SCHEDULED FOR ORAL ARGUMENT FEB. 9, 2001

No. 00-5035
Consolidated with Nos. 00-5036, 00-5055, 00-5090, 00-5148

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

OLIVIA A. ALAW, et al.,

Defendants-Appellants

BRIEF FOR THE UNITED STATES AS APPELLEE

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. *Parties and Amici.* All parties, intervenors and amici appearing before the district court and this Court are listed in the Joint Brief for Appellants.

B. *Rulings Under Review.*

(1) Order Denying Motion to Dismiss (Oct. 28, 1998) (Hon. Gladys Kessler) (J.A. 39);

(2) Order Granting United States' Motion to Amend Complaint and Strike Defendants' Jury Demand (Oct. 20, 1999) (Hon. Gladys Kessler) (J.A. 83)

(3) Order Granting Motion to Supplement Record (Jan. 19, 2000) (Hon. Gladys Kessler) (J.A. 126)

(4) Permanent Injunction Order and Memorandum Opinion (Jan. 21, 2000) (Hon. Gladys Kessler) (J.A. 129, 133)

(5) Order Denying Motion To Order Compliance With Mediation Order (Feb. 15, 2000) (Hon. Gladys Kessler) (J.A. 181).

C. *Related Cases.* There are no related cases.

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GLOSSARY

App. Br. – refers to the Joint Brief for Appellants

CWC – refers to the Capitol Women's Center

J.A. – refers to Appellants' Joint Appeal Appendix

J.A. Supp. – refers to the Joint Appendix Supplement, Trial Exhibits

Mahoney Br. – refers to the Brief for Patrick Mahoney

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ISSUES PRESENTED

1. Whether the United States proved a violation of the Freedom of Access to Clinic Entrances Act (Access Act or FACE), 18 U.S.C. 248.

2. Whether the district court violated the First Amendment by considering Defendants' expressions of belief in determining whether Defendants intended to obstruct access to clinic entrances in violation of the Access Act.

3. Whether Defendants' voluntary cessation of illegal conduct during the pendency of the litigation mooted this case or made equitable relief unavailable.

4. Whether the district court's injunction violated the First Amendment.

5. Whether Defendants were entitled to a jury trial in this case seeking solely injunctive relief.

6. Whether the district court had personal jurisdiction over some of the out-of-state Defendants.

7. Whether the deposition of a defendant who could not be subpoenaed to appear at trial was admissible evidence.

8. Whether the district court abused its discretion in reopening the record after trial to admit into evidence a newsletter created after the close of evidence.

9. Whether the district court erred in refusing to require the United States to enter into a consent decree against its will.

STATUTES AND REGULATIONS

The Freedom of Access to Clinic Entrances Act (Access Act or FACE), 18 U.S.C. 248, is reproduced as Addendum A to this brief.

STATEMENT OF THE CASE

This case arises from a January 24, 1998 anti-abortion protest at which Defendants obstructed the entrances to the Capitol Women's Center (CWC or the Clinic), a reproductive health facility in the District of Columbia. On June 9, 1998, the United States filed a complaint (J.A. 24) in the district court for the District of Columbia, alleging that the defendant-appellants (Defendants) and others violated the Freedom of Access to Clinic Entrances Act (Access Act or FACE), 18 U.S.C. 248. The complaint requested an injunction, civil penalties, and statutory damages.

The United States entered into consent decrees with several defendants (J.A. 8, 11). With respect to the others, the district court denied various motions to dismiss on October 28, 1998 (J.A. 39). On October 20, 1999, the court granted the United States' motion to amend its complaint to remove the prayer for civil penalties and statutory damages (J.A. 83). The court also granted the United States' motion to strike Defendants' jury demand (J.A. 83). On December 6, 1999, the court referred the case to a magistrate judge for mediation (J.A. 18). When that mediation failed, the court held a two-day bench trial on December 14-15, 1999. After permitting the United States to supplement the record on January 19, 2000 (J.A. 126), the court issued judgment in favor of the United States with

respect to the defendant-appellees (and against the United States with respect to four other defendants) (J.A. 129). The court issued a permanent injunction against Defendants (J.A. 129) and denied a motion by Defendant Tyree to "enforce compliance" with the December 6, 1999 order referring the case to mediation (J.A. 181). This appeal followed.

