IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 11-CV-01430-PAB-MEH

UNITED STATES OF AMERICA,

Plaintiff,

v.

KENNETH SCOTT and
JO ANN SCOTT,

Defendants.

UNITED STATES' REPLY TO DEFENDANT KENNETH SCOTT'S OPPOSITION TO THE UNITED STATES' MOTION FOR PRELIMINARY INJUNCTION

The United States of America (the "United States") hereby replies to Defendant Kenneth Scott's Opposition to the United States' Motion for Preliminary Injunction ("Def. Opp.") (Dkt. No. 79). As discussed below and in the United States' Memorandum in Support of its Motion for Preliminary Injunction (Dkt. No. 4), the United States has established the necessity for a Preliminary Injunction against Defendant Kenneth Scott ("Defendant").

I. THE UNITED STATES' DECLARATIONS ARE VALID AND SHOULD NOT BE STRICKEN.

Defendant improperly seeks, "as an initial matter," to strike the Declaration of Danny Cram, which was filed in support of the United States' Memorandum in Support of its Motion for Preliminary Injunction ("United States' Memo") (Dkt. No. 4), by claiming that Mr. Cram's declaration is "not based on personal knowledge." (Def. Opp. 2.) Defendant also seeks to strike the declaration of FBI Agent "Jenessa [sic] Boteler," alleging that it violates Fed. R. Evid.

404(b). (Def. Opp. 14.) However, D.Colo. L Civ R 7.1(C) specifically prohibits such attempts to incorporate or include such a motion to strike in Defendant's response brief.

In addition to Defendant's procedural errors, Defendant is substantively incorrect about the admissibility and validity of the declarations submitted in support of the United States' Motion. Defendant misapprehends the admissibility of a declaration submitted in support of a Motion for Preliminary Injunction, for "[a]ffidavits usually are accepted on a preliminary injunction motion without regard to the strict standards of Rule 56(e)." 11A Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure: Civil § 2949 (2d ed. 1990); see also, Heideman v. S. Salt Lake City, 348 F.3d 1182, 1188 (10th Cir. 2003) (noting Federal Rules of Evidence do not apply to preliminary injunctions) (citations omitted).

Moreover, even if the standards for preliminary injunction declarations were not relaxed, the declarations in support of the United States' Motion would still be proper, as they are based on admissible evidence. Mr. Cram has worked at Planned Parenthood of the Rocky Mountains ("PPRM") as a Security Supervisor for over six years and, as a result, he is familiar both with Defendant and his daily activities at PPRM, and with PPRM's video system. He personally reviewed each video, and in some instances was physically present at the PPRM driveway during the incidents at issue. Mr. Cram's declaration is based upon that personal knowledge, and he is competent to testify about the matters in his declaration.

Similarly, Agent Boteler's declaration is based on the numerous occasions she has responded to PPRM regarding Defendant's activities, and upon her personal review of Defendant's criminal history. Contrary to Defendant's argument, Defendant's criminal history is admissible here as proof of motive, intent, or absence of mistake or accident, among other things. Fed. R. Evid. 404(b); see also, Huddleston v. United States, 485 U.S. 681, 685 (1998);

Sanjuan v. IPB, Inc., 160 F.3d 1291, 1297 (10th Cir. 1998) (prior acts evidence admissible in civil trial to show motive or intent).

II. THE UNITED STATES' MOTION FOR PRELIMINARY INJUNCTION IS NOT SUBJECT TO A HEIGHTENED STANDARD.

The United States relies upon the proper standard for its preliminary injunction motion, and should not be subject to a heightened standard as defendant urges. Defendant misunderstands the nature of the preliminary injunction the United States is seeking by claiming that it would "alter the status quo" and be "mandatory." (Def. Opp. 6.) Defendant is incorrect on both points.

Defendant erroneously believes his ongoing violations of FACE in the PPRM driveway represent the unalterable status quo. This argument is not only legally deficient, but also defies common sense and the very nature of a motion for preliminary injunction. As the exact case Defendant cites to makes clear, the status quo is determined by the "last peaceable uncontested status existing between the parties *before* the dispute developed." Schrier v. Univ. of Colo., 427 F.3d 1253, 1260 (10th Cir. 2005) (emphasis added) (citations omitted). Defendant appears to argue that because an injunction had not yet been sought against him, he was not prohibited from engaging in his activity in the PPRM driveway. (Def. Opp. 6.) Contrary to Defendant's argument, though, Defendant was and is prohibited from interfering, by physical obstruction, with individuals seeking or providing reproductive health services. Defendant is required to comply with federal law, whether or not enforcement action is taken against him. The "last peaceable uncontested status," therefore, was when Defendant engaged in his activities, without interfering with access to PPRM or otherwise violating FACE.

