UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

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

UNITED STATES' OPPOSITION TO DEFENDANT'S
MOTION TO DISMISS OR MOTION FOR SUMMARY JUDGMENT

The United States of America hereby opposes Defendant Angel Dillard's Motion to Dismiss or Motion for Summary Judgment. Dkt. 54.

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 mailed a threat of force to Dr. Mila Means in order to intimidate her from her professed goal of performing abortions in Wichita. In particular, Defendant warned Dr. Means that, because of the "soulless existence [Dr. Means is] purposefully considering," she may be the victim of a car bomb. Defendant further predicted that Dr. Means would suffer the same consequences as assassinated physician Dr. George Tiller, the last abortion provider in Wichita, who is now, in Defendant's words, "in hell." Defendant further warned that "[W]e will not let this abomination continue without doing everything we can to stop it."

Defendant now moves to dismiss, or for summary judgment. Neither motion has merit. First, Defendant is procedurally barred from moving, again, to dismiss under Federal Rule of

Civil Procedure 12(b)(6). This Court already denied her initial motion to dismiss five months ago. Dkt. 30.

Second, Defendant's motion displays a fundamental misunderstanding of the FACE statute. Defendant argues that she is entitled to judgment as a matter of law because Defendant targeted Dr. Means-- who did not have a facility in Wichita where she could perform actual abortions -- based on Dr. Means' future plans to perform abortions Wichita. Yet FACE plainly prohibits Defendant's confessed activity. FACE protects people who are targeted for their past, current, or future involvement with reproductive health services. In addition, Dr. Means has long been providing reproductive health services in Wichita, and at the time Defendant wrote and mailed the threat, she had been providing abortions elsewhere in Kansas.

The plain language of the statute, its legislative history, and simple logic all reveal the fallacy in Defendant's reasoning; a fallacy this Court already recognized during the preliminary injunction hearing. Defendant's Motion to Dismiss or for Summary Judgment must, therefore, be denied.

DISCUSSION

I. Defendant has Already Moved to Dismiss and has Filed an Answer, and is thus Procedurally Barred from Filing a Second Motion to Dismiss under Fed. R. Civ. P. 12(b)(6).

At this stage in the proceedings, Defendant is barred from trying again to dismiss this case pursuant to Federal Rule of Civil Procedure Rule 12(b)(6). Rule 12(b) makes clear that a motion asserting a failure to state a claim upon which relief can be granted -- as Defendant attempts to do now -- "must be made before pleading if a responsive pleading is allowed." Defendant filed responsive pleadings over a year ago: an answer on May 16, 2011, Dkt. 20, and an amended answer on May 20, 2011. Dkt. 23. Her current motion is therefore barred.

Furthermore, under Federal Rule of Civil Procedure 12(g)(2), "a party that makes a motion under [Rule 12] must not make another motion under this rule raising a defense or objection that was available to the party but omitted from its earlier motion." Defendant filed a motion to dismiss on April 19, 2011, Dkt. 14, which this Court denied on December 21, 2011. Dkt. 30. Because Defendant did not raise the current defense in her earlier Motion to Dismiss, and has already filed her responsive pleading, this instant Motion to Dismiss should not be considered.

Even if Defendant were not procedurally barred from filing this Motion to Dismiss, the motion should be denied because, as discussed more fully below, the United States has adequately pled that Defendant mailed a threat of force to Dr. Means to intentionally injure, intimidate or interfere with her because she is or has been, or in order to intimidate Dr. Means from, providing reproductive health services**.** 18 U.S.C. § 248(a)(1).

II. Defendant is not Entitled to Judgment as a Matter of Law.

Summary judgment can be granted only "if there is no genuine issue as to any material fact and the movant is entitled to judgment as a matter of law." Doe v. City of Albuquerque, 667 F.3d 1111, 1122 (10th Cir. 2012) (citation omitted). "Judgment as a matter of law is appropriate when the nonmoving party has failed to make a sufficient showing on an essential element of his or her case with respect to which he or she has the burden of proof." Id. In reviewing a motion for summary judgment, the court views the evidence and draws reasonable inferences in the light most favorable to the non-moving party. Thomas v. Nat'l Ass'n of Letter Carriers, 225 F.3d 1149, 1152 n.1, 1154 (10th Cir. 2000) (citation omitted). Here, Defendant has not established that the United States has failed to make a showing on an essential element of its FACE case, and therefore is not entitled to judgment as a matter of law.