STATEMENT OF THE FACTS

After a two-day bench trial, which included videotape evidence of the events described below, the district court found the following facts.

1. *The Clinic.* The Capitol Women's Center (CWC or the Clinic) provided reproductive health services, including family planning and abortions.[1] The Clinic was located in northwest Washington, D.C., in a building that had three entrances: the main entryway used by staff and patients at the south end of the front of the building (south door), a second front door at the north end of the building that was generally used as an emergency exit (north door), and a door in a back alley (back alley door) that was used by doctors in ordinary circumstances and by patients and staff when protesters made the front entrances inaccessible (Order, J.A. 139-140; see also J.A. 182 (Map)).

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[1] The clinic closed in the summer of 1998 (Order, J.A. 133 n.1).

2. *Pre-Demonstration Planning Session.* In late January 1998, Defendants were among those who traveled to the District for demonstrations relating to the anniversary of the Supreme Court's decision in *Roe* v. *Wade*. On January 23, 1998, Defendants and others met at a hotel to discuss a demonstration planned for the next day at the Clinic (Order, J.A. 140-141). A speaker told the audience that "the Centers for Disease Control had identified the blocking of access to clinics and the harassment of clinic patients as the number one and two causes, respectively, of decreased abortions in the last five years" (Order, J.A. 141). Defendant Benham called for volunteers from the audience to participate in a "rescue" at the Clinic the following day (Order, J.A. 141). Defendant Mahoney announced the address of the Clinic and methods of transportation to the protest (Stipulations, J.A. 444 ¶ 6, J.A. 449, ¶ 4).

3. *The Blockade*. The Clinic had approximately 15 to 20 appointments scheduled for January 24, 1998 (Order, J.A. 140). When clinic staff arrived that morning, demonstrators were already beginning to congregate (Order, J.A. 140), leading Clinic staff to lock the doors (Order, J.A. 140). The Clinic had experienced blockades in the past and had worked with volunteers in an attempt to prevent such demonstrations from making the Clinic completely inaccessible. A group of clinic

volunteers arrived and began preparations aimed at ensuring that patients could breach the scheduled blockade (Order, J.A. 142). District police also arrived and deployed approximately 40-50 officers in anticipation of the demonstration (Order, J.A. 142).

At about 8:00 a.m., when the Clinic's first appointment was scheduled, Defendants and other demonstrators arrived at the front of the building, led by Defendants Benham and Gabriel (Order, J.A. 142). Defendants Newman, Gabriel, Heldreth, Tyree, and White, along with other demonstrators, then "knelt or sat in the south walkway" approximately five feet in front of the doors and immediately in front of clinic volunteers who were attempting to protect the main entrance to the facility (Order, J.A. 142-143, 153). Defendant Benham led the demonstrators, pacing on the main sidewalk in front of the clinic (Order, J.A. 143). The other demonstrators "stood in front of the clinic volunteers at both front entrances, thus blocking passage into or out of either walkway" (Order, J.A. 143). Still other protesters encircled the back alley entrance and the clinic volunteers stationed there (Order, J.A. 143). All told, between 50 and 100 protesters, volunteers, police, and onlookers crowded around the three entrances to the facility (Order, J.A. 142).

During this time, patients with scheduled appointments were unable to enter the front doors of the clinic (Order, J.A. 145-146). Instead, to gain entry, patients had to make their way though the narrow back alley that was also filled with protesters. Even by this route, patients had to be encircled by clinic volunteers who would escort the patient down the alleyway to the semi-circle of volunteers protecting the gate leading to the back door (Order, J.A. 146; see also J.A. 183 (Map)). Those volunteers then unlinked arms and squeezed the patient through the fence (Order, J.A. 146). Clinic staff would then meet the patient at the fence, unlock the back alley doorway, and lead the patient into the Clinic (Order, J.A. 146). Those patients forced through this gauntlet "were visibly shaken, angry, confused, or frightened" (Order, J.A. 146). Approximately ten patients with appointments that morning were subject to this arduous process, but none were ultimately denied access to the Clinic's services (Order, J.A. 145).