Moreover, contrary to Defendant's assertion, the United States' request for a preliminary injunction is not mandatory. It is prohibitory. Defendant appears to assert that because he might

not "abide" by an injunction, the Court would have to supervise his compliance with the injunction, and, therefore, the injunction sought by the United States is mandatory. This is not a correct interpretation of the "mandatory injunction" doctrine. The injunctive relief sought by the United States would not affirmatively require the Defendant to take affirmative steps, as the term "mandatory" contemplates. For example, the Tenth Circuit has found mandatory injunctions to include issuance of 1.5 million credit cards or ordering transfer of record title. See SCFC ILC Inc., v. Visa USA, Inc., 936 F.2d 1096 (10th Cir. 1991) and RoDa Drilling Co. v. Siegal, 552 F.3d 1203 (10th Cir. 2009), respectively. The United States requests that Defendant be ordered to refrain from specific behavior – coming within 25 feet of the PPRM driveway. Thus, the injunction would be prohibitory. Defendant's implicit assertion that he will not abide by any such injunction does not convert the injunction into a mandatory injunction.

Notably, the United States Supreme Court has upheld preliminary injunctions, without requiring a heightened standard, in cases involving buffer zones at reproductive health clinics "as a way of ensuring access to the clinic." Madsen v. Women's Health Ctr., Inc., 512 U.S. 753, 768 (1994). In Schenck v. Pro-Choice Network of Western New York, 519 U.S. 357 (1997), for example, the Supreme Court upheld a preliminary injunction imposing a 15-foot buffer zone around the streets, sidewalks, and driveways surrounding a number of reproductive health care providers throughout upstate New York. . Similarly, in Madsen, the Supreme Court upheld a preliminary injunction imposing a 36-foot buffer zone around the street, sidewalk, and driveway surrounding a reproductive health center in Florida. 512 U.S. 753. While these Supreme Court cases predated the enactment of FACE, they involved preliminary injunctions issued under the traditional standard, as opposed to a heightened standard, for buffer zones around access areas to reproductive health care facilities.

III. THE UNITED STATES HAS ESTABLISHED THE NEED FOR A PRELIMINARY INJUNCTION AGAINST DEFENDANT.

A. The United States Has Demonstrated a Likelihood of Success on the Merits.

Without restating the uncontroverted arguments outlined in the United States' Memo, the United States' evidence includes ten separate instances, in which Defendant intentionally obstructs vehicles in the PPRM driveway, by either directly walking into the PPRM driveway in the path of oncoming vehicles and/or using those vehicles required to stop in the middle of the PPRM driveway to further obstruct additional vehicles. He undertook his actions intentionally to interfere with or intimidate, or attempt to do the same, individuals because they were seeking or providing reproductive health services at PPRM. Defendant did not accidentally fall or trip into the middle of the PPRM driveway, nor did he walk into the PPRM driveway on his way to the grocery store. Indeed, there is a reason why he conducts his activities outside of PPRM instead of a grocery store, for example: Defendant's motive is to interfere with or intimidate women seeking reproductive health care at PPRM. Moreover, Defendant conducts his activities in the middle of the PPRM driveway because that is the only way he can force individuals to listen to him.

Granting the United States' injunction and requiring Defendant to stay out of the PPRM driveway would not violate Defendant's First Amendment rights. Courts have repeatedly and conclusively held that the First Amendment does not exempt unlawful activity – physical obstruction -- just because it is conducted in conjunction with speech. See Hill v. Colorado, 530 U.S. 703, 717 (2000); United States v. Weslin, 156 F.3d 292, 297-98 (2d Cir, 1998); Terry v. Reno, 101 F.3d 1412, 1418-19 (D.C. Cir. 1996).

