No. 99-2

In the Supreme Court of the United States

RUBY MCDANIEL, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals correctly held that the motivation element of the Freedom of Access to Clinic Entrances Act of 1994, 18 U.S.C. 248, was satisfied by proof that petitioners engaged in the prohibited conduct against another 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," 18 U.S.C. 248(a)(1).

2. Whether the imposition of modest civil penalties under 18 U.S.C. 248(c)(2)(B), absent a government showing of damages, constitutes criminal punishment.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-6) is unpublished, but the judgment is noted at 175 F.3d 1009 (Table).

JURISDICTION

The judgment of the court of appeals (Pet. App. 7) was entered on March 26, 1999. The petition for a writ of certiorari was filed on June 24, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. Petitioners are ten individuals who, on July 23, 1996, entered the building of the Eastern Women's Center (EWC), a Manhattan reproductive health clinic, and "physically blocked the elevator and door entrances to the clinic by locking themselves together at the neck and ankles." Pet. 1; Pet. App. 3. As a result of petitioners' actions, "no one was able to gain access to the clinic for several hours until the police forcibly removed them." Pet. App. 3. Petitioners subsequently were convicted of violating a New York City ordinance that makes it unlawful for a person to obstruct or block another person from entering or exiting a reproductive health care facility with the intent to prevent another person from obtaining or rendering a reproductive health care service or counseling. 1A New York, N.Y., Admin. Code & Charter tit. 8, § 8-803 (Supp. I 1999).

b. On December 6, 1996, the United States brought a civil action against petitioners in the United States District Court for the Southern District of New York, alleging that petitioners had, "by physical obstruction, intentionally interfered with and/or attempted to interfere with patients and employees of the EWC because they were obtaining and/or providing reproductive health services," in violation of the Freedom of Access to Clinic Entrances Act of 1994 (Access Act), 18 U.S.C. 248. C.A. Supp. App. 9-11. The government sought pemanent injunctive relief, statutory damages, and civil penalties. *Id.* at 1-11.

After a jury trial, petitioners were found liable for violating the Access Act and the district court entered a permanent injunction prohibiting petitioners from obstructing or being present at the EWC. After two hearings to determine the appropriateness of imposing

civil penalties, the district court imposed such penalties on certain of the petitioners who the court determined had sufficient financial resources. Pet. App. 3. The penalties imposed ranged from $1000 to $6000. The court imposed no civil penalties on petitioners Buchta, McDaniel, and Raiser because of their insufficient financial resources. *Id.* at 3 & n.1.

2. The court of appeals affirmed. Pet. App. 1-6. The court rejected petitioners' argument that proof of a discriminatory mental state is required under the Access Act, 18 U.S.C. 248, and that the trial evidence was inadequate on that element. See Pet. C.A. Br. 2-5. The court relied on its recent decision in *United States* v. *Weslin*, 156 F.3d 292, 298 (2d Cir. 1998), cert. denied, 119 S. Ct. 804 (1999), holding that the plain language of the statute establishes that the motive element of the Access Act is satisfied if a defendant meant "to obstruct and interfere with the obtaining and provision of reproductive health services." Pet. App. 4 (quoting *Weslin*, 156 F.3d at 298). The court found that petitioners' actions "fall squarely within the ambit of the statute," because petitioners "stipulated that their purpose in blockading the clinic was 'in order to prevent people from receiving and [the clinic] staff from providing, abortions.'" *Ibid.* (quoting C.A. Supp. App. 33).

The court of appeals also rejected petitioners' argument that, because the government had not provided proof of damages commensurate with the civil penalties imposed, imposition of such penalties constituted criminal punishment requiring a heightened evidentiary showing. Pet. App. 5. The court of appeals noted that, under *Hudson* v. *United States*, 522 U.S. 93 (1997), "[w]hether a particular punishment is criminal or civil is, at least initially, a matter of statutory construction." Pet. App. 5. The court of appeals concluded that "[a]

reading of the statute manifestly demonstrates that Congress intended penalties of this sort under it to be classified as civil." *Ibid.* The court further noted that "the relatively mild penalties assessed in this case, imposed with careful consciousness of capacity to pay, do not rise to the level of 'punitive.'" *Id.* at 5-6 n.5.[1]

ARGUMENT

The court of appeals correctly held that the motivation element of the Freedom of Access to Clinic Entrances Act of 1994, 18 U.S.C. 248, was satisfied in petitioners' case, and that the civil penalties imposed on certain of the petitioners did not rise to the level of criminal punishment. Those fact-specific holdings are correct, and do not conflict with any decision of this Court or of any other court of appeals. Further review therefore is not warranted.

1. The Access Act provides, in relevant part, for civil and criminal penalties for anyone who:

> 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 that person is or has been, or in order to intimidate such person or any other

[1] Because the court of appeals rejected petitioners' arguments on the merits, it declined to decide whether petitioners had waived their right to appeal their claim of failure to prove a discriminatory mental state, whether petitioner McWilliams' default precluded review of his appeal, and whether petitioners Buchta, McDaniel, and Raiser lacked standing in the appeal because no civil penalties had been imposed on them. Pet. App. 3 n.1, 4 n.3.

> person or any class of persons from, obtaining or providing reproductive health services.