The blockade did not end until the police physically removed Defendants from the entrances to the facility. At about 8:15 a.m., District police informed Defendants they were violating the District's ordinance prohibiting obstruction of walkways and facility entrances, D.C. Code Ann. § 22-1107, and warned them to remove themselves from the front of the Clinic (Order, J.A. 144). Police cordoned

off the front of the clinic with police tape and warned that anyone not leaving the designated area would be subject to arrest (Order, J.A. 143-144). After a third warning, the clinic volunteers left the area, but Defendants Newman, Gabriel, Heldreth, Tyree, and White remained "sitting, kneeling, or lying down directly in front of the south clinic door" and Defendant Benham remained standing on the walkway behind them (Order, J.A. 144). At that point, Defendant Mahoney proceeded through the police line to the Clinic's other front entrance and stood or knelt approximately three to four feet from the clinic's north door (Order, J.A. 144-145; Stipulation, J.A. 445 ¶ 12). Defendants remained in these positions until arrested and, in the case of all Defendants except Mahoney, had to be physically carried away from the entrances by the police (Order, J.A. 145). The removal of Defendants and the other protesters required more than a dozen police officers approximately two hours to complete (Order, J.A. 145).

Defendants pleaded guilty to incommoding and paid a $50 fine (Order, J.A. 146-147). After being released, Defendants Gabriel and Heldreth returned to the clinic, walked inside, and began protesting again (Order, J.A. 147). They did not leave until the office manager threatened to call the police (Order, J.A. 147).

SUMMARY OF THE ARGUMENT

This case involves the straight-forward application of the Freedom of Access to Clinic Entrances Act (Access Act or FACE), 18 U.S.C. 248, to a typical clinic blockade of the type the statute was designed to prevent. Defendants are experienced anti-abortion protesters who knew what they were doing when they attempted to stop patients from obtaining abortions at the Capitol Women's Center by physically obstructing the Clinic's doors. Defendants' attempts to blame the Clinic itself, the volunteers, and the police for the obstruction are meritless. Their claims that they did not actually intend to interfere with anyone's access to the clinic or to actually impede the patients' ability to enter the facility ring hollow in light of their actions that day, their conduct in the past, and their stated goals of preventing abortions through their "rescues" at such clinics.

Defendants' illegal conduct is not immunized by the First Amendment. The injunction in this case is both a reasonable response to, and narrowly-tailored restriction upon, their conduct, not their speech. Defendants' unrepentant disregard for the limited and reasonable restrictions the Access Act imposes on their conduct justified the district court's conclusion that a prospective injunction was needed to ensure that Defendants' future visits to the District do not result in

repeated violations of the Act at other clinics in the area. That the CWC has since closed its doors does not diminish that danger. Nor does the Clinic's closure reduce the United States' interest in the protection of other areas clinics and patients and in the effective enforcement of federal law.

The order itself is a narrowly tailored restriction of Defendants' conduct that restricts no more speech than is necessary to prevent Defendants from violating the Access Act in the future. The district court had abundant reason to conclude that a small, fixed buffer zone was needed to ensure that Defendants did not obstruct clinic entrances during future protests. The geographic scope of the injunction, limiting Defendants' activities within the Washington beltway, was tailored to the specific threat of future violations found by the district court. The court knew that the blockade in this case was linked to the annual *Roe* v. *Wade* protests. The court also understood that those protesters, including Defendants, had randomly selected clinics in the area for blockades in the past and would likely do so again in the future if unrestrained.

Defendants' various complaints about the conduct of the trial are also meritless. The United States' withdrawal of its request for civil penalties and statutory damages left only claims for equitable relief, claims upon which

Defendants had no right to a jury trial. Defendants' intentional violations of federal and local law within the District of Columbia provided a more than adequate foundation for the exercise of personal jurisdiction against them. The district court properly admitted the deposition testimony of the Defendants who could not be subpoenaed to appear at trial. And the court rightly reopened the record after trial to admit pertinent evidence that was not available at the time of trial. Finally, the trial court correctly refused to order the United States to enter into a consent decree to which it did not consent.

