UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

UNITED STATES OF AMERICA,	:	CIVIL ACTION
	:	
Plaintiff,	:	
	:	
v.	:	
	:	
ANGEL DILLARD,	:	No. 6:11-cv-1098-JTM-KGG
	:	
Defendant.	:	

UNITED STATES' OPPOSITION
TO DEFENDANT'S MOTION TO DISMISS

The United States of America (the "United States") hereby opposes Defendant Angel Dillard's Motion to Dismiss the Complaint under Federal Rule of Civil Procedure 12(b)(6).[1]

The United States brought this action pursuant to the Freedom of Access to Clinic Entrances Act ("FACE"), 18 U.S.C. § 248 (1994), because Defendant sent a letter containing a threat of force to Dr. Mila Means, with the intent to intimidate Dr. Means from her professed goal of providing reproductive health services in Wichita, Kansas. In particular, among other statements included in her letter, Defendant told Dr. Means that, because of the "soulless existence [Dr. Means is] purposefully considering," she may be the target of a car bomb, and might suffer the same consequences as Dr. George Tiller, the last abortion provider in Wichita, who is now, in Defendant's words, "in hell."

[1] Since Defendant filed her Motion to Dismiss, the United States has filed an Amended Complaint, superseding the original Complaint. See ECF No. 19. However, the United States is filing this Opposition to the Motion to Dismiss, in anticipation of Defendant's adoption of her Motion to Dismiss in response to the Amended Complaint. This Opposition, therefore, contains references to the Amended Complaint.

In considering whether a statement constitutes a true threat, courts use an objective test, analyzing the language used, the context, and the reaction of the recipient, in order to determine whether it would be reasonably foreseeable that the statement's recipient would perceive it as threatening. Under these three factors, the United States has clearly stated more than a plausible claim that Defendant issued a true threat to Dr. Means, and thus violated FACE.

In support of her Motion, Defendant maintains that the letter she sent is not a true threat, in part because she has no propensity for, or history of, violence, and was merely warning Dr. Means about the potential for violence from others. In so arguing, Defendant not only introduces alleged facts that are outside the pleadings, but, more importantly, misconstrues the case law, which makes clear that it is the intent to intimidate, and not the intent to actually carry out the threat, that is relevant in a true threat analysis. Furthermore, Defendant's argument defies logic, for Defendant, under the circumstances, cannot possibly have believed that she needed to inform Dr. Means about potential violence from others. No one could seriously doubt that Dr. Means was aware of that potential. Moreover, the language Defendant used makes clear that she herself is associated with those who may use force in their efforts to stop Dr. Means. Therefore, it is clear from the language of Defendant's letter and the context in which it was written that Defendant's goal must have been—and was—to threaten Dr. Means with violence if Dr. Means continued with her plans to perform abortions in Wichita. As such, Defendant violated FACE.

Defendant's Motion to Dismiss should, therefore, be denied.

STANDARD OF REVIEW

Federal Rule of Civil Procedure 12(b)(6) allows dismissal of a complaint for "failure to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). In considering a motion to dismiss under Rule 12(b)(6), the court "must accept all the well-pleaded allegations of

the complaint as true and must construe them in the light most favorable to the plaintiff." Alvarado v. KOB-TV, L.L.C., 493 F.3d 1210, 1215 (10th Cir. 2007) (quotation and citation omitted).[2]

Federal Rule of Civil Procedure 8(a) provides that a complaint must contain only "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). In two cases, Bell Atl. v. Twombly, 550 U.S. 544, 127 S.Ct. 1955 (2007), and Ashcroft v. Iqbal, --- U.S. ----, 129 S.Ct. 1937 (2009), the Supreme Court clarified the standards that apply in evaluating a motion to dismiss for failure to state a claim. In Twombly, the Court held that in order to survive a motion to dismiss, a complaint must set forth "only enough facts to state a claim to relief that is plausible on its face." 550 U.S. at 570. In the same vein, the Court further elucidated that the factual allegations in a complaint "must be enough to raise a right to relief above the speculative level, on the assumption that all the allegations in the complaint are true (even if doubtful in fact)." Id. at 555 (citations omitted). The Court also instructed that the rule "does not impose a probability requirement at the pleading stage." Rather, a complaint is sufficient when it identifies "facts that are suggestive enough to render [the element] plausible." Id. at 555-56.

---

[2] Defendant appears to treat her Motion as one for summary judgment, for she introduces supposed facts, such as her allegedly non-violent history and alleged lack of contact with, and knowledge of, Dr. Means, that are found nowhere within the pleadings. Def.'s Br. at 17. This is a Motion to Dismiss, however, and on such a motion, "a court should consider no evidence beyond the pleadings." Alvarado, 493 F.3d at 1215. The United States submits that the allegations in its Complaint, standing alone, are sufficient to establish that Defendant violated FACE. If, however, this Court were to consider the supposed facts presented by Defendant that are outside the pleadings, and treat this motion as one for summary judgment, it should provide the United States with an opportunity to conduct discovery and then present additional materials to the Court. See id. In fact, it would not be appropriate for the Court to rule on Defendant's Motion as one for summary judgment at this time, because that Motion presents alleged facts that the United States may dispute after it conducts discovery, and there may be other material facts that are not yet known to the United States because it has not yet had the opportunity to discover them.