RESPONSE TO DEFENDANT'S STATEMENT OF FACTS

The United States responds as follows to the "Statement of Uncontroverted Facts" submitted by Defendant:[1]

1. The United States does not dispute that Dr. Mila Means testified as such; however, Dr. Means' answer implies that she was in fact providing abortions in a setting other than her private practice.
2. Undisputed.
3. The United States does not dispute that Dr. Means testified as such; however, Dr. Means' answer implies that she was providing abortion services to patients in settings other than her office at the time Angel Dillard wrote the letter.
4. The United States does not dispute that Dr. Means testified as such.
5. Undisputed.
6. The United States does not dispute that Dr. Means testified as such. To the extent Defendant suggests that Angel Dillard's conduct was not motivated by what Dr. Means was doing in training, the United States disputes that suggestion, as Dr. Means specifically testified, "I can't read between the lines and know how offended she may be about the abortions I do as part of my training." Tr. Hr'g Mot. Prelim. Inj. 59:9-11, Apr. 20, 2011.
7. The United States does not dispute that Dr. Means testified as such. To the extent Defendant suggests that Angel Dillard's conduct was not motivated by what Dr.

[1] To the extent that any of the facts alleged by Defendant are not disputed by the United States in this response, such are only undisputed for purposes of Defendant's motion for summary judgment and should not be deemed to be undisputed for any other purpose.

Means was doing in training, the United States disputes that suggestion, as Dr. Means specifically testified, "I can't read between the lines and know how offended she may be about the abortions I do as part of my training." Tr. 59:9-11.

8. The United States does not dispute that Dr. Means testified as such. To the extent Defendant suggests that the letter was solely about future conduct, the United States disputes that suggestion, as Dr. Means specifically testified, "I can't read between the lines and know how offended she may be about the abortions I do as part of my training." Tr. 59:9-11.
9. Undisputed.
10. Undisputed.
11. The United States does not dispute that Dr. Means testified as such. To the extent Defendant suggests that her letter concerned future conduct, the United States disputes that suggestion, as Dr. Means specifically testified, "I can't read between the lines and know how offended she may be about the abortions I do as part of my training." Tr. 59:9-11.
12. Undisputed.
13. The United States does not dispute that Dr. Means testified as such. To the extent Defendant suggests that Dr. Means was not providing abortion services at the time she received the letter, the United States disputes that suggestion, as the term "abortion services" is vague and it is therefore not clear what Dr. Means understood this term to mean. In fact, at the time she received the letter, Dr. Means was providing reproductive health services, Tr. 17:12-15, which may include "abortion services."

14. The United States does not dispute that Dr. Means testified as such. To the extent Defendant suggests that Dr. Means was not providing abortion services at the time she received the letter, the United States disputes that suggestion, as the term "abortion services" is vague and it is therefore not clear what Dr. Means understood this term to mean. In fact, at the time she received the letter, Dr. Means was providing reproductive health services, Tr. 17:12-15, which may include "abortion services."

15. The United States does not dispute that Dr. Means testified as such; however, her complete answer is, "No, but the letter threatens as intending, it says nothing about this will only happen if you do abortions." Tr. 62:22-24. To the extent Defendant suggests that Dr. Means was not providing abortion services at the time she received the letter, the United States disputes that suggestion, as the term "abortion services" is vague and it is therefore not clear what Dr. Means understood this term to mean. In fact, at the time she received the letter, Dr. Means was providing reproductive health services, Tr. 17:12-15, which may include "abortion services."

16. The United States does not dispute that Dr. Means testified as such. To the extent Defendant suggests that Dr. Means was not providing abortion services at the time she received the letter, the United States disputes that suggestion, as the term "abortion services" is vague and it is therefore not clear what Dr. Means understood this term to mean. In fact, at the time she received the letter, Dr. Means was providing reproductive health services, Tr. 17:12-15, which may include "abortion services."

17. The United States does not dispute that Dr. Means testified as such. To the extent Defendant suggests that Dr. Means was not in fact qualified to provide abortions at the time she received the letter, the United States disputes that suggestion, as Dr. Means' testimony does not establish that fact.

18. The United States does not dispute that Dr. Means testified as such. To the extent Defendant suggests that Dr. Means was not in fact qualified to provide abortions at the time she received the letter, the United States disputes that suggestion, as Dr. Means' testimony does not establish that fact.

