

**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.

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**PLAINTIFF UNITED STATES' MOTION IN LIMINE FOR ADVERSE INFERENCES  
AGAINST DEFENDANT KENNETH SCOTT**

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Plaintiff, the United States of America (the "United States"), through its undersigned attorneys, submits this motion in limine for adverse inferences against Defendant Kenneth Scott ("Defendant") at the upcoming hearing on the United States' Motion for Preliminary Injunction, based on Defendant's invocation of his Fifth Amendment right against self-incrimination during his deposition.

**CERTIFICATION PURSUANT TO D.C.COLO.LCivR 7.1.A**

The United States certifies that it has in good faith conferred with counsel for Defendant, who objects to this Motion.

**MOTION FOR ADVERSE INFERENCES**

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, on numerous occasions,

has, through physical obstruction, intimidated and/or interfered, or attempted to do the same, with individuals providing or obtaining reproductive health services at the Planned Parenthood of the Rocky Mountains (“PPRM”). A hearing on the United States’ Motion for Preliminary Injunction will take place on January 26, 2012. See Dkt. 105.

The United States took Defendant’s deposition on December 13, 2011. At that deposition, Defendant refused to answer any questions other than general background questions related to his education and employment, invoking his Fifth Amendment privilege against self-incrimination in response to questions on any other topics. See Exh. 1, Deposition of Kenneth Scott (“Scott Dep.”), 6:10-20:1; 27:2-30:2; 33:16-40:5; 44:18-73:7, December 13, 2011.<sup>1</sup> Specifically, and most relevant to the instant motion, Defendant invoked the Fifth Amendment rather than answer any questions about the incidents at issue in this case, including Defendant’s presence at PPRM on those occasions, his actions on those occasions, and his motive and intent on those occasions. See Scott Dep. 61:6-68:18. Defendant also invoked the Fifth Amendment

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<sup>1</sup> Notably, Defendant—or, in many cases, his counsel, despite the fact that the Fifth Amendment privilege is a personal privilege—invoked the Fifth Amendment in response to numerous questions that could not possibly have prompted an answer that could lead to self-incrimination. See, e.g., Scott Dep. 6:2-9:4 (Defendant invokes Fifth Amendment when asked to describe a lawsuit he had previously filed); Scott Dep. 10:17-20:1 (Defendant invokes Fifth Amendment when asked if he had a criminal record); Scott Dep. 54:25-55:11 (Defendant invokes Fifth Amendment when asked if there are documents he intends to rely on as a defense in this case that he has not provided to the United States). Defendant also invoked the Fifth Amendment in response to questions about certain topics after Defendant himself had opened the door to discussion of those topics. See, e.g., Scott Dep. 26:15-30:2 (after Defendant mentions his missionary work, counsel for the United States asks where Defendant performed that work, and defense counsel objects, citing the Fifth Amendment); Scott. Dep. 44:3-46:11 (after Defendant discusses a girlfriend’s abortion, counsel for the United States asks where that abortion was performed, and defense counsel objects, again citing the Fifth Amendment). These many improper invocations of the Fifth Amendment are not the subject of this motion; however, the United States reserves its right to move for sanctions at a later date based on this conduct.

when asked if he currently physically obstructs people as they try to enter or leave PPRM to obtain or provide reproductive health care. See Scott Dep. 68:14-18.

Significantly, Defendant continued to assert his Fifth Amendment privilege even after the deposition was adjourned briefly so that counsel could confer with the Court, during which time the Court noted that if Defendant asserts the Fifth Amendment, “the assertion of the Fifth Amendment could be used against him for inferences.” Scott Dep. 79:11-12. In fact, after the Court’s warning, defense counsel consulted with her client off the record, and then announced that Defendant could answer the single question, “Have you reviewed the videos in this case?” See Scott Dep. 92:23-93:15. Defendant, then, was on notice that his assertion of the Fifth Amendment could lead to adverse inferences against him at a hearing or trial.

This proposition is not a novel one, as it has long been recognized that courts in civil actions may properly draw adverse inferences against a party that asserts its Fifth Amendment right against self-incrimination. See *Baxter v. Palmigiano*, 425 U.S. 308, 318 (1976). See also *MacKay v. DEA*, No. 10-9556, 2011 WL 6739420, at \*10 (10th Cir. 2011); *Grace Bros., Ltd. v. Futro, et al.*, No. 06-cv-00886-PSF-BNB, 2007 WL 3023325, at \*4 (D. Colo. Oct. 12, 2007) (noting that “it may be appropriate for the Court as fact-finder to draw” adverse inferences against Defendant who asserted Fifth Amendment during deposition); *SEC v. Merrill Scott & Assoc., Ltd., et al.*, No. 2:02-CV-39-TC, 2011 WL 5834271, at \*12 (D. Utah Nov. 21, 2011) (court draws adverse inference against individual in a civil action for refusing to answer questions during deposition by invoking Fifth Amendment).