ARGUMENT

I. THE UNITED STATES PROVED A VIOLATION OF THE FREEDOM OF ACCESS TO CLINIC ENTRANCES ACT

Pursuant to the Access Act, the United States was required to prove that Defendants (1) by physical obstruction (2) intentionally interfered with, or attempted to interfere with, any person (3) because that person is or has been obtaining or providing reproductive health services. See 18 U.S.C. 248(a). Defendants argue that the district court erred in concluding (a) that they interfered or attempted to interfere with patients by obstructing access to the clinic (App. Br. 33-45), and (b) that the obstruction was intentional (App. Br. 23-33).

Neither argument has merit. The district court had before it considerable evidence regarding the events at the Clinic, including videotapes of the event and the testimony of a clinic volunteer (J.A. 490-643), senior police officers at the scene (J.A. 643-779), clinic staff (J.A. 779-799), and Defendants themselves.[2] The district court assessed the credibility of the witnesses and weighed the evidence in reaching its factual findings. Even under the "heightened review" afforded in cases implicating the First Amendment, "some deference must be given to the [trial] court's familiarity with the facts and the background of the dispute." *Madsen* v. *Women's Health Care Clinic*, 512 U.S. 753, 769-770 (1994). The Supreme Court has observed that under this standard, "[i]t is not for us to make an independent valuation of the testimony." *Milk Wagon Drivers Union* v. *Meadowmoor Dairies, Inc.*, 312 U.S. 287, 294 (1941) (cited by *Madsen*, 512 U.S. at 770).

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[2] The court received this evidence through direct testimony (J.A. 899-928 (Mahoney), deposition testimony (J.A. Supp. 188-365 (Benham); J.A. Supp. 366-574 (Gabriel)), answers to interrogatories (J.A. Supp. 15 (Gabriel); J.A. Supp. 54 (Heldreth); J.A. Supp. 67 (Mahoney); J.A. Supp. 83 (Newman); J.A. Supp. 117 (White)), answers to requests for admissions (J.A. Supp. 151 (Benham and Tyree); J.A. Supp. 154 (Gabriel); J.A. Supp. 158 (Heldreth); J.A. Supp. 162 (Mahoney)), and stipulations (J.A. Supp. 172 (Mahoney); J.A. Supp. 177 (Benham and Tyree); J.A. Supp. 184 (Newman and White)), and other documentary evidence (see, *e.g.*, J.A. Supp. 1-6 (Letters of Gabriel); J.A. Supp. 7 (Operation Rescue West newsletter); J.A. Supp. 575 (Operation Rescue West web page)).

A. Defendants, By Physical Obstruction, Interfered Or Attempted To Interfere With Patients' Access To The Clinic

1. Defendants Obstructed Access To The Clinic

The statute defines "interfere with" as meaning "to restrict a person's freedom of movement." 18 U.S.C. 248(e)(2). It defines "physical obstruction" as "rendering impassable ingress to or egress from a facility * * * or rendering passage to or from such a facility * * * unreasonably difficult or hazardous." 18 U.S.C. 248(e)(4). Thus, the United States was required to prove that Defendants did, or attempted to, restrict patients' freedom of movement by rendering ingress or egress from the Clinic impassable or unreasonably difficult or hazardous.

The district court did not err in finding that the United States met that burden. The court found, and the videotape evidence made clear, that as soon as they arrived at the clinic, Defendants Newman, Gabriel, Heldreth, Tyree,[3] and

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[3] Defendant Tyree objects (App. Br. 43-44) to the district court's evidentiary ruling admitting the pre-trial identification of Tyree as the person shown blockading the clinic in the videotape evidence. The district court did not abuse its discretion in admitting this evidence or commit clear error in finding, as a matter of fact, that Defendant Tyree was the person portrayed in the evidence as participating in the blockade. The individual in the videotape answered to the fairly unusual first name of "Esther." This individual then participated in the blockade and was arrested. Thus, the district court knew that someone named "Esther" participated in the blockade and was among the arrested. Defendant Tyree admitted to being at the protest, lying down in the walkway in front of the Clinic entrance, and being

(continued...)