In its subsequent decision in Iqbal, the Court explained the plausibility standard:

> To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to "state a claim to relief that is plausible on its face." A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. The plausibility standard is not akin to a "probability requirement," but it asks for more than a sheer possibility that a defendant has acted unlawfully.

129 S.Ct. at 1949 (citations omitted). Assessing whether a claim is "plausible" is "a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." Id. at 1950.

As the Court is of course aware, although it may only look to the Complaint in considering a Motion to Dismiss, there has already been a hearing on the United States' Motion for a Preliminary Injunction in this matter, during which findings were made. See Order Denying Mot. for Prelim. Inj., ECF No. 16. The outcome of that hearing should have no bearing on the Motion to Dismiss, however, for while the Court determined that the United States had not met its burden of showing a right to preliminary injunctive relief, such relief "is an extraordinary remedy," Love ex rel. Love v. Kan. State High Sch. Activities Ass'n, No. 04-1319-JTM, 2004 WL 2357879, at *2 (D. Kan. Oct. 15, 2004) (Marten, J.), and thus has a much higher bar than the "liberal standard of review governing a motion to dismiss." Indep. Living Res. Ctr., Inc. v. City of Wichita, No. 00-1190-WEB, 2002 WL 539037, at *3 (D. Kan. Mar. 15, 2002).

ARGUMENT

The United States has sufficiently stated a claim that Defendant violated FACE when she sent a letter threatening force—including the potential of an explosive placed under her car—to Dr. Mila Means, a family practitioner who is receiving abortion training and intends to perform

abortions in Wichita, with the intent to intimidate Dr. Means from providing such reproductive health services.

Section 248(a)(1) of FACE provides:

> (a) Prohibited Activities – Whoever –
>
> > (1) by . . . threat of force . . . , intentionally injures, intimidates or interferes with or attempts to injure, intimidate or interfere with any person because that person is or has been, or in order to intimidate such person or any other person or class of persons from, obtaining or providing reproductive health services . . . shall be subject to . . . the civil remedies provided in subsection (c) . . . .

Defendant does not contest that she mailed the letter at issue to Dr. Means, nor that her intent was to intimidate Dr. Means from performing abortions.[3] Defendant's sole argument is that her letter does not constitute a threat of force, but rather was a merely a means of providing information. But that contention is not supported by reason or by the relevant case law, under which similar—and indeed, less threatening—statements and actions have been deemed true threats, based on the language used, the context in which they were made, and the reactions of the recipients, factors that here lend credence to the argument that Defendant's letter constitutes a true threat.

The United States maintains that the allegations in its Complaint, standing alone, provide sufficient grounds on which to find that Defendant violated FACE. Even if the Court is not convinced of this, however, it should find that the United States has, at the very least, met the low bar necessary to survive a motion to dismiss. Accepting all the allegations in the pleadings

[3] Even if Defendant argued otherwise, this court found at the hearing on the United States' Motion for a Preliminary Injunction that Defendant could not have had any other intent. See Partial Tr. of Apr. 20, 2011 Hr'g on Mot. for Prelim. Inj. at 3 ("You know, there is no question in my mind but what this letter, notwithstanding any gloss that anybody might choose to put on it, was designed to intimidate Dr. Means. I mean, there is just absolutely no doubt about the fact, Ms. Dillard, that that was what you were trying to do, to get her to not engage in an abortion practice. And there was no other spin that can be put on that letter but that.").

as true, and construing them in the light most favorable to the United States, it is clear that the United States has stated a claim that is plausible on its face. See Iqbal, 129 S.Ct. at 1949.[4]

1. To determine whether there is a "threat of force" under FACE, a true threat analysis should be used, examining the statement from the perspective of an objectively reasonable person, and considering the language of the alleged threat, the context in which it was made, and the reaction of the recipient.

An examination of Tenth Circuit true threat case law and FACE case law from other jurisdictions reveals that, in order to determine whether a statement is a threat under FACE, the court must consider how an objectively reasonable person would foresee the statement being interpreted by the recipient, taking into account the language used, the context, and the reaction of the recipient.[5] See Nielander v. Bd. of Cty. Comm'rs of Cty. of Republic, Kansas, 582 F.3d 1155, 1167-68 (10th Cir. 2009) ("The question is whether those who hear or read the threat reasonably consider that an actual threat has been made . . . Whether a statement constitutes a 'true threat' is a fact-intensive inquiry, in which the language, the context in which the statements are made, as well as the recipients' responses are all relevant.") (internal citations

[4] It would be inappropriate for the Court to dismiss the case at this stage, pre-discovery, when it is plausible that discovery will reveal further evidence to support the United States' allegations. See Shero v. City of Grove, 510 F.3d 1196, 1200 (10th Cir. 2007). As will be discussed, in conducting a true threat analysis, the Court must consider not only the language of the statement and the reaction of the recipient, both of which were addressed in the pleadings, but the context in which the statement was made. While some of the context known publicly was pled—context the United States contends is sufficient to find that a true threat was made—there may well be other facts that provide further context, but which are unknown and unknowable to the United States at this time, when discovery has yet to be conducted.

