

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ALBERTO R. GONZALES,	:	
ATTORNEY GENERAL OF THE	:	
UNITED STATES OF AMERICA,	:	CIVIL ACTION
	:	
Plaintiff,	:	
	:	
v.	:	
	:	
JOHN DUNKLE,	:	No. 07- _____
	:	
Defendant.	:	

**MOTION OF THE ATTORNEY GENERAL
OF THE UNITED STATES OF AMERICA
FOR PRELIMINARY INJUNCTIVE RELIEF**

Pursuant to Rule 65 of the Federal Rules of Civil Procedure and the Freedom of Access to Clinic Entrances Act ("FACE"), 18 U.S.C. § 248(c)(2), Alberto R. Gonzales, Attorney General of the United States of America (the "United States Attorney General"), by the undersigned attorneys, hereby moves the Court for an order preliminarily enjoining Defendant, John Dunkle, from publishing, either orally or in writing, in paper or electronic form, in whole or in substantial part, the message appearing on his internet webpage and weblog as set forth in paragraphs 15 and 16 of the verified complaint, and from publishing, either orally or in writing, in paper or electronic form, equivalent messages that contain the names, addresses, or photographs of reproductive health clinic physicians, staff, or patients with the intent to threaten physical harm to clinic physicians, staff, or patients -- or any other person or any class of persons -- thus preventing them from obtaining or

providing reproductive health services.

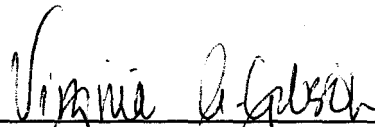
In support hereof, the Attorney General incorporates herein the averments of the verified complaint, the verification thereto, and the attached memorandum of law.

WHEREFORE, the United States Attorney General respectfully requests an order issuing a preliminary injunction preventing Defendant, John Dunkle, from publishing, either orally or in writing, in paper or electronic form, in whole or in substantial part, the threats giving rise to this action.

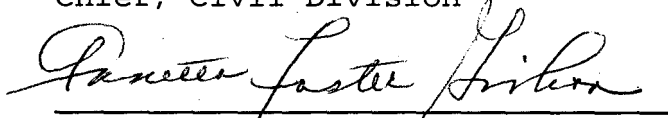
Respectfully submitted,



Patrick L. Meehan
United States Attorney



Virginia A. Gibson
Assistant United States Attorney
Chief, Civil Division



Annetta Foster Givhan
Assistant United States Attorney
615 Chestnut Street, Suite 1250
Philadelphia, PA 19106
(215) 861-8319

Attorneys for the Attorney General
of the United States of America

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**MEMORANDUM OF LAW IN SUPPORT OF THE
MOTION OF THE ATTORNEY GENERAL
OF THE UNITED STATES OF AMERICA
FOR PRELIMINARY INJUNCTIVE RELIEF**

The Attorney General of the United States of America (the "United States Attorney General") has moved the Court for an order preliminarily enjoining Defendant, John Dunkle, from publishing, either orally or in writing, in paper or electronic form, in whole or in substantial part, the message appearing on his internet webpage and webblog as set forth in paragraphs 15 and 16 of the verified complaint, and from publishing, either orally or in writing, in paper or electronic form, equivalent messages that contain the names, addresses, or photographs of reproductive health physicians, staff, or patients with the intent to threaten the physicians, staff, or patients -- or any other person or any class of persons -- thus preventing them from obtaining or providing reproductive health services.

I. RELEVANT BACKGROUND

The verified complaint avers as follows: Defendant, John Dunkle, has described himself as an "anti-abortionist" and has actively engaged in anti-abortion activities since the early 1970s; he is a suspected member of the so-called "Army of God," a network of anti-abortion activists that advocate violence against reproductive health clinics and staff; he is a frequent contributor to the "Army of God" internet webpage, posting an online newsletter and accompanying webblog that encourages the "use of force" against reproductive health clinics and clinic physicians and staff; he has frequent contacts with various reproductive health clinics, physicians, staff, as well as patients and their companions, in connection with the clinics' work involving reproductive health services, including services relating to pregnancy and pregnancy termination.

Defendant's general anti-abortion activities

Defendant's anti-abortion activities and efforts include, inter alia, the publication and dissemination of various written materials circulated in both paper and electronic form, including a monthly newsletter, an internet webpage [REDACTED], and an internet webblog site [REDACTED].

