government may not 'selectively shield the public from some kinds of speech on the ground that they are more offensive than others.'" *Id.* (quoting *Erznoznik v. Jacksonville*, 422 U.S. 205, 209 (1975)). "When the government makes it more difficult to engage in these modes of communication, it imposes a significant First Amendment burden." *Id.* at 2536.

Here, it is beyond cavil that Fitchett's expressive activities are protected by the First Amendment. In fact, Fitchett's expressive activities have taken place in the traditional public forum of the public sidewalk. (Fitchet Decl., ¶¶ 3, 5.) As Fitchett testified, his entire purpose for engaging in his expressive activity has been "to persuade women to change their minds about seeking an abortion by communicating the Gospel of Jesus Christ . . . ." (Fitchett Decl., ¶ 4). Such activity in the traditional public forum – even if offensive to some – enjoys the highest rung of First Amendment protection. *See, e.g.*, *Snyder v. Phelps*, 562 U.S. 443, 452 (2011) ("speech on public issues occupies the highest rung of the hierarchy of First Amendment values, and is entitled to special protection." (citing *Connick v. Myers*, 461 U.S. 138, 145 (1983))); *see also Texas v. Johnson*, 491 U.S. 397, 414 (1989) ("If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.").

The Second Circuit applied these principles in analyzing FACE violations alleged by the New York Attorney General in *Operation Rescue Nat'l*, providing district courts are required to "differentiate illegal protestor activity from protected and typical, albeit aggressive, protest

activities." 273 F.3d at 195. The Second Circuit held that the district court erred when it lumped together those protestors who were blocking driveways with those who simply "'approach[ed]' and 'yell[ed]' at patients." *Id*. In sum,

> As much as we might idealize the antiseptic, rational exchange of views, **expressions of anger, outrage or indignation nonetheless play an indispensable role in the dynamic public exchange safeguarded by the First Amendment**. **The fact that such protests make approaching health facilities unpleasant and even emotionally difficult does not automatically mean that such protest activities may be curtailed.** It is worth reinforcing that we must tolerate even views that upset our most heartfelt and deeply held convictions. **Speech is often provocative and challenging**. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea.

273 F.3d at 195–96 (internal quotation marks omitted) (emphasis added).

B. The Attorney General's Allegations and Proffered Evidence Fall Far Short of Establishing any Violation of Law.

Attorney General Schneiderman purportedly bases his claims against Fitchett on federal, state, and local laws: The Freedom of Access to Clinic Entrances Act ("FACE"), 18 U.S.C. § 248(a)(l), the New York State Clinic Access Act ("NY Clinic Access Act"), N.Y. Civ. Rights Law § 79-m, and the New York City Access to Reproductive Health Care Facilities Act 9 ("NYC Clinic Access Act"), N.Y.C. Admin. Code § 8-803. (PI Mem., ECF 2-1, at 1.)

Despite his conclusory statements that "Defendants have violated FACE and the NY Clinic Access Act" (PI Mem., ECF 2-1, at 18), the Attorney General has made no allegations, let alone proffered evidence, of any FACE violation by Fitchett. (FACE and the NY Clinic Access Act are substantially identical, and therefore discussed together collectively as "FACE.") The Attorney General has not averred that Fitchett used or threatened force against, or physically obstructed, any person. Thus, Fitchett's sworn declaration that he has done none of those things stands

uncontroverted (Fitchett Decl., ¶ 7), and the Attorney General has shown no likelihood of success, or even raised a substantial question, on the merits of his FACE claims against Fitchett.

The Attorney General's allegation that Fitchett "films" patients and staff, even if supported by the proffered declarations (s*ee supra* Facts at pp. 3-4), cannot satisfy any element of a FACE violation. The district court in *New York v. Kraeger*, 160 F. Supp. 2d 360 (N.D.N.Y. 2001), expressly rejected the New York Attorney General's contention there that the defendants' videotaping of patients and staff constituted intimidation. *See* 160 F. Supp. 2d at 369, 380 n.10. Fitchett's uncontroverted declaration establishes that his purpose for filming events at Choices, when he did, was to protect his own First Amendment rights by creating a record of his activities and interactions. (Fitchett Decl., ¶ 6.) Fitchett is entitled to make a record of his own expressive activities on public ways. *See Kraeger*, 160 F. Supp. 2d at 369.

The Attorney General's remaining allegation that Fitchett "follows and harasses . . . within fifteen feet of the facility" is obviously formulated to parrot the elements of a violation of the NYC Clinic Access Act, specifically § 8-803(a)(3). But, as shown above, the Attorney General proffers no evidence in support of this allegation. (*See supra* Facts at pp. 3-4.) Once again, Fitchett's sworn declaration that he has neither followed nor harassed stands uncontroverted. (Fitchett Decl., ¶ 7.) And even if the vague and undefined term "harass" was enforceable constitutionally, it could not prohibit Fitchett's protected speech (*see supra* Argument Part I.A) merely because it was "aggressive" or made "approaching health facilities unpleasant and even emotionally difficult." *Operation Rescue Nat'l*, 273 F.3d at 195. Indeed, construing "harass" to have the meaning ascribed to it elsewhere in New York penal law would require the Attorney General to prove the actual "'following'" of a person or placing such person "'in reasonable fear of physical injury.'" *Kraeger*, 160 F. Supp. 2d at 376 (quoting N.Y. Penal Law § 240.25); *see also New York v. Cain*, 418 F.

Supp. 2d 457, 486 (S.D.N.Y. 2006) (citing N.Y. Penal Law §§ 240.25-240.32 for definition of "harassment").