White knelt or sat within five feet of the main clinic entrance (Order, J.A. 42-143, 153). Defendant Benham was pacing just behind them (Order, J.A. 43). The other demonstrators blocked the other front entrance, ensuring that patients could not even access the clinic through its emergency exit (Order, J.A. 143). After the police warned them that they were illegally blocking the sidewalk and doors, Defendants moved even closer to the entrances, lying or kneeling within a few feet or touching the doors (Order, J.A. 144-145). They refused to move, even to the point of passively resisting arrest (except for Defendant Mahoney) (Order, J.A. 145).

The district court properly found that, by these actions, Defendants "rendered passage into and out of the front entrances of the clinic unreasonably difficult and hazardous, if not impossible" (Order, J.A. 153). Any patient attempting to enter the facility through these entrances would have been required to

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[3](...continued)
arrested (Order, J.A. 138 (citing J.A. Supp. 152 ¶¶ 11, 14); Stipulation, J.A. 449-450 ¶¶ 5, 8, 12)). She does not point to any evidence that a different person named "Esther" was among the arrested. In these circumstances, the district court did not commit clear error in concluded that the Esther Tyree arrested during the protest was the "Esther" shown in the videotape blockading the clinic.

walk over Defendants or forcibly them push aside.[4] This fact, in itself, is sufficient to show a physical obstruction. See, *e.g.*, *United States* v.*Gregg*, 32 F. Supp. 2d 151, 156 (D.N.J. 1998), aff'd, 226 F.3d 253 (3d Cir. 2000); *United States* v. *Lindgren*, 883 F. Supp. 1321, 1325 (D.N.D. 1995).

That no single Defendant could have accomplished a complete blockade acting alone does not mean that no Defendant attempted to make access unreasonably difficult or hazardous. Whether an individual's actions amount to an attempt to make access unreasonably difficult or hazardous depends on the context in which her or she acts. A protester kneeling alone in front of a clinic wall does not impede access because, in that context, his or her action does not make access unreasonably difficult. In this case, however, Defendants knew that by placing themselves in front of an entrance being blockaded by others, they were each filling a gap in the blockade that might otherwise provide an entry for a clinic patient. As the district court observed, "the scene as a whole" further supports the

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[4] That Defendant Benham was standing or pacing in front of the entrance, rather than kneeling or lying down does not mean he was not obstructing access. It is no easier for patients to get by protesters standing or pacing in a small walkway in front of a door than it is to get by demonstrators sitting in place. If Defendant Benham's activities are exempt from the Access Act, demonstrators could easily evade the Act's restrictions by pacing or standing in front of doors rather than sitting or kneeling before them.

conclusion that Defendants obstructed access to the clinic (Order, J.A. 154). Defendants' illegal activities foreseeably[5] attracted a massive police presence as well as clinic volunteers and on-lookers (Order, J.A. 154), making access even more difficult.

2. Defendants, Not The Clinic Volunteers, The Police, Or The Clinic Itself, Obstructed Access To The Facility

Ironically, Defendants attempt to seize on this aspect of their blockade as a defense to their obstruction, blaming the Clinic, its volunteers, and the police for the unreasonable difficulty patients had in entering the Clinic.

Defendants argue (App. Br. 35-36) that they could not have made access unreasonably difficult because the doors they were blockading had been locked by the Clinic at the start of the demonstration. They argue further (App. Br. 43) that even if those doors had not been locked, the clinic volunteers were blocking them. Defendants assert (App. Br. 42-43) that they only got close enough to effect an obstruction after the police ordered everyone out of the cordoned-off area in front of the clinic and the clinic volunteers left their positions in front of the doors. But by that time, they say (App. Br. 41-43), it was the police, not the protesters, who

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[5] In fact, Defendant Mahoney twice called the police to inform them of the protest (Order, J.A. 142). Defendants knew as well that their attempts would lead clinic volunteers to seek to defend the clinic entrances (see App. Br. 81).

were obstructing access because the police would not let anyone near the Clinic while they were arresting Defendants.