Defendant's anti-abortion activities and efforts also

frequently include activities that directly target specific individuals who provide reproductive health services to women residing in the Philadelphia, Allentown, Reading, and West Chester, Pennsylvania areas.

Since at least 1994, Defendant's anti-abortion activities and efforts have been an ongoing, continuous, and consistent pattern of conduct including, but not limited to, incidents such as the following:

- a. encouraging readers of his publications to use deadly force against specifically identified reproductive health clinic physicians and staff, providing instruction on how to employ deadly force tactics;
- b. provoking physical and verbal confrontations with reproductive health clinic physicians, staff, and patients at various clinics;
- c. publishing internet postings containing photographs and the home addresses of reproductive health clinic physicians and staff;
- d. threatening to publish internet postings containing photographs of reproductive health clinic patients and their vehicle license plates;

- e. confronting reproductive health clinic physicians and staff at their homes, warning the physicians and staff to abandon their careers in reproductive health services;
- f. appearing at the homes of friends and neighbors of reproductive health clinic physicians and staff to "pray" for the physicians and staff to abandon their careers in reproductive health services;
- g. standing outside various reproductive health clinics demanding to speak to the individual(s) "in charge";
- h. mailing letters directly to the residences of reproductive health clinic physicians and staff, threatening to appear in the neighborhoods of the physicians and staff to "pray" until the physicians and staff "get out of the baby-killing business"; and
- i. distributing pamphlets to the residential neighbors of various reproductive health clinic physicians and staff, identifying the physician and staff by name, address, and occupation, and stating that their neighbor is in "the baby-killing business."

Defendant intended to force reproductive health clinic physicians and staff targeted in his anti-abortion activities and efforts to fear for their lives and cease providing reproductive health services.

Defendant's actionable threats

Defendant targeted, placed in danger, and threatened a specifically identifiable female reproductive health clinic physician, formerly employed at the Philadelphia Women's Center. The targeted individual ceased providing reproductive health services in fear of the Defendant's threats to her life.

Defendant explicitly encouraged his readers to kill the targeted individual by shooting her in the head; published the targeted individual's name, photograph, and home address on his internet webpage and weblog; and published instructions regarding the specific means to kill the targeted individual, as well as how to escape detection upon the commission of her murder.

Defendant's publication states in relevant part:

To kill someone in self-defense is not a sin if that level of violence was needed to repel the attack. I further this by saying the babies' self defense is all of us standing in their place to stab, shoot, beat, burn, or kill the aggressors all the time. . . .

I am bringing you some of the hidden faces of baby murderers that the law protects. Here's [full name of the provider] hiding under a hood with sunglasses on (picture included). She wears a vest, probably. While it does not sound good to say go shoot her between the eyes, it sounds even worse to say let her alone; she

has a right to do abortions and kill a hundred babies a week. This pig has murdered over 24,000 babies to my belief. So I am telling you it's much better that someone put a piece of lead in her brain so she will be known as an unviable fetus who was a product of her own belief system. Go rent a car and take the license plate off[;] wear gloves and don't let anyone notice you or tell anyone. I have given you her address. When people look around and say I heard or saw this they won't know for sure nor will they be able to have the correct information to come back to you. Make sure you're not being followed either. Stay away from hidden cameras also. Look to see if there are motion and smoke detectors at residences. Surveillance cameras are at death camps and all over - parking lots, streets, hospitals, and buildings.

[REDACTED] (excerpts from Defendant's webpage at pages 8 and 9) (emphasis added). This message continues to appear on Defendant's internet webpage and webblog.

Postings on Defendant's internet webpage and webblog dating back to May 2005 identify the same targeted individual and reflect similar language. For example, one posting claims that the same targeted individual referenced in paragraph 15 hereof "looks as if she won't run, though, and won't stop killing either. Once one of these former Mds gets a taste of blood, and the money that goes with it, she or he is almost impossible to stop - short of a bullet."

[REDACTED].

Defendant's conduct constitutes a threat of death or serious bodily injury to the targeted individual reproductive health clinic physician. Defendant engaged in the conduct with

intent to intimidate with the ability of the clinic physician to provide reproductive health services. Defendant should be enjoined from violating and committing future violations of FACE.

II. LEGAL DISCUSSION

Defendant's unlawful acts threaten -- and are so intended -- to intimidate, interrupt, hinder and impede the ability of the clinic physician to provide reproductive health services. The United States Attorney General has the authority -- and indeed the duty -- to commence this action seeking preliminary and permanent injunctive relief. See 18 U.S.C. § 248(c)(2)(B).