Defendant erroneously asserts that because he is not engaged in "blockades or in violent conduct towards patients or employees of PPRM," he is not engaged in physical obstruction. (Def. Opp. 10.) However, FACE applies to a wider range of actions than blockades or violence. As outlined in the United States' Memo and the cases cited therein, physical obstruction is defined in the FACE statute as "rendering impassable ingress to or egress from a facility that provides reproductive health services . . . or rendering passage to or from such a facility . . . unreasonably difficult or hazardous." 18 U.S.C. § 248(e). Each of Defendant's ten separate incidents of physical obstruction rendered passage to and from PPRM impassable, unreasonably difficult, or hazardous. Therefore, Defendant indeed engaged in physical obstruction, as defined under FACE. Id.; see also Schenck, 519 U.S. at 380 (upholding preliminary injunction imposing fixed buffer zone because record showed protestors purposefully or effectively blocked people from driving up to and away from clinic entrances and from driving in and out of clinic parking lots.).

B. The United States Has Established Irreparable Harm.

The United States has established that, if not enjoined, Defendant's conduct in the PPRM driveway will cause irreparable harm. Defendant interferes with both patients and their companions, and with PPRM employees. The Supreme Court recognized in Schenck that women who are "denied unimpeded access [to the clinics] cannot be compensated merely by money damages." Schenck, 519 U.S. at 367. See also Hill, 530 U.S. at 715 (recognizing state interest in unimpeded and safe access to medical health care facilities). In addition, as the Supreme Court noted in Hill, employees' right to free passage in going to and from work applies equally -- or perhaps with greater force -- to access to a medical facility. Id. at 717. Further, "[i]n going to and from work, men have a right to as free a passage without obstruction as the

streets afford, consistent with the right of others to enjoy the same privilege." Id. Individuals seeking or providing reproductive health care at PPRM are entitled to unobstructed access, and only injunctive relief can assure such access. Interference with such access cannot be compensated through money damages at a later date.

Defendant argues that the United States' decision to file its Complaint and Motion for Preliminary Injunction six months after the occurrence of the last incident out of a pattern of ten incidents over the course of sixteen months indicates the absence of irreparable harm. (Def. Opp. 12-13.) On the contrary, Defendant's repeated FACE violations over the course of sixteen months support the United States' Motion.[1] The United States engaged in a thorough investigation and review of the evidence before it filed its Complaint and Motion for Preliminary Injunction against Defendant.[2] The frequency and regularity of Defendant's conduct further justifies the necessity for a preliminary injunction against Defendant.

[1] It should be noted that, over the course of the United States' investigation, Defendant was cited by the City and County of Denver for his activities at PPRM for violation of C.R.S. § 54-542, which prohibits pedestrians from crossing a roadway except in crosswalks and without yielding the right of way to lawfully present vehicles. Defendant was found guilty of this violation and ordered to pay a fine. (Attached as Exhibit A.) Accordingly, due consideration was given to the available local and state remedies and enforcement authority against Defendant.

[2] See RoDaDrilling Co. v. Siegal, 552 F.3d 1203, 1211 (10th Cir. 2009) (need for further documentation of harm is relevant irreparable harm determination) (internal citations and footnote omitted); BP Chemicals Ltd. V. Formosa Chemical & Fibre Corp., 229 F.3d 254, 264 (3d Cir. 2000) (internal citations omitted); Tom Doherty Assocs., Inc. v. Saban Entm't, Inc., 60 F.3d 27, 39 (2d Cir. 1995) (internal citations omitted); In re Indep. Serv. Orgs. Antitrust Litig. v. Xerox, 910 F. Supp. 1537, 1545 (D. Kan. 1995) (several year delay caused by plaintiff's good faith efforts to investigate the violation survives presumption that there is no irreparable harm).