The district court rightly rejected this argument (Order, J.A. 155-156). First, the district court found, as a matter of fact, that the locked doors were not an impediment to access. The court found that every time a patient succeeded in maneuvering through the blockade to a clinic entrance, the door was unlocked and the patient was let in (Order, J.A. 145-146; see also Stipulations, J.A. 450 ¶ 13, J.A. 455 ¶ 12). Although Defendant Mahoney implausibly claims (Mahoney Br. 2) that "from ten years of experience protesting abortion, he knew that [the north] walkway led to an unused and locked door," the evidence showed that the north door could have been used (and would have been easier to use than the back alley door) if Mahoney and others had not been blocking it (see, *e.g.*, J.A. 493, 780-783). The district court properly held that Defendants were the proximate cause of patients' inability to enter the Clinic through the main entrances to the facility, as the front doors were locked only because Defendants were massing in front of them (Order, J.A. 140, 156; Stipulations, J.A. 450 ¶ 9, J.A. 456 ¶ 6).[6]

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[6] Defendants attempt to argue (App. Br. 36) that the Clinic locked the doors as a courtesy to the protesters, intending to permit them to hold a peaceful vigil while patients continued to have access through the back alley entrance. This assertion of

(continued...)

Second, the court found, as a matter of fact, that the clinic volunteers promoted, rather than obstructed access to the clinic by the patients that day:

> [I]t was established that the clinic volunteers would have allowed any and all authorized persons into the clinic, which they did at the back entrance. The presence of Defendants Gabriel, Heldreth, Newman, Tyree, and White, kneeling in the south walkway in front of the clinic volunteers, made it impossible for anyone to pass through to the volunteers to seek admission into the clinic through the primary entrance

(Order, J.A. 155-156). And, again, the volunteers were present only because of Defendants' illegal blockade (Order, J.A. 142).

Third, Defendants' attempt to blame the police fails on several grounds. Their argument relies on an unfounded assertion (App. Br. 42-43) that "the district court decided that the obstruction of [the Clinic] by the Appellants happened after the third police warning and after the [volunteer] line defenders evacuated the cordon." This is not true. While the court clearly concluded that Defendants were obstructing the clinic after the third warning (Order, J.A. 153-154), it also found that almost all of Defendants were obstructing entrance to the Clinic from the moment they arrived:

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[6](...continued)
fact is devoid of any citation to the findings of the district court or the record and is contradicted by both (see, *e.g.*, Order, J.A. 140; Stipulation, J.A. 450 ¶ 9; J.A. 794).

> *Before* the police tape was put up in front of the clinic, Defendants Gabriel, Heldreth, Newman, Tyree, and White knelt on the south walkway in front of the clinic volunteers, approximately five feet from the clinic's primary entrance, rendering passage into that entrance unreasonably difficult and hazardous

(Order, J.A. 153 (emphasis added)).

Even if the district court had concluded that Defendants had not obstructed access until after the police had cordoned off the area (as it did with respect to Defendant Mahoney), that finding would not have assisted Defendants' argument. Defendants were the proximate cause of any impediment to access occasioned by the police action necessary to remove Defendants from the entrances. See, *e.g.*, *Lindgren*, 883 F. Supp. at 1328. The clinic entrances would have been impassible because of Defendants' actions even if the police had permitted patients to attempt to crawl over the protesters (see Order, J.A. 154).[7] And but for Defendants' obstruction, the police would not have cordoned off the area in front of the clinic (see Order, J.A. 154). Defendants cannot plausibly blame the police for acting to swiftly end the illegal obstruction of the clinic.

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[7] The police did allow a number of patients and clinic volunteers through the police line after the arrests (Stipulation, J.A. 446 ¶ 17).

3. It Is Irrelevant That Clinic Patients Eventually Succeeded In Gaining Access To The Clinic

Defendants also argue (App. Br. 35-36) that they could not have violated the Access Act because no one actually tried to enter the Clinic through the entrances they were blockading and because, in the end, the blockade failed to prevent any patient from receiving services that day. Neither fact is a defense under the Access Act.

That no patient actually attempted to crawl over Defendants does not mean that Defendants did not interfere with access. Rather, this simply demonstrates how clear it was that Defendants had made access to the facility unreasonably difficult.