The United States Attorney General has satisfied the standards for obtaining preliminary injunctive relief.

It is well settled that a party is entitled to preliminary injunctive relief if the party demonstrates:

1. a reasonable probability of success on the merits;
2. a possibility of irreparable injury to the movant;
3. granting the relief will not result in even greater harm to the non-movant; and
4. granting the relief is in the public interest.

Swartzwelder v. McNeilly, 297 F.3d 228, 234 (3d Cir. 2002);

Tanimura & Antle, Inc. v. Packed Fresh Produce, Inc., 222 F.3d

132, 140 (3d Cir. 2000); American Civil Liberties Union v. Janet

Reno, 217 F.3d 162, 172 (3d Cir. 2000), judgment vacated on other grounds, 122 S. Ct. 1700, 1713-14 (2002) (not disturbing preliminary injunction entered by the district Court); Allegheny Energy, Inc. v. DOE, Inc., 171 F.3d 153, 158 (3d Cir. 1999).

Injunctive relief should be granted if the four elements necessary for issuance of a preliminary injunction are present on the record before the court. Tanimura, 222 F.3d at 140. For the reasons set forth below, the United States Attorney General has satisfied all the elements necessary for the issuance of a preliminary injunction.

1. The United States Attorney General has a reasonable probability of success on the merits.

Defendant' internet posting is plainly a threat within the meaning of FACE. A statement constitutes a threat under FACE when "a reasonable person would foresee that the statement would be interpreted by those to whom the maker communicates the statement as a serious expression of intent to harm or assault others." Planned Parenthood of the Columbia/Willamette, Inc. v. American Coalition of Life Activists, 290 F.3d 1058, 1075 (9th Cir. 2002); see also United States v. Kosma, 951 F.2d 549, 556-57 (3rd Cir. 1991) (statement is a threat under 18 U.S.C. § 871 -- a threat statute dealing with threats to the President -- if a reasonable person would foresee that it would be interpreted as an expression of intent to harm).

In American Coalition of Life Activists, the Court squarely addressed the issue of whether publicly disseminated anti-abortion publications that identified physicians by name, address and photograph constituted "threats" under FACE. 290 F.3d 1058 (9th Cir. 2002). There, the threats consisted of "Wanted" and "Guilty" posters that identified specific reproductive health services physicians and listed their addresses. Id. at 1065. The posters neither contained threatening language nor identified anyone who would cause injury to the physicians. Id. at 1085. The Court, however, considered the "whole factual context and all of the circumstances," which included the fact that three other physicians had been shot and killed after appearing on similar posters, to conclude that the posters constituted threats as proscribed by FACE. Id. at 1078 (internal quotation omitted).

The Court further explained that it is not necessary that a defendant intend to or be able to carry out the threat because the only intent requirement for a threat case is that "the defendant intentionally or knowingly communicate the threat." Id. at 1075. It is the making of "the threat with intent to intimidate" that makes a defendant's conduct unlawful under FACE. Id. at 1077.

In addition, the public method in which the posters were communicated did not negate the nature of the threats. Id.

at 1086. See also Madsen v. Women's Health Center, 512 U.S. 753, 773 (1994) ("threats . . . however communicated, are proscribable under the First Amendment"). The Court noted that although "a privately communicated threat is generally more likely to be taken seriously than a diffuse public one, this cannot be said of a threat that is made publicly but is about a specifically identified doctor and is in the same format that had previously resulted in the death of three doctors who had also been publicly, yet specifically, targeted." American Coalition of Life Advocates, 290 F.3d at 1086.

Here, Defendant's internet messages similarly constitute threats under FACE. His threats explicitly state, both to the intended target and to the community at large, that the targeted physician should be shot and killed. The message is neither conditional nor extemporaneous, but rather specifically directed at an identified individual. As a direct result of being the target of Defendant's internet publications, the targeted physician wore a bullet-proof vest, a fact which Defendant also disclosed on his internet postings. She later stopped performing reproductive health services for fear for her safety.

This is not a case involving classic protected speech. To the contrary, Defendant's speech is plainly a threat proscribed by FACE. 18 U.S.C. § 248(a)(1). Such threats are not

protected by the First Amendment. American Coalition of Life Advocates, 290 F.3d at 1076; see also Schenck v. Pro-Choice Network of Western New York, 519 U.S. 357, 373 (1997); Madsen, 512 U.S. at 774. Defendant's speech intended to harm and intimidate reproductive health clinic physician(s), staff, and patient(s) -- the precise conduct that FACE is intended to prohibit.