19. The United States does not dispute that Dr. Means testified as such. To the extent Defendant suggests that Dr. Means was not providing abortion services at the time she received the letter, the United States disputes that suggestion, as the term "abortion services" is vague and it is therefore not clear what Dr. Means understood this term to mean. In fact, at the time she received the letter, Dr. Means was providing reproductive health services, Tr. 17:12-15, which may include "abortion services."

20. The United States does not dispute that Dr. Means testified as such. To the extent Defendant suggests that Dr. Means was not providing abortion services at the time she received the letter, the United States disputes that suggestion, as the term "abortion services" is vague and it is therefore not clear what Dr. Means understood this term to mean. In fact, at the time she received the letter, Dr. Means was providing reproductive health services, Tr. 17:12-15, which may include "abortion services."

21. Undisputed.

22. Undisputed.

23. Undisputed that Dr. Means has no personal knowledge of Defendant's current or ongoing plans to violate FACE.

24. Undisputed.

25. Undisputed that Dr. Means has no personal knowledge of whether Defendant has visited Dr. Means' house, office, or car, and that Dr. Means did not believe that she had ever met Defendant.

26. The United States does not dispute that Dr. Means testified as such. To the extent Defendant suggests that her letter addressed only what other people might do, the United States disputes that suggestion, as Dr. Means' testimony speaks only to her understanding of one possible interpretation of the letter.

27. The United States does not dispute that Dr. Means testified as such. To the extent Defendant suggests that she did not in fact make threats of violence, the United States disputes that suggestion, as Dr. Means' testimony about the literal contents of the letter cannot establish such legal conclusion.

28. The United States does not dispute that Dr. Means testified as such. To the extent Defendant suggests that she did not in fact make threats of violence, the United States disputes that suggestion, as Dr. Means' testimony clearly establishes otherwise, by saying "She made reference that she was part of a 'they' group and this 'we' group, so I don't know what her intentions in her brain were." Tr. 45:15-17.

29. The United States does not dispute that Dr. Means testified as such concerning Defendant's past plans to do violence.

30. Undisputed.

31. The United States does not dispute that Defendant has testified as such. To the extent Defendant suggests that she in fact did not write her letter "because Dr. Means was, is, or had been providing abortion services or toehr reporductive [sic] health services," the United States disputes that suggestion, and submits that such self-serving, conclusory assertions should not be considered in the context of a motion for summary judgment, especially where, as here, the United States has not had the opportunity to depose or otherwise cross-examine Defendant.

32. The United States does not dispute that Defendant has testified as such. To the extent Defendant suggests that she was in fact motivated to write her letter "because I had heard that Dr. Means was contemplating opening an abortion facility at some unknown time in the future," the United States submits that Defendant was motivated by Dr. Means' present and future conduct, and further submits that such self-serving, conclusory assertions should not be considered in the context of a motion for summary judgment, especially where, as here, the United States has not had the opportunity to depose or otherwise cross-examine Defendant.

PLAINTIFF'S STATEMENT OF SUPPLEMENTAL UNCONTROVERTED FACTS

1. At the time Dr. Means received Defendant's letter, Dr. Means was providing reproductive health services. Tr. 17:12-15. (Q: "Dr. Means, do you currently provide reproductive health services in your practice?" A: "Yes, I take care of women's needs for birth control, prepregnancy consultations.").

2. At the time Dr. Means received Defendant's letter, Dr. Means was performing abortions. Tr. 57:12-20 (Q: "[W]hen Angel Dillard wrote you the letter you didn't

have any patients that you were providing abortion services to, did you?" A: "Well, in training, with someone over your shoulder you actually do perform abortions."); Id. 59:9-11 ("I can't read between the lines and know how offended she may be about the abortions I do as part of my training."); Id. 60:16-19 ("Well, as a part of my training I am doing [abortions] somewhere else."); Id. 73:6-13 (discussing abortions performed by Dr. Means as part of her training).

3. Defendant sent her letter to Dr. Means at least in part to prevent Dr. Means from providing abortions. Letter, Dkt. 1-1.; Aff. Angel Dillard, Dkt. 57 at ¶ 2.

A. Defendant Admits that she Wrote her Letter to Dr. Means based on Defendant's Belief that Dr. Means Intended to Provide Abortions, and therefore her Summary Judgment Motion Must be Denied as a Matter of Law.