The Attorney General has proffered no evidence of any actual following or actual threat by Fitchett. Far from being actionable (or even plausible) threats, the statements attributed to Fitchett by the Attorney General, to the effect that abortion is murder, "go 'to the core of [the defendants'] protest message,' that abortion is a brutal and immoral practice." *Cain*, 418 F. Supp. 2d at 477 (quoting *Operation Rescue Nat'l*, 273 F.3d at 197).

II. THE ATTORNEY GENERAL'S PRELIMINARY INJUNCTION MOTION SHOULD BE DENIED AS TO FITCHETT BECAUSE NEITHER THE ATTORNEY GENERAL NOR NEW YORK WILL SUFFER IRREPARABLE INJURY ABSENT INJUNCTIVE RELIEF.

Not only will there be no harm to Attorney General Schneiderman or any citizen of New York absent an injunction against Fitchett—because Fitchett has violated no law—but Fitchett himself would be subjected to irreparable harm if an injunction is entered. "The loss of First Amendment freedoms, for even minimal periods of time unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976); *see also Swartwelder v. McNeilly*, 297 F.3d 228, 241-42 (3d Cir. 2002) (same). A citizen who exercises the right to free speech exercises a right that "lies at the foundation of free government." *Schneider v. New Jersey*, 308 U.S. 147, 165 (1939). To impose an injunction on Fitchett for conduct he has not personally engaged in is to deny him his cherished constitutional rights and impose irreparable injury on his liberties. The irreparable harm here flows to Fitchett, not the Attorney General.

CONCLUSION

For all of the foregoing reasons, the Attorney General's Motion for a Preliminary Injunction (ECF 2) should be denied.

DATED this October 6, 2017.

Respectfully submitted,

/s/ Roger K. Gannam
Horatio G. Mihet
Roger K. Gannam
LIBERTY COUNSEL
P.O. Box 540774
Orlando, Florida 32854
hmihet@LC.org
rgannamm@LC.org
court@LC.org
(407) 875-1776

Attorneys for Defendant Scott Fitchett, Jr.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this October 6, 2017, the foregoing document was filed with the Clerk of the Court and served in accordance with the Eastern District's Rules on Electronic Service upon all counsel or parties of record.

/s/ Roger K. Gannam
Attorney for Defendant
Scott Fitchett, Jr.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----------X

People of the State of New York, by ERIC T. SCHNEIDERMAN, Attorney General of the State of New York,

Plaintiff,

v.

Kenneth Griepp, Ronald George, Patricia Musco, Randall Doe, Osayinwense N. Okuonghae, Anne Kaminsky, Brian George, Sharon Doe, Deborah M. Ryan, Angela Braxton, Jasmine LaLande, Dorothy Rothar, Prisca Joseph, and Scott Fitchett, Jr.,

Defendants.

----------X

Case No. 17-cv-3706-CBA

DECLARATION OF DEFENDANT SCOTT FITCHETT, JR.

1. I am thirty-seven years old and a named Defendant in this case. I have personal knowledge of the matters set forth in this Declaration, and would testify competently as to such matters if called to do so.

2. I am a resident of Jamaica, New York. I received a Bachelor of Fine Arts degree in Communication Arts from the New York Institute of Technology in 2004. I am currently a pre-K teacher on Long Island, New York, which position I have held for approximately seven years.

3. Beginning in 2014, and on average two Saturdays per month, I have engaged in verbal expression of my Christian beliefs about God and abortion at Choices Women's Medical Center ("Choices"), 147-32 Jamaica Avenue, Jamaica, New York, on the public sidewalk adjacent to the entrance of Choices on 147th Place.

4. The goals of my expressive activities at Choices are to persuade women to change their minds about seeking an abortion by communicating the Gospel of Jesus Christ—that God offers forgiveness of sins and salvation from His wrath through faith in the death and resurrection

of His Son Jesus Christ, and that abortion is sinful because it is the murder of an innocent human life. I have never attempted or intended to force or intimidate any woman to change her mind about seeking an abortion.

5. I have communicated my message primarily by standing in place on or near the edge of the sidewalk, carrying a sign displaying the text, "Christ Died for Sin," and intentionally projecting my voice loudly enough to be heard by passers-by on the sidewalk, but without screaming or shouting.

6. Occasionally I have worn a GoPro video camera while engaging in expressive activities outside Choices. On the few occasions that I have used the GoPro camera to record events outside Choices, I did so to safeguard my own First Amendment rights by creating a record of my activities and interactions. I have never posted online or otherwise published any video recording made outside Choices.

7. In connection with my expressive activities outside Choices, I have never chased, followed, or approached any person; I have never obstructed or interfered with any person's entry into or exit from Choices, or any person's movement on any sidewalk or roadway; I have never used force or threatened force against any person; I have never trespassed on private property; and I have never violated any laws. As a long-time street preacher and pro-life advocate, I am always careful to obey all applicable laws and to limit my expressive activities to public ways. I have never been arrested or subject to an injunction.

8. I have never entered into any agreement or otherwise coordinated with any other person regarding either the method or the content of my or any other person's expressive activities outside Choices.

9. Of the still video images filed by Plaintiff in support of his Motion for a Preliminary Injunction at ECF 2-3, I am only depicted on pages 4, 39-42, and 54 of 73. These still images, and the video recordings produced by Plaintiff from which the images are purportedly derived, depict my typical position and expressive activity outside Choices—on or near the edge of the sidewalk, carrying a sign displaying, "Christ Died for Sin," and speaking to passers-by without obstructing, chasing, following, approaching, or using or threatening force against any person.

I DECLARE under penalty of perjury that the foregoing is true and correct.

EXECUTED this 6th day of October, 2017.

/s/ Scott Fitchett, Jr.
Scott Fitchett, Jr.