[5] Defendant makes much of the fact that the United States, in its brief in support of its Motion for a Preliminary Injunction, relied "on 10th Circuit cases that were not addressing FACE." Def.'s Br. at 7. That is indeed so, for one simple reason: the Tenth Circuit has yet to rule on a case involving a threat of force under FACE. As such, it is entirely appropriate to look to the Tenth Circuit's "true threat" case law for guidance. See Planned Parenthood of the Columbia/Willamette, Inc. v. Am. Coalition of Life Activists, 290 F.3d 1058, 1074-75 (9th Cir. 2002) (en banc) (adopting objective "reasonable speaker" true threat test to FACE because "[w]e have applied this test to threats statutes that are similar to FACE" and "[o]ther circuits have, too," and finding "reasonable listener" and "reasonable speaker" test to be roughly equivalent). Of course, it is also instructive to look at threat cases under FACE in other jurisdictions.

omitted); United States v. Viefhaus, 168 F.3d 392, 396 (10th Cir. 1999) (to determine existence of a threat, "we have adopted an objective test focusing on how a 'reasonable person would foresee . . . the statement [being] interpreted by persons hearing or reading it'") (internal citation omitted); United States v. Magleby, 241 F.3d 1306, 1311, 1319 (10th Cir. 2001) (affirming conviction on a civil rights violation for threatening a family by burning a cross in their yard, noting that "[c]ontext is important in determining whether a true threat has been made," and also looking "to the reaction of the recipient of the alleged threat"); United States v. Hart, 212 F.3d 1067, 1071 (8th Cir. 2000) (affirming conviction for threat of force under FACE after analyzing "the alleged threat in light of its 'entire factual context' and determin[ing] 'whether the recipient of the alleged threat could reasonably conclude that it expresses a determination or intent to injure presently or in the future'") (internal citation omitted); Planned Parenthood of the Columbia/Willamette, Inc., 290 F.3d at 1077 ("[W]e hold that 'threat of force' in FACE means what our settled threats law says a true threat is: a statement which, in the entire context and under all the circumstances, a reasonable person would foresee would be interpreted by those to whom the statement is communicated as a serious expression of intent to inflict bodily harm upon that person.").

Numerous cases have found threats of force under FACE, even where, divorced from the context and the recipient's reaction, the language used might not have represented a true threat standing alone. For instance, in United States v. Dinwiddie, 76 F.3d 913 (8th Cir. 1996), the court found that the defendant violated FACE by making threats of force when she said to a Planned Parenthood doctor, "Robert, remember Dr. Gunn [a doctor who had been killed by an opponent of abortion] . . . This could happen to you. . . . He is not in the world anymore. . . . Whoever sheds man's blood, by man his blood shall be shed." Id. at 925. The court looked not

only at the language used, but at the surrounding circumstances, including that the statements were made directly to the doctor and the defendant was known to believe that killing doctors who perform abortions is justifiable. Id. at 925. The Eighth Circuit found that "[a]lthough Mrs. Dinwiddie did not specifically say to Dr. Crist, 'I am going to injure you,' the manner in which Mrs. Dinwiddie made her statements, the context in which they were made, and Dr. Crist's reaction to them [e.g., wearing a bullet-proof vest] all support the conclusion that the statements were 'threats of force' that 'intimidated' Dr. Crist." Id.

In a similar case, United States v. McMillan, 53 F. Supp. 2d 895 (S.D. Miss. 1999), the court, after examining the legislative history of FACE and case law interpreting it, determined that the defendant had violated FACE by making a threat of force against a doctor outside a reproductive health facility when he asked the following question: "Where's a pipebomber when you need him?" As in Dinwiddie, the defendant did not specifically say to the doctor that he was going to set off a bomb, but the court found that the doctor could have reasonably concluded that the defendant's statement "expressed a determination or intent to injure either presently or in the future for the purpose of threatening and intimidating [the doctor] because of his activities relating to the provision of reproductive health services," and thus the defendant had violated FACE. McMillan, 53 F. Supp. 2d at 907 (internal quotation omitted). The court found it significant that the statement at issue was made directly to the doctor, that the defendant was known to support the view that lethal force can justifiably be used against doctors who perform abortions, and that the "pipebomber" statements were made in close temporal proximity to the Atlanta Olympics bombing and the arrest and prosecution of the "Unibomber." Id. at 906-07.

Also integral to the court's analysis was that the doctor, in response to the defendant's utterance, "took precautions in addition to those he had previously taken." Id. at 906.[6]

In a 2000 case, the Eighth Circuit affirmed a conviction under FACE for threat of force based on the defendant's actions in renting two Ryder trucks and leaving them unattended in the driveways of two Little Rock, Arkansas abortion clinics. United States v. Hart, 212 F.3d 1067 (8th Cir. 2000). The Hart court was persuaded that placing Ryder trucks in the driveways of abortion clinics, even without any accompanying statements, represented a threat, in part because of this context: "the placement of the trucks at the clinics coincided with a visit to Little Rock from President Clinton, whose presence in the area further heightened concerns about potential violence," and the circumstances were similar "to the well-known events of the Oklahoma City bombing." Id. at 1072. Demonstrating the importance of considering the recipient's reaction, the court found it significant that "the reaction of clinic staff indicates that they did in fact perceive the Ryder trucks as a threat of force." Id.