C. The Balance of Equities Weighs Strongly in Favor of the Injunction.

Contrary to Defendant's argument, the United States does not seek to infringe upon any of his First Amendment rights to free expression. (Def. Opp. 4.) The United States does not seek to prohibit or limit Defendant's right to speech. Defendant mistakenly believes that he is entitled to conduct his free speech activity in the middle of the PPRM driveway, in the path of individuals seeking or providing reproductive health services. Defendant also blames PPRM for attempting to provide its patients and staff unobstructed access to PPRM by accusing PPRM of "configur[ing] its property in such a manner as to make it difficult for protestors to interact with patients or providers at any location other than the driveway." (Def. Opp. 4.) Thus, Defendant admits that he enters the PPRM driveway because his access to patients and employees of PPRM is limited. The United States' proposed injunction would not place any restrictions on -- and clearly would not prohibit -- a particular viewpoint or any subject matter that may be discussed by a speaker. See, e.g., Hill 530 U.S. at 723. The United States simply asks that Defendant be preliminarily enjoined from expressing his viewpoint while standing within 25 feet of the PPRM driveway, because Defendant's activity renders passage to or from PPRM unreasonably difficult or hazardous. As in Schenck, 519 U.S. at 380, and Madsen, 512 U.S. at 768, Defendant has available alternative channels of communication, and a preliminary injunction is necessary because of his prior unlawful conduct, not because of the content of his expression. Defendant's purported need to exercise his "speech" in the middle of the driveway is for the very purpose of hindering and interfering with individuals' access to PPRM.

D. The Injunctive Relief Requested Against the Defendant is in the Public Interest.

The Supreme Court has recognized the significant governmental interests at issue in this case: "public safety and order, promoting the free flow of traffic on streets and sidewalks,

protecting property rights, and protecting a woman's freedom to seek pregnancy-related services." Schenck, 519 U.S. at 376. Indeed, Defendant's repeated actions in the middle of the PPRM driveway result in a "dangerous situation created by the interaction between cars and protestors." Id. at 376. Moreover, "[t]hese buffer zones are necessary to ensure that people and vehicles trying to enter or exit the clinic property or clinic parking lots can do so." Id. at 380. Defendant fails to address any of the cases the United States cites providing support for the significant government interest in allowing unfettered access to health care facilities. (United States' Memo. 9.) Instead, Defendant continues to assert that his conduct is expressive conduct and, thus, entitled to greater weight. Regardless of the number of times and ways that Defendant attempts to transform this matter into one of First Amendment speech, the fact remains that Defendant's conduct falls outside of protected First Amendment speech. See, e.g., United States v. Hart, 212 F.3d 1067, 1073 (8th Cir. 2000) (finding FACE survives First Amendment challenge because it is "narrowly tailored"); Planned Parenthood Assoc. of Se. Pa., Inc. v. Walton, 949 F. Supp. 290, 292 (E.D. Pa. 1996) (FACE is not overbroad because it "prohibits only force, the threat of force, and physical obstruction").

IV. DEFENDANT'S REMAINING ARGUMENTS FAIL.

A. The PPRM Driveway is an Entrance to a Reproductive Health Facility.

Defendant claims that the PPRM driveway and parking lot are not part of a "facility," as contemplated under FACE. (Def. Opp. 14-15.) As alleged in the United States' Complaint, Defendant's ten incidents of physical obstruction occurred in the PPRM driveway. (Dkt. No. 1.) In addition, the PPRM facility consists of a main building and a parking lot for staff and patients, and these are enclosed by a fence. (Compl. ¶ 12.) The PPRM facility is the only building within the enclosure. (Compl. ¶ 12.) The primary means for entry and exit of vehicles and pedestrians

to and from PPRM is through the driveway to the PPRM parking lot, which opens onto Pontiac Street. (Compl. ¶ 12.) Accordingly, Defendant's physical obstructions in the PPRM driveway interfere with or intimidate individuals who are seeking or providing reproductive health services at PPRM. Defendant not only fails to provide any legal or statutory support for this argument, he does not address the cases the United States cites which conclude that facility driveways and parking lots are included under FACE's protections.

B. C.R.S. §18-19-122(3) et seq. is Irrelevant to the United States' FACE Claim.

Although entirely unclear, Defendant's final argument appears to assert that the United States is prohibited from instituting a cause of action against Defendant under a federal statute because a state statute is unavailable to the United States. (Def. Opp. 15.) Whether or not Defendant's activity is prohibited under C.R.S. § 18-19-122(3) et seq., the United States is entitled to seek relief under FACE. Defendant provides no factual, legal, or logical support for the proposition that the United States is barred from enforcing a federal statute when a state statute providing "adequate remedies" exists. Under FACE, the United States, through the Attorney General, may commence a civil action in any appropriate United States District Court. 18 U.S.C. § 248(c)(2).

V. CONCLUSION

Based on the foregoing, the United States' Motion for Preliminary Injunction should be granted.

Respectfully submitted,

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