Accordingly, the United States hereby requests that this Court draws the following adverse inferences based on Defendant’s deposition testimony cited below:

1. Q. On August 5<sup>th</sup>, 2009, did you intend to stop individuals because they were going into PPRM to seek reproductive health services – seek or provide reproductive health services?

A. I respectfully invoke the Fifth Amendment. [Scott Dep. 61:14-18.]

*Adverse inference: On August 5<sup>th</sup>, 2009, Ken Scott intended to stop individuals because they were going into PPRM to seek or provide reproductive health services.*

2. Q. On August 5<sup>th</sup>, 2009, did you obstruct multiple cars in the PPRM driveway?

A. I respectfully invoke the Fifth Amendment. [Scott Dep. 61:19-21.]

*Adverse inference: On August 5<sup>th</sup>, 2009, Ken Scott obstructed multiple cars in the PPRM driveway.*

3. Q. Okay. That covers all of August 5<sup>th</sup> and that would apply – would your previous responses apply to 8:23 a.m., 9:33 a.m., and 9:36 a.m. videos?

A. That's correct. [Scott Dep. 62:1-4.]

*Adverse inference: On August 5<sup>th</sup>, 2009, at 8:23 a.m., 9:33 a.m., and 9:36 a.m., Ken Scott intended to stop individuals because they were going into PPRM to seek or provide reproductive health services, and obstructed multiple cars in the PPRM driveway.*

4. Q. On September 30<sup>th</sup>, 2009, did you enter the PPRM driveway and obstruct multiple vehicles from entering and exiting the PPRM driveway?

A. I respectfully invoke the Fifth. [Scott Dep. 62:21-24.]

*Adverse inference: On September 30<sup>th</sup>, 2009, Ken Scott entered the PPRM driveway and obstructed multiple vehicles from entering and exiting the PPRM driveway.*

5. Q. On that same date, did you enter the PPRM driveway with the intent to stop people from providing or receiving reproductive health services at PPRM?

A. I respectfully invoke the Fifth. [Scott Dep. 62:25-63:3.]

*Adverse inference: On September 30<sup>th</sup>, 2009, Ken Scott entered the PPRM driveway with the intent to stop people from providing or receiving reproductive health services at PPRM.*

6. Q. And on December 16<sup>th</sup>, 2009, did you enter the PPRM driveway in order to obstruct individuals seeking or providing PPRM – seeking reproductive health services from PPRM?

A. I respectfully invoke the Fifth. [Scott Dep. 63:20-24.]

*Adverse inference: On December 16<sup>th</sup>, 2009, Ken Scott entered the PPRM driveway in order to obstruct individuals seeking or providing reproductive health services.*

7. Q. On [December 16, 2009,] did you enter the driveway to obstruct multiple vehicles attempting to enter PPRM?

A. I respectfully invoke the Fifth. [Scott Dep. 63:25-64:2.]

*Adverse inference: On December 16<sup>th</sup>, 2009, Ken Scott entered the driveway to obstruct multiple vehicles attempting to enter PPRM.*

8. Q. On that date [Dec. 23, 2009], did you enter the PPRM driveway to impede the vehicle attempting to enter the PPRM driveway?

A. I respectfully invoke the Fifth. [Scott Dep. 64:18-21.]

*Adverse inference: On December 23, 2009, Ken Scott entered the PPRM driveway to impede the vehicle attempting to enter the PPRM driveway.*

9. Q. On [December 23, 2009], did you block a vehicle intending – let me rephrase. I'm getting lost in my questions. On that date, did you intend to stop individuals who were seeking or providing reproductive health services at PPRM?

A. I respectfully invoke the Fifth. [Scott Dep. 64:22-65:3.]

*Adverse inference: On December 23, 2009, Ken Scott intended to stop individuals who were seeking or providing reproductive health services at PPRM.*

10. Q. Did you enter the PPRM driveway on that date [Jan. 16, 2010] with the intention to stop individuals who were entering or exiting the PPRM driveway to receive or provide reproductive health services?

A. I respectfully invoke the Fifth. [Scott Dep. 65:12-16.]

*Adverse inference: On January 16, 2010, Ken Scott entered the PPRM driveway with the intention to stop individuals who were entering or exiting the PPRM driveway to receive or provide reproductive health services.*

11. Q. On that date [Feb. 4, 2010], did you enter the PPRM driveway in order to counsel individuals who were entering or exiting PPRM in order to provide or receive reproductive health services?