In yet another threat of force case under FACE, the Ninth Circuit found that "Guilty" posters, publicizing the names and addresses of doctors who perform abortions, constituted true threats, despite the fact that "the posters contain no language that is a threat." Planned Parenthood of the Columbia/Willamette, Inc., 290 F.3d at 1072. The court's analysis of the posters was informed by the context in which they were issued and the reaction of the recipients. As the court stated, "Indeed, context is critical in a true threats case and history can give meaning to the medium." Id. at 1078. The court gave great significance to the fact that the posters at issue were similar to previous "Wanted" posted that depicted doctors who performed abortions, several of whom were subsequently killed. The court stated, "In the context of the poster

[6] Note that, although this case was a contempt proceeding, the finding of contempt was the functional equivalent of finding a FACE violation. McMillan, 53 F. Supp. 2d at 897.

pattern, the posters were precise in their meaning to those in the relevant community of reproductive health service providers. They were a true threat. The posters are a true threat because, like Ryder trucks or burning crosses, they connote something they do not literally say, yet both the actor and the recipient get the message." Id. at 1085. The court further took note of the recipients' reaction: "As a direct result of having a 'GUILTY' poster out on them, physicians wore bullet-proof vests and took other extraordinary security measures to protect themselves and their families." Id. at 1086.

a. Defendant Dillard's language alone constitutes a true threat.

Defendant's letter uses language that itself indicates a threat of force. Defendant criticizes Dr. Means' decision to perform abortions and writes:

> Maybe you don't realize the consequences of killing the innocent. If Tiller could speak from hell, he would tell you what a soulless existence you are purposefully considering, all in the name of greed. Thousands of people are already looking into your background, not just in Wichita, but from all over the US. They will know your habits and routines. They will know where you shop, who your friends are, what you drive, where you live. You will be checking under your car everyday-because maybe today is the day someone places an explosive under it.

See Compl., Attach. A; Am. Compl., Attach. A (Letter from Defendant Dillard to Dr. Means). The Court's inquiry into whether Defendant intended to intimidate Dr. Means with a threat of force can, and, in the United States' view, should end with this statement. While Defendant may not have directly stated, "I am going to put a bomb under your car," the implication is clear. Defendant mentions "the consequences of killing the innocent," and then immediately references Dr. Tiller—a doctor who performed abortions in Wichita and was murdered in his church less than two years ago, precisely because he performed abortions—speaking "from hell." "The

consequences of killing the innocent," Defendant implies, then, arguably include being murdered, as was the consequence for Dr. Tiller.

Defendant further threatens the use of force by writing that Dr. Means "will be checking under [her] car everyday-because maybe today is the day someone places an explosive under it," if she continues with her plans to perform abortions. Id. Defendant's language implies that, while it may not be today, one day someone will certainly bomb Dr. Means' car. Given the circumstances, an objectively reasonable person reading these statements would surely foresee them being interpreted by Dr. Means, the first doctor with an announced intention to perform abortions openly in Wichita since Dr. Tiller's murder, as a threat of force.

Defendant's argument that she should escape liability because she is merely conveying a threat by a third party who may put an explosive under Dr. Means' car is both factually and legally flawed. Factually, Defendant's letter is not simply the conveyance of a threat by some unknown third party. Defendant clearly has some connection to the "thousands of people" who "are already looking into [Dr. Means'] background" and will at some point place an explosive under Dr. Means' car. See Compl., Attach. A; Am. Compl, Attach. A. Defendant herself has obviously been the recipient of some of the information gleaned by the "thousands of people," for she reveals the information she has already obtained when she states, "You will come under greater scrutiny than you've ever known, legally and professionally. Much worse than the disciplinary actions and ethical concerns that you've been facing." Id. By referencing alleged "disciplinary actions and ethical concerns" that Dr. Means has "been facing," Defendant demonstrates that she has enough of a connection to the people who have been looking into Dr. Means' background to have received information from them – or that she herself has been looking into Dr. Means' background. Defendant therefore connects herself to the "thousands of

people" who will know Dr. Means' habits and routines, who will know where she shops and what she drives – and who will one day place explosives under her car.

Furthermore, Defendant's contention that she needs to inform Dr. Means of a possible third-party threat because Dr. Means may not be aware of potential danger defies logic. Dr. Means considered the murdered Dr. Tiller to be her mentor, and, like the rest of the adult population of Wichita, surely knows that he was murdered because he performed abortions, and understands that she could be facing the same risk by stepping into his shoes. See Compl. ¶ 6; Am. Compl. ¶¶ 6, 12. Defendant herself suggests that Dr. Means has likely been warned by friends or family that she may become a target of violence if she performs abortions, Def.'s Br. at 12, so there should be no reason for Defendant to feel it necessary to repeat this "information." Moreover, the tone of Defendant's letter is not that of a concerned friend. Defendant's letter is entirely lacking of any type of language that would indicate that she intends to do anything other than threaten Dr. Means. In addition, Defendant does not write about the specific risks that abortion providers have faced in the past, such as being shot or having their clinics bombed, but mentions a new kind of threat—a car bomb. The implication, then, must be that this letter is not intended to inform or provide a historical picture of the potential risks to Dr. Means, but instead to intimidate her with a specific new threat of force.