2. **Reproductive health clinic physicians, staff, and patients are being, have been and will be irreparably harmed by Defendant's FACE violations unless the Court issues a preliminary injunction.**

The "irreparable" injury element of a preliminary injunction is satisfied "if a plaintiff demonstrates a significant risk that he or she will experience harm that cannot adequately be compensated after the fact by monetary damages." Adams v. Freedom Forge Corp., 204 F.3d 475, 484-85 (3d Cir. 2000) (citations omitted). Here, Defendant's motive is to harm and intimidate a specific reproductive health clinic physician. The denial of this preliminary injunction will result in her continued intimidation. In addition, these threats also have the potential to intimidate other clinic physicians, staff, and patients who may be aware of the threats. Plainly stated, so long as Defendant's internet postings remain, clinic physicians, staff, and patients, specifically the targeted individual referenced in paragraphs 15 and 16 of the verified complaint, remain at risk of irreparable harm.

The publication of Defendant's illegal threats causes irreparable harm to reproductive health clinic physicians, staff, and patients, by causing them to live in fear for their lives, and to cease providing legal reproductive health services. Here, the target individual physician has been deprived of the opportunity to exercise her lawful rights to provide reproductive health services free of fear for her personal safety.

The unlawful threat further caused irreparable harm to the United States by interfering with lawful reproductive health services. Defendant is seeking to intimidate reproductive health clinic physicians, staff, and patients because of their involvement in reproductive health services. Such conduct interferes with the performance of lawful health care services and inflicts immeasurable harm on the United States' health care system as a whole.

The threat of additional publications by Defendant is substantial given Defendant's prior conduct of collecting and disseminating personal information and photographs of reproductive health clinic physicians. There is, therefore, actual harm and clearly a threat of "irreparable" injury.

3. **The balance of the hardships weighs strongly in favor of the reproductive health clinic physicians, staff, and patients; granting injunctive relief will not result in any harm to Defendant.**
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Defendant will not be injured in any manner if this

Court issues a preliminary injunction. "FACE was enacted in 1994 against a backdrop of escalating violence directed toward reproductive health clinics, their employees, and patients." United States v. Gregg, 226 F.3d 253, 259 (3d Cir. 2000). FACE prohibits only a very limited range of activities, namely, force, threat of force and physical obstruction. Planned Parenthood Association of Southeastern Pennsylvania, Inc. v. Walton, 949 F. Supp. 290, 292 (E.D. Pa. 1996).

Here, a preliminary injunction will not prohibit Defendant from creating, publishing, and disseminating anti-abortion information, but for the exception of illegal threats eliciting violence. The conduct that the United States Attorney General seeks to enjoin is not legally protected. No legally cognizable damages can or will result to Defendant if a preliminary injunction issues.

4. Injunctive relief against Defendant is in the public interest.

Reproductive health services are a matter of public interest and concern, and the public will best be served by the granting of a preliminary injunction in the instant matter. The public has a legitimate interest in the unimpeded administration of health care, and in the prevention of violent threats to health care providers. Madsen, 512 U.S. at 768; see also United States v. Van Dyke, 568 F. Supp. 820, 822 (D. Or. 1983) (not involving health care, but finding that where public employees

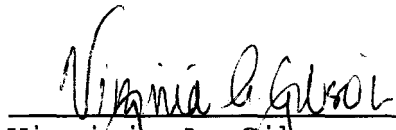
were being harassed for doing their jobs, the "public interest will be served by an injunction forbidding this harassment in the future"). The requested preliminary injunction is plainly in the public interest.

III. CONCLUSION

For the foregoing reasons, this Court should issue a preliminary injunction, enjoining Defendant, John Dunkle, and his representatives, agents, employees, and all others acting in concert or participating with him, from publishing threats within the meaning of FACE.

Respectfully submitted,


Patrick L. Meehan
United States Attorney


Virginia A. Gibson
Assistant United States Attorney
Chief, Civil Division


Annetta Foster Givhan
Assistant United States Attorney
615 Chestnut Street, Suite 1250
Philadelphia, PA 19106
(215) 861-8319

Attorneys for the Attorney General
of the United States of America