A. I respectfully invoke the Fifth. [Scott Dep. 66:10-14.]

*Adverse inference: On February 4, 2010, Ken Scott entered the PPRM driveway in order to counsel individuals who were entering or exiting PPRM in order to provide or receive reproductive health services.*

12. Q. On that date [Dec. 2, 2010], did you enter the PPRM driveway in order to provide counseling to multiple vehicles entering or exiting PPRM for the purpose of providing or receiving reproductive health services?

A. I respectfully invoke the Fifth. [Scott Dep. 66:24-67:3.]

*Adverse inference: On December 2, 2010, Ken Scott entered the PPRM driveway in order to provide counseling to multiple vehicles entering or exiting PPRM for the purpose of providing or receiving reproductive health services.*

13. Q. On that date [Dec. 8, 2010], did you enter the PPRM driveway in order to provide counseling to individuals who were entering or exiting the PPRM driveway in order to receive or provide reproductive health services?

A. I respectfully invoke the Fifth. [Scott Dep. 67:20-24.]

*Adverse inference: On December 8, 2010, Ken Scott entered the PPRM driveway in order to provide counseling to individuals who were entering or exiting the PPRM driveway in order to receive or provide reproductive health services.*

14. Q. Do you currently physically obstruct people as they try to enter or leave PPRM to obtain or provide reproductive health care?

A. I respectfully invoke the Fifth Amendment to the United States Constitution. [Scott. Dep. 68:14-18.]

*Adverse inference: Ken Scott currently physically obstructs people as they try to enter or leave PPRM to obtain or provide reproductive health care.*

### CONCLUSION

For the foregoing reasons, the United States requests that the Court make the above adverse inferences against Defendant at the upcoming January 26, 2012 hearing on the United States' Motion for Preliminary Injunction.

A proposed order is attached.

Dated: January 20, 2012

Respectfully submitted,

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UNITED STATES OF AMERICA,

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**ORDER GRANTING UNITED STATES' MOTION IN LIMINE FOR ADVERSE  
INFERENCES AGAINST DEFENDANT KENNETH SCOTT**

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The Court, having reviewed the United States' Motion in Limine for adverse inferences against Defendant Kenneth Scott, and sufficient cause appearing, hereby GRANTS the motion.

The Court will draw the following inferences at the January 26 hearing on the United States' Motion for Preliminary Injunction:

1. On August 5<sup>th</sup>, 2009, Ken Scott intended to stop individuals because they were going into PPRM to seek or provide reproductive health services.
2. On August 5<sup>th</sup>, 2009, Ken Scott obstructed multiple cars in the PPRM driveway.
3. On August 5<sup>th</sup>, 2009, at 8:23 a.m., 9:33 a.m., and 9:36 a.m., Ken Scott intended to stop individuals because they were going into PPRM to seek or provide reproductive health services, and obstructed multiple cars in the PPRM driveway.

4. On September 30<sup>th</sup>, 2009, Ken Scott entered the PPRM driveway and obstructed multiple vehicles from entering and exiting the PPRM driveway.
5. On September 30<sup>th</sup>, 2009, Ken Scott entered the PPRM driveway with the intent to stop people from providing or receiving reproductive health services at PPRM.
6. On December 16<sup>th</sup>, 2009, Ken Scott entered the PPRM driveway in order to obstruct individuals seeking or providing reproductive health services.
7. On December 16<sup>th</sup>, 2009, Ken Scott entered the driveway to obstruct multiple vehicles attempting to enter PPRM.
8. On December 23, 2009, Ken Scott entered the PPRM driveway to impede the vehicle attempting to enter the PPRM driveway.
9. On December 23, 2009, Ken Scott intended to stop individuals who were seeking or providing reproductive health services at PPRM.
10. On January 16, 2010, Ken Scott entered the PPRM driveway with the intention to stop individuals who were entering or exiting the PPRM driveway to receive or provide reproductive health services.
11. On February 4, 2010, Ken Scott entered the PPRM driveway in order to counsel individuals who were entering or exiting PPRM in order to provide or receive reproductive health services.
12. On December 2, 2010, Ken Scott entered the PPRM driveway in order to provide counseling to multiple vehicles entering or exiting PPRM for the purpose of providing or receiving reproductive health services.

13. On December 8, 2010, Ken Scott entered the PPRM driveway in order to provide counseling to individuals who were entering or exiting the PPRM driveway in order to receive or provide reproductive health services.

14. Ken Scott currently physically obstructs people as they try to enter or leave PPRM to obtain or provide reproductive health care.

Dated this \_\_\_\_ day of \_\_\_\_\_, \_\_\_\_\_.

BY THE COURT:

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United States District Judge

**CERTIFICATE OF SERVICE**

I hereby certify that the foregoing document was filed electronically using the CM/ECF system, which will provide notice of such filing to all registered parties.

/s/ Aaron Fleisher  
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