If all that is not enough to make clear that Defendant's letter cannot be intended to merely convey information about potential threats from others, Defendant further involves herself in the threat directly by stating, "I urge you to think very carefully about the choices you are making . . . We will not let this abomination continue without doing everything we can to stop it." Compl., Attach. A; Am. Compl., Attach. A. The United States submits that, in light of the larger context of violence against abortion providers in Wichita, see Compl. ¶ 6; Am. Compl. ¶ 6, these two

sentences, standing alone, could also be deemed a threat of force by Defendant. The Court need not reach this question, however, because these statements were not made in a vacuum. Rather, they were made in the context of the earlier statement about an explosive under Dr. Means' car. When the letter is read in its entirety, then, it is clear that Defendant intended to communicate something to Dr. Means far more menacing than the mere prospect of legal action to thwart Dr. Means' plans to provide abortion services again in Wichita. To the contrary, when viewed as a whole, Defendant's letter conveys – and is intended to convey – that Dr. Means is likely to become the target of violence.

Legally, even if Defendant were conveying a threat on behalf of a third party, such a threat would be actionable under FACE. The case law makes clear that, contrary to Defendant's argument, Def.'s Br. at 6-8, 13-14, if the circumstances surrounding the conveyance of a third-party threat reveal the speaker's intent to intimidate, that is sufficient for the court to find a true threat. See Viefhaus, 168 F.3d at 396. In Viefhaus, the defendant, a white supremacist, recorded an outgoing message on a telephone hotline in which he stated, "a letter from a high ranking revolutionary commander has been written and received demanding that action be taken against the government by all white warriors by December 15th and if this action is not taken, bombs will be activated in 15 pre-selected major U.S. cities." Id. at 394. Defendant argued that his actions did not constitute a true threat, in part because he was merely relating a threat made by a third party. Id. at 396. The court nevertheless found that he had made a true threat, noting, "There is no requirement that the defendant convey an intent to carry out the threatened conduct himself." Id.

Dinwiddie and McMillan also reveal the error in Defendant's argument. The Dinwiddie court, noting that Mrs. Dinwiddie did not explicitly say, "I am going to injure you," stated

pointedly, "The fact that Mrs. Dinwiddie did not specifically say to Dr. Crist that *she* would injure him does not mean that Mrs. Dinwiddie's comments were not 'threats of force.'" 76 F.3d at 926 n.9. The McMillan court similarly found Mr. McMillan's "where's a pipebomber" utterance to be a true threat even though it did not specifically threaten any action by Mr. McMillan himself, and even though the threatened doctor specifically testified that he did not believe Mr. McMillan would place a pipebomb, but "did fear that McMillan might employ someone else to do so." 53 F. Supp. 2d at 906.

It must be noted that, in support of her erroneous argument that a true threat can be found only where the author of the statement personally "authorized, ratified, or directly threatened" violence, Defendant quotes extensively from Planned Parenthod of Columbia/Willamette, Inc. v. American Coalition of Life, 244 F.3d 1007 (9th Cir. 2001). Def.'s Br. at 13-14. What Defendant crucially fails to mention, however, is that after that decision, the case was subsequently re-heard *en banc*, and the full Ninth Circuit did not adopt that reasoning, finding instead that the actions of the defendants in publishing "Guilty" posters of abortion providers, whether or not the defendants themselves had any intention to carry out violence, constituted threats of force under FACE. Planned Parenthood of the Columbia/Willamette, Inc., 290 F.3d 1058.

Defendant also mischaracterizes the applicable legal standard in arguing that a true threat must be unconditional and convey an imminent prospect of execution. Def.'s Br. at 5-6. In Viefhaus, the defendant's hotline message had threatened that "bombs will be activated" if certain action was not taken. 168 F.3d at 394. The defendant argued that his statement could not be a true threat, because it was conditional, but the Tenth Circuit recognized that a conditional statement could constitute a true threat. Id. at 396.

Dinwiddie and McMillan further illustrate the error in Defendant's argument. Mrs. Dinwiddie was found to have made a threat of force in violation of FACE even though her statement, "this could happen to you," was phrased in the conditional. Dinwiddie, 76 F.3d at 925. Although the statement did not convey the imminent prospect of execution, the Eighth Circuit still concluded that it violated FACE, based on the manner in which the statement was made, the context, and the recipient's reaction. Id. In McMillan, the statement found to be a threat of force, given the context, was "Where's a pipebomber when you need him?" 53 F. Supp. 2d at 896. Such a statement may not appear to be a direct threat, and certainly does not convey the imminent prospect of execution, but the McMillan court determined it to be a true threat in violation of FACE, because the threatened doctor reasonably could have believed that the statement "expressed 'a determination or intent to injure *either presently or in the future*' for the purpose of threatening and intimidating [the doctor] because of his activities relating to the provision of reproductive health services." Id. at 907 (emphasis added). It is clear, then, that a statement that an objectively reasonable person can foresee putting the recipient in fear of bodily harm, even if that harm may occur in the future, is a true threat.