Defendant has not established that the United States has failed to make a showing on an essential element of its FACE case, and therefore is not entitled to judgment as a matter of law. This Court has already ruled that whether Defendant's letter constitutes a "true threat" is a question of fact for the jury. Dkt. 30. Defendant's sole argument now appears to be that Defendant cannot be liable for threatening a doctor who plans to provide abortions in a certain city but lacks a facility to do so. The law does not support Defendant's position.

FACE's plain language prohibits Defendant's conduct: sending a letter threatening force to Dr. Means in order to intimidate her from providing future abortions. The legislative history further demonstrates that FACE was intended to cover those who, like Dr. Means, are planning on or contemplating providing reproductive health services in the future. With the plain language, legislative history, and simple logic all dictating the same result, it is not surprising that this Court has already rejected Defendant's argument that FACE cannot apply simply because Dr. Means was not performing abortions in a facility in Wichita.

1. The plain text of the statute reveals that FACE covers those intending to perform abortion services in the future, and no case has held otherwise.

The United States brought this action under 18 U.S.C. § 248(a)(1), which prohibits: 1) any threat of force; that 2) intentionally injures, intimidates or interferes with any person, or attempts to do the same; 3) because that person "is or has been, **or in order to intimidate such person from obtaining or providing** reproductive health services." The plain language of the statute clearly covers defendants who are motivated by someone's perceived past, current, or future behavior concerning reproductive health services.

Defendant erroneously focuses exclusively on Section (c)(1)(A) of the FACE statute – giving any aggrieved person a right of action – instead of focusing on Section (c)(2) – giving the Attorney General of the United States authority to commence a civil action. Section (c)(1) limits those who may commence civil actions as "aggrieved" persons to those "involved in providing or seeking to provide, or obtaining or seeking to obtain, services in a facility that provides reproductive health services." By contrast, Section (c)(2) allows the Attorney General to commence a civil action if he "has reasonable cause to believe that **any person or group of persons** is being, has been, or may be injured by conduct constituting a violation." (emphasis added). The language referring to "a facility" and "aggrieved" persons and defining such persons is nowhere to be found in Section (c)(2), the Section under which this lawsuit was commenced. Section (c)(2) clearly and purposefully allows the Attorney General to commence civil actions to protect a wide range of individuals, even if those individuals might not necessarily be able to bring suit themselves under (c)(1). Whether any section of FACE may or may not give a private litigant a cause of action for future conduct is irrelevant. As this Court recognized in its ruling denying Defendant's Motion to Dismiss, Section (c)(2) clearly authorizes

the United States to do so. Dkt. 30 at 3. Section (c)(1) simply does not apply at all to the United States' action.

Even the cases Defendant herself cites do not, and cannot, support her position. In Sharpe v. Conole, the Second Circuit recognized that, "by its very terms, the FACE Act requires that a defendant act **because** the interfered-with person was seeking, obtaining, or providing, or had obtained or provided, **or might obtain or provide**, reproductive health services." Sharpe, 386 F.3d 482, 484 (2d Cir. 2004) (second emphasis added); accord, Lotierzo v. A Woman's World Med. Ctr., Inc., 278 F.3d 1180 (11th Cir. 2002) (explaining the motive element as requiring the defendant act "because that person has sought or provided, or is seeking or providing, **or will seek or provide,** reproductive health services.") (emphasis added); Raney v. Aware Woman Ctr. for Choice, Inc., 224 F.3d 1266, 1268 (11th Cir. 2000) (quoting FACE as applying to persons "providing or **seeking to provide** . . . services.") (emphasis added). "Might obtain or provide," "will seek or provide," and "seeking to provide," of course, all suggest the possibility that the victim will provide reproductive health services in the future -- the exact situation encountered here.

2. Congress intended FACE to cover future providers of reproductive health services.

As demonstrated above, the plain language of the statute is clear. The legislative history also reinforces the fact that the legislature intended FACE to cover future providers of reproductive health services.

The House of Representatives' Judiciary Committee Report could not be more clear: "Subsection 248(a)(1) would cover acts of force, threats of force, and physical obstruction that intentionally injure, intimidate, or interfere with any person, but only if these actions are undertaken because the victim or others are obtaining or providing reproductive health services.

In accordance with the rules of statutory construction set out in title 1 of the U.S. Code, Section 1, the concept of 'obtaining or providing' is meant to include persons who have obtained or provided these services, **and persons who intend to obtain or provide these services**." H.R. Rep. No. 103-306, at 11 (1993) (emphasis added). Furthermore, the background provided in that Report explains, "The facts are that only 17 percent of U.S. counties have an abortion provider and that clinic owners face a shortage of doctors willing to perform abortions. These facts are at least partially attributable to the violence and intimidation described in this report. Doctors understandably are leaving the field, and new graduates have little desire to enter the field even as part of a wider obstetrics/gynecology practice." Id. at 8. Obviously, then, the statute was aimed not only at current abortion providers, but also at potential future ones, like the new graduates mentioned who were intimidated from providing abortion services.