18 U.S.C. 248(a)(1). Thus, to establish a statutory violation, the government must prove that a person intentionally committed certain proscribed conduct ("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") with a specified motive ("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").[2]

The court of appeals correctly held that petitioners' conduct met this standard. As the court recognized, petitioners "stipulated that their purpose in blockading the clinic was 'in order to prevent people from receiving and [the clinic] staff from providing, abortions.'" Pet. App. 4 (quoting undisputed fact in joint pretrial order included in C.A. Supp. App. 33). Petitioners' contention (Pet. 12) that that stipulation "goes to conduct, but not to motive" is belied by the plain language of the stipulation clearly stating the purpose of petitioners' clinic blockade.

In any event, testimony by various petitioners at trial confirmed the undisputed fact of petitioners' motive.[3] See, *e.g.*, C.A. Supp. App. 272-273 (petitioner Radich admitted that he sat in front of a clinic door "to

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[2] The First Amendment does not prevent a civil or criminal statutory provision from turning on such a motive. *Wisconsin* v. *Mitchell*, 508 U.S. 476 (1993).

[3] That trial testimony also undermines petitioners' contention (Pet. 11) that, "[w]hile Petitioners may have been aware that their conduct could have some undesirable consequences, they acted *in spite* of these consequences, not *because* of them."

prevent anyone from getting in and out" of the door and "for the sole reason of preventing abortions from taking place that day"); *id.* at 262-263 (petitioner Gerlach testified that he chained himself in front of a clinic door "to keep the mothers from killing their babies"); *id.* at 282-283 (petitioner Conlon testified that he sat down by a clinic door to "prevent use of the door" and "to prevent the killing of children"). Therefore, sufficient evidence supported the conclusion that petitioners, by physical obstruction, interfered with or intimidated another person (or attempted to do so) with the requisite motive, *i.e.*, "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," 18 U.S.C. 248(a)(1).

Petitioners' suggestion (Pet. 12-14) that the jury instructions somehow failed to require proof of the relevant motive is without merit. As petitioners concede (Pet. 13), the trial court unequivocally instructed that the government had to prove that petitioners' obstructive conduct "was done for the purpose of interfering with or preventing people from obtaining reproductive health services." See C.A. Supp. App. 397-398. That instruction was part of the court's explanation of the elements of the offense. The later comment by the court on which petitioners rely (Pet. 13)—that there "wasn't much of an issue of intent here"—is properly understood in context as a reference back to the court's observation that there was not much dispute about the motive element in light of the trial testimony. See C.A. Supp. App. 398. The court took care, however, when making that observation to also emphasize that a jury finding on the element was still required. The court stated: "I think the defendants who testified frankly admitted that they were

concerned with preventing people from, to use their language, 'killing babies.' That element does not appear to be in hot dispute, but it is still something that you must find established by a preponderance of the evidence." *Ibid.* Thus, there was no contradiction or confusion in the jury instructions regarding the requisite proof of motive.

2. a. Petitioners' assertion (Pet. 14-20) that the civil penalties imposed on several of the petitioners constitute criminal punishment because the government proved no damages or costs is likewise without merit. The Access Act provides that, in a civil action brought under the Act by the Attorney General of the United States, the court may award "appropriate relief, including temporary, preliminary or permanent injunctive relief, and compensatory damages to persons aggrieved" as described in the preceding section of the statute. 18 U.S.C. 248(c)(2)(B). The Act further provides that

> [t]he court, to vindicate the public interest, may also assess a civil penalty against each respondent—
>
> (i) in an amount not exceeding $10,000 for a nonviolent physical obstruction and $15,000 for other first violations; and
>
> (ii) in an amount not exceeding $15,000 for a nonviolent physical obstruction and $25,000 for any other subsequent violation.

18 U.S.C. 248(c)(2)(B). The statutory language thus clearly reflects an intent that such a penalty be civil in nature and not depend on proof of damage to the government.

The court of appeals properly noted (Pet. App. 5-6 n.5) that, in *Hudson* v. *United States*, 522 U.S. 93

(1997), this Court held that "[e]ven in those cases where the legislature 'has indicated an intention to establish a civil penalty, we have inquired further whether the statutory scheme was so punitive either in purpose or effect,' * * * as to 'transfor[m] what was clearly intended as a civil remedy into a criminal penalty.'" *Id.* at 99 (citations omitted). At the same time, this Court emphasized, however, that "only the clearest proof" will suffice to override legislative intent and effect such a transformation. *Id.* at 100 (citations omitted).

The statutory scheme here is not "so punitive either in purpose or effect" as to justify overriding the intent of Congress and petitioners have not presented such clear proof to support that result. For example, petitioners provide no support for their contention that the court of appeals erred in rejecting the claim that the fines are excessive. As the court noted, the fines ranged from $1000 to $6000, and it found that those "relatively mild penalties assessed in this case, imposed with careful consciousness of capacity to pay, do not rise to the level of punitive." Pet. App. 5-6 n.5. The court's case-specific rejection of petitioners' claim under *Hudson* does not merit further review.

b. Petitioners also attempt to raise (Pet. 17-20) a double jeopardy claim, contending that their case falls within an exception to the dual sovereignty doctrine articulated in *Bartkus* v. *Illinois*, 359 U.S. 121 (1959). But nothing in the record suggests that the federal authorities were acting as a "tool" for the state prosecutors, or vice versa, see *id.* at 123, as petitioners' theory would require. In any event, petitioners raise this issue for the first time in this Court, and this Court has, "with very rare exceptions," refused to consider claims

that were not raised or addressed below. *Yee* v. *City of Escondido*, 503 U.S. 519, 533 (1992).[4]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[4] Because the case does not warrant further review, the Court also need not, at this juncture, address the issues not reached by the court of appeals. See Pet. App. 3 n.1.