Note, finally, that even if Defendant's reading of the letter as merely conveying information about a possible third-party threat might in theory be plausible, it is irrelevant under the controlling legal standard. As discussed, the true threat analysis is an objective one, which looks at the statement from the point of view of a reasonable person, and considers whether such a person would foresee the statement being interpreted as a threat by the recipient. Viefhaus, 168 F.3d at 396. Thus, Defendant's highly subjective and highly implausible reading is, in any event, not relevant. Of course it is true that any letter could be read in a number of ways. The relevant inquiry, however, is in which of those ways an objectively reasonable person would foresee Dr.

Means reading this letter, considering the entire context, and there can be no doubt that under that standard, it is a threat of force. Furthermore, in the context of a motion to dismiss, the court must read the pleadings in the light most favorable to the Plaintiff, so Defendant's subjective reading is largely irrelevant.

b. The context here lends weight to the view of the language as a true threat.

While the language discussed above may, in theory, be susceptible to several interpretations, the language must not be decoupled from the context, and the context here adds layers of intimidation on top of the already intimidating language. The letter was written directly to Dr. Means, a mentee of Dr. Tiller's, Am. Compl. ¶ 12, and both the Defendant and Dr. Means reside in the Wichita area, where the last doctor to openly perform abortions, Dr. Tiller, was murdered in his church less than two years ago. Compl. ¶ 6; Am. Compl. ¶ 6. Wichita, moreover, has long been a sort of "ground zero" for the anti-abortion movement, at least as far back as the "Summer of Mercy" in the early 1990's. There can be no doubt that both Defendant and Dr. Means are aware of this context, and in fact Defendant made the connection to the context overt through her reference to Dr. Tiller in her letter. Compl. ¶ 12; Am. Compl. ¶ 16. Finally, Defendant has established a friendship with Scott Roeder, Dr. Tiller's killer, and has professed admiration for him, stating that "[w]ith one move, [Roeder] was able . . . to accomplish what we had not been able to do. So he followed his convictions, and I admire that." Am. Compl. ¶¶ 8-9. Looking at the letter at issue here in the very specific time and place in which it was written, the context conclusively contributes to its threatening nature, just as Mr. McMillan's references to a pipebomb soon after the Atlanta Olympics bombing and with the Unibomber in the news, see McMillan, 53 F. Supp. 2d 895, and Mr. Hart's Ryder trucks soon after the Oklahoma City bombing, see Hart, 212 F.3d 1067, added context to their threats of

force. Under these circumstances, the only logical conclusion is that Dr. Means, the recipient of the letter, would perceive it as a threat of force.

The significance of context in assessing whether a statement is a true threat is unwittingly revealed by Defendant herself, who argues in support of her Motion, "it is entirely possible that Dr. Means had received similar warnings from friends or family who have had concerns about her well being if she is to ultimately embark upon her contemplated career choice." Def.'s Br. at 12. Dr. Means may indeed have received warnings from family or friends, but the context of those warnings would have been vastly different from the context of this letter. Dr. Means would of course be aware that warnings from friends and family would be made because of genuine concern for her well-being, and she would therefore likely not be intimidated. When she received this letter from a well-known anti-abortion activist who has professed admiration for the murderer of Dr. Tiller, see Am. Compl. ¶¶ 8-9, however, it would have been reasonable for her to react quite differently.

In maintaining that the context here does not indicate a true threat, Defendant argues that statements "which show no intent by the speaker to use force" are not actionable. Def.'s Br. at 4. But that is patently untrue, as myriad cases make clear. Indeed, not only is intent to carry out the threat not necessary, but even the ability to carry it out is not required. See Viefhaus, 168 F.3d at 395-96 ("It is not necessary to show that defendant intended to carry out the threat, nor is it necessary to prove he had the apparent ability to carry out the threat. *The question is whether those who hear or read the threat reasonably consider that an actual threat has been made.* It is the making of the threat and not the intention to carry out the threat that violates the law.") (citation omitted); Planned Parenthood of the Columbia/Willamette, Inc., 290 F.3d at 1075-76 ("It is not necessary that the defendant intend to, or be able to carry out his threat; the only intent

requirement for a true threat is that the defendant intentionally or knowingly communicate the threat . . . [W]hether or not the maker of the threat has an actual intent to carry it out, 'an apparently serious threat may cause the mischief or evil toward which the statute was in part directed.'") (citations omitted). "It is the making of the threat with intent to intimidate—not the implementation of it—that violates FACE." Planned Parenthood, 290 F.3d at 1077. Thus, the only intent that must be proven here is the intent to intimidate, and that showing has been made.[7]

It is only logical that any supposed lack of propensity to commit violence is not relevant, for the applicable standard looks at how the recipient will reasonably perceive the threat. Thus, Defendant's alleged lack of propensity to engage in violence cannot be relevant, for Dr. Means would have no way of knowing if Defendant indeed lacked this propensity. All that Dr. Means knows is that Defendant affiliates with, and admires, someone who has actually murdered the last doctor to perform abortions in Wichita, precisely because he performed abortions, so it would be logical for Dr. Means to suspect that Defendant indeed might have such a propensity. Am. Compl. ¶¶ 8-9.