Similarly, the Senate's Committee on Labor and Human Resources Report states, "The availability of abortion services is already very limited in many parts of the United States. At least one study has concluded that anti-abortion violence and intimidation have contributed to this shortage. It is evident to the Committee, therefore, that continued anti-abortion violence and intimidation threaten to exacerbate the shortage of providers who are qualified and willing to perform safe and legal abortions." S. Rep. No. 103-117, at 17 (1993). Set against this backdrop, there can be no doubt that Congress intended FACE to apply to future abortion providers as well as current ones.

3. Defendant's reading of the statute would lead to an absurd result.

The text of FACE and its legislative history are clear enough. But there is yet another reason why FACE must cover potential future abortion providers like Dr. Means: if it did not, individuals like Defendant could make threats against them with impunity up until the moment

they start providing services. This cannot possibly be what the statute intended, for it would gut FACE of one of its central purposes. Logic dictates, therefore, that FACE must apply to actions designed to intimidate someone who has announced an intention to perform abortions, even if that intention has not yet been realized.

4. This Court has already ruled that FACE covers future providers of abortion services.

Defendant already attempted, unsuccessfully, to make this very same argument during the hearing on the United States' Motion for Preliminary Injunction. There, defense counsel spent much time and effort establishing that Dr. Means was not yet performing abortions at her office, and was hoping to find a facility in which to perform abortions, but might not be successful in her pursuit. In response to such questioning, this Court stated,

> [A]s I am reading the statute, this is being prosecuted -- by that I mean the complaint filed under 13 -- excuse me 18 U.S.C. Section 248 (a)(1). It has nothing to do with the facility itself but whoever by force or threat of force or by physical obstruction intentionally injures, intimidates, or interferes with, or attempts to injure, intimidate, or interfere with any person because of that person -- because that person is or has been, or in order to intimidate such person or any other person or any class of persons from obtaining or providing reproductive health services. That statute, as I read it, does not require that somebody in fact has been providing those services, or that they have a facility for doing it, Mr. McKinney, so all of the business about whether she had a place, whether she was looking for it, is totally irrelevant to the issue that I am looking at here. What this really comes down to, from my perspective, is simply, is this a true threat or not. I mean, that's the real number of the whole issue, so all this other stuff is nothing more than collateral kind of extraneous stuff that misses the true target that we're looking at here in terms of a preliminary injunction in this case.

Tr. 116:9-117:8. As such, Defendant is well aware that the issue she raises has already been decided by this Court, which read the statute in the only way it can reasonably be read -- as including future providers within its reach. Therefore, this issue need not be revisited. See Been

v. O.K. Indus., Inc., 495 F.3d 1217, 1224 (10th Cir. 2007) ("[P]rior judicial decisions on rules of law govern the same issues in subsequent phases of the same case").

B. Dr. Means is Covered Even by Defendant's Flawed Reading of FACE, because Dr. Means was Providing Reproductive Health Services in Wichita and Abortions elsewhere in Kansas when Defendant issued her Threat.

FACE applies to interference with all reproductive health services – not merely abortions, which are a small subset of reproductive health services. FACE defines "reproductive health services" as including "medical, surgical, counseling or referral services relating to the human reproductive system, including services relating to pregnancy or the termination of pregnancy." 18 U.S.C. § 248(e)(5). Dr. Means testified that she was providing such reproductive health services when she received the letter, including "women's needs for birth control, prepregnancy consultations." Tr. 17:12-15. Even if FACE only applied to actual abortions, the statute would still protect Dr. Means, as she testified that she was providing actual abortions outside of Wichita as part of her training. Tr. 73:6-13.

CONCLUSION

Defendant improperly filed the instant Motion to Dismiss, for she is procedurally barred from doing so. Nor is she entitled to judgment as a matter of law. For the foregoing reasons, this Court should deny Defendant's Motion to Dismiss or Motion for Summary Judgment.

Dated : May 23, 2012

Respectfully submitted,

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

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

CERTIFICATE OF SERVICE

I hereby certify that on May 23, 2012, 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.

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