In any event, this entire line of argument—that Defendant has no propensity to engage in violence—is improper in the context of a motion to dismiss, for the Court must consider only the pleadings, and must do so in the light most favorable to the United States. Defendant's argument on this point relies on supposed facts not in the record before this Court—facts that the United

[7] Defendant argues that this case is similar to Lucero v. Trosch, 928 F. Supp. 1124 (S.D. Ala. 1996), an Alabama District Court case, in part because the defendant there, allegedly like Defendant here, had displayed no propensity to engage in violence. That case, however, is inapplicable here, as the Lucero court determined there was no true threat largely because the statements at issue were made in the context of the Geraldo Rivera television talk show, at the prodding of the show's host. The statements here, by contrast, were made directly to Dr. Means through a letter addressed to her, and at no one's urging but Defendant's.

States is not able to contest at this point, having not yet had the opportunity to conduct discovery—and thus must not be considered by the Court. See Def.'s Br. at 17-18.

c. The reaction of the recipient weighs strongly in favor of liability.

If the language of the letter and the context in which it was written were not enough to make clear its threatening nature—and they surely are—the reaction of the recipient further points to that conclusion. Dr. Means took numerous security measures, at her office and in her personal life, as a result of receiving Defendant's letter. See Compl. ¶ 15; Am. Compl. ¶ 19. Dr. Means' reaction was similar to the reactions of many of the doctors in the cases mentioned above, and should therefore be considered in determining whether Defendant's letter is a true threat, just as the reactions of those other recipients were considered. See Dinwiddie, 76 F.3d at 925 (doctor wore a bullet-proof vest); McMillan, 53 F. Supp. 2d at 906 (doctor took additional precautions); Hart, 212 F.3d at 1070 (clinic employees left the buildings and notified police); Planned Parenthood of the Columbia/Willamette, Inc., 290 F.3d at 1086 (doctors wore bullet-proof vests and took other security measures).

Defendant argues that relying on Dr. Means' reaction is somehow inappropriate or unfair, but her argument is simply not supported by the case law or by reason. For instance, Defendant cites Dinwiddie for the proposition that a recipient's reaction is not a content-neutral basis for restricting speech. Def.'s Br. at 10. But in making that observation, the Dinwiddie court was responding to the defendant's argument that FACE violates the First Amendment. 76 F.3d at 921. And immediately after making the observation cited by Defendant, the Dinwiddie court went on to explain, "But this reasoning does not apply to statutes that outlaw threats of violence." Id. at 922. In fact, contrary to Defendant's argument, considering the reaction of the recipient does not make the true threat test subjective and thus void for vagueness. Def.'s Br. at

10. The standard is still one of an objectively reasonable person. It merely looks to the reaction of the recipient as one factor to guide the fact-finder about how an objectively reasonable person would foresee the statement being interpreted.

Defendant further argues that it would be unfair for a court to rely on the reaction of the recipient because the recipient could infer a threat on the basis of events outside of Defendant's knowledge. While that may be true in theory, it is absolutely not the case here, where the factors that influenced Dr. Means' perception of Defendant's letter—the language itself, the anti-abortion culture in Wichita, the murder of Dr. Tiller, and the fact that Defendant acknowledges a friendship with, and admiration for, Scott Roeder—are most certainly within Defendant's knowledge.

2. Analyzing Defendant's letter using all three factors—language, context, reaction—leads to the inescapable conclusion that this letter constitutes a true threat.

An examination of the entire circumstances here—the language, context, and reaction—reveals that Defendant's letter is at least as threatening as, if not more threatening than, the actions and statements found to be threats in the FACE cases discussed above. Defendant's reference to Dr. Tiller, coupled with her statement that today could be the day Dr. Means finds an explosive under her car, is similar to the statements made by Mrs. Dinwiddie, who referenced the consequences that befell another doctor who performed abortions, and couched her threat in the conditional, "this *could* happen to you." Dinwiddie, 76 F.3d 913. Defendant's statement here that an explosive may be placed under Dr. Means' car is no less threatening than Mr. McMillan's suggestion that a pipebomb could be used against the doctor there. McMillan, 53 F. Supp. 2d 895. And surely, if the mere parking of trucks outside a clinic was deemed a threat of force, based on the context in the Hart case, then Defendant's letter to Dr. Means, with its

mention of the murdered Dr. Tiller and explosives under her car, must be considered a threat as well. 212 F.3d 1067. Finally, the context and reaction of the recipient lend credence to the notion that Defendant's letter here is a true threat, as was the case in Planned Parenthood of the Columbia/Willamette, but the language of Defendant's letter here is itself threatening as well, making this an even stronger case than that one, in which there was no such explicitly threatening language. 290 F.3d 1058.

One way in which courts have analyzed threats of force under FACE, in order to take account of the entire circumstances, is through the Dinwiddie factors, so named because they were first articulated in the aforementioned Dinwiddie case. 76 F.3d 913. An analysis of those factors as applied here provides further grounds for finding that Defendant's letter was a threat of force. Under Dinwiddie, the court considers: (1) the reaction of the recipient and others; (2) whether the threat was conditional; (3) whether the threat was communicated directly to the victim; (4) whether the maker of the threat had made similar statements before; and (5) whether the victim had reason to believe that the threat's maker had a propensity to engage in violence. Id. at 925. As the Dinwiddie court noted, the "list is not exhaustive, and the presence or absence of any one of its elements need not be dispositive." Id. Here, several of the factors directly support the United States' case, while others are ambiguous or cannot be determined at this time. The reaction of Dr. Means and the fact that this threat was communicated directly in a letter addressed to Dr. Means—factors one and three—lend credence to the notion that the letter is a true threat. In terms of factor four, the United States does not possess enough information at this pre-discovery stage to determine whether Defendant has made similar statements in the past. Defendant contends that she has "never threatened any abortion provider or staff member," Def.'s Br. at 9, but that claim is untested and not within the record before this Court on the

Motion to Dismiss. Defendant argues that the threat at issue was conditional, and thus factor two supports her, but the United States submits that there is no condition placed upon the statement, "maybe today is the day someone places an explosive under [your car]"—by the express terms of the letter, this event is going to happen, and it is only a matter of when. Finally, based solely on the pleadings, which is all the Court may consider at this stage, it would be improper to conclude that Defendant has no propensity to engage in violence, and it is improper for Defendant to so argue here. Def.'s Br. at 9. Moreover, Defendant's argument here misses the mark, for the question under Dinwiddie factor five is not whether the Defendant may indeed have a propensity to engage in violence, but whether the recipient has reason to believe that the maker of the threat has such a propensity. Thus, this factor supports the United States here, for it would be reasonable for Dr. Means to believe that Defendant has such a propensity, based on her affiliation with, and professed admiration for, Scott Roeder, who was convicted of murdering Dr. Tiller, a doctor who performed abortions. See Am. Compl. ¶¶ 8-9.

In erroneously contending that the Dinwiddie factors weigh in her favor, Defendant here dwells heavily on the fact that she has only written one letter to Dr. Means, while the defendants in Dinwiddie and McMillan, for example, were found to have repeated their statements many times. Two points must be made in response. First, Defendant's statement here was made in writing, and thus was more lasting and permanent than the statements made orally in those other cases. In essence, by taking the time to craft her threat and put it on paper, Defendant indicated the severity of the threat in the same way that Mrs. Dinwiddie and Mr. McMillan did by repeating their statements, rather than just making them once or twice in what could be considered off-hand remarks. Second, while the United States has no information at present to indicate that Defendant has made any other threatening statements to Dr. Means, the United

States cannot, at this stage of the proceedings, without discovery, be assured that Defendant has never made any such statements to others, and the Court therefore must not accept Defendant's contention on this point in considering this Motion to Dismiss.

3. Defendant's speech is not protected by the First Amendment.

Defendant repeatedly invokes the First Amendment to claim that her letter is protected speech. For example, Defendant states that the first paragraph of her letter "consists primarily of moral and philosophical arguments against abortion," with "only one reference to any type of violence." Def.'s Br. at 11. That reference, however—to explosives under Dr. Means' car—is impossible to downplay. It is the crux of the threat and presents a truly frightening image, and any attempt to minimize its importance as Defendant does is simply to ignore reality. Moreover, Defendant cannot hide her threat behind the guise of political statements. It is well-established that "[t]he fact that a specific threat accompanies pure political speech does not shield a defendant from culpability." Viefhaus, 168 F.3d at 396. Defendant here could have expressed a political viewpoint—her opposition to abortion—without putting Dr. Means in reasonable apprehension of bodily harm. Defendant chose not to do so, and she cannot now use the First Amendment to shield her from the consequences of her actions.[8]

CONCLUSION

For the foregoing reasons, this Court should deny Defendant's Motion to Dismiss.

Dated : May 20, 2011

[8] Defendant's argument also invokes the First Amendment when she claims that, if the injunctive relief sought by the United States were granted, she would not be able to attend her church. Whether or not this is so—and the United States has no basis to know at this point—this argument should have no bearing on any decision at the Motion to Dismiss stage, as it can properly be addressed later in the proceedings.

Respectfully submitted,

BARRY R. GRISSOM
United States Attorney
District of Kansas

By: Emily Metzger
Assistant United States Attorney
1200 Epic Center
301 N. Main St.
Wichita, KS 67202
Kansas Bar No. 10750
(316) 269-6481
(316) 269-6484 (fax)

THOMAS E. PEREZ
Assistant Attorney General
Civil Rights Division

JONATHAN SMITH
Chief
Special Litigation Section

JULIE K. ABBATE
Deputy Chief
Special Litigation Section

s/Aaron Fleisher
AARON FLEISHER
Trial Attorney
United States Department of Justice
Civil Rights Division
Special Litigation Section
950 Pennsylvania Ave., N.W.
Washington, DC 20530
(202) 514-6255
(202) 514-6903 (fax)
aaron.fleisher@usdoj.gov

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

UNITED STATES OF AMERICA,	:	CIVIL ACTION
	:	
Plaintiff,	:	
	:	
v.	:	
	:	
ANGEL DILLARD,	:	No. 6:11-cv-1098-JTM-KGG
	:	
Defendant.	:	

CERTIFICATE OF SERVICE

I hereby certify that on May 20, 2011, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF, which will provide notice of such filing to all registered parties.

s/Aaron Fleisher
AARON FLEISHER
Trial Attorney
Special Litigation Section
Civil Rights Division
UNITED STATES Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530
Telephone: (202) 514-6255
Facsimile: (202) 514-6903
aaron.fleisher@usdoj.gov