That no patient was denied medical services is no defense either. The statute only requires that Defendants have made, or attempted to make, ingress or egress from the clinic "unreasonably difficult or hazardous." 18 U.S.C. 248(a)(1), (e)(4). As Chief Judge Posner has explained:

> Confined to forbidding the complete blockage of clinic entrances (and thus dispensing with the "unreasonably difficult" language, the source of the alleged vagueness), the Act would be easily evaded, for example by blockaders' leaving just enough space between two of them for a person to squeeze through, touching the blockaders on either side (thus committing a technical battery upon them, though probably a privileged one); or by lying down across the entrance so that the entrant has to step--or jump?--over the

> blockader. And what of cases in which only one entrance of several (but that the main one) is blocked, or in which all entrances are blocked but persons could easily enter through windows on the ground floor, or in which the roof is strong enough to land a helicopter on? It is difficult to imagine a form of words more perspicuous than "unreasonably difficult" to encompass these and the myriad of other possibilities that come to mind.

United States v. *Soderna*, 82 F.3d 1370, 1377 (7th Cir.), cert. denied, 519 U.S. 1006 (1996). See also *Gregg*, 32 F. Supp. at 151.

In this case, the record amply demonstrates both Defendants' success in making entrance unreasonably difficult and hazardous and their attempts to prevent anyone from entering the clinic at all. Because Defendants succeeded in preventing anyone from using the main entrances, "[p]atients wishing to enter the clinic were forced to do so through the crowded and chaotic back alley entrance" (Order, J.A. 156). The court found that all but one of the patients who were able to enter the clinic that day entered through this back alley (Order, J.A. 145). Even this was accomplished only through the herculean efforts of the clinic volunteers:

> During the demonstration, a protective circle of clinic volunteers escorted each patient to the back alley* * *. When the volunteers and patient reached the back alley, the other clinic volunteers with interlocked arms, who were standing in front of the back alley fence, squeezed the patient through to the fence. * * * * It was very difficult and intimidating to maneuver in that chaotic atmosphere

(Order, J.A. 146). As a result, those patients who gained access to the clinic "were visibly shaken, angry, confused, or frightened" (Order, J.A. 146). And even though these patients made it into the Clinic, this does not negate the clear evidence that Defendants tried to stop them, which is enough in itself to prove a violation of the Access Act. See 18 U.S.C. 248(a).

B. Defendants Intended To Obstruct Clinic Entrances

The district court did not err in finding that Defendants obstructed the clinic entrances because they intended to interfere with patients' access to the Clinic.

1. Defendants' Intent Was Shown Through Their Statements, Conduct, And Past Actions

Defendants' intent was clearly demonstrated by their statements before, during, and after the obstruction, through their conduct at the Clinic, and by their prior history of obstructive demonstrations. The protest was organized as a "rescue" with the stated intent of preventing abortions from taking place at the clinic during the demonstration (Order, J.A. 141, 164-168). At the planning session for the event on the night before the blockade, organizers made clear that the prevention of abortions was to be accomplished through physical obstruction of the clinic, telling the audience that "the Centers for Disease Control had identified the blocking of access to clinics and the harassment of clinic patients as the number

one and two causes, respectively, of decreased abortions in the last five years" (Order, J.A. 141). During the blockade, Defendant Benham urged the other Defendants and other "rescuers" to have "courage to stay at those doors and not allow one mother in" so that "there will not be one baby killed today" (Order, J.A. 143). When the police ordered them to move from in front of the entrances, Benham urged the other Defendants and "rescuers" to continue physically blocking the doors, shouting "don't leave the door, keep blocking the doors, kids" (Order, J.A. 144). After the event, Defendant Gabriel wrote in a newsletter that his actions were intended to "rescue" the unborn scheduled to be aborted that day (Order, J.A. 158).

Defendants' conduct at the Clinic further demonstrated their intent. The district court properly noted that each Defendant could be found to have intended "the natural and probable consequences of his knowing acts" (Order, J.A. 156 (quoting *United States* v. *Wilkinson*, 460 F.2d 725, 733 (5th Cir. 1972)). See also *Washington* v. *Davis*, 426 U.S. 229, 253 (1976) (Stevens, J., concurring) ("Frequently the most probative evidence of intent will be objective evidence of what actually happened rather than evidence describing the subjective state of mind of the actor. For normally the actor is presumed to have intended the natural

consequences of his deeds."); *Gregg*, 32 F. Supp. 2d at 157. It requires no great leap of logic to conclude that one who knowingly stands, kneels, or lies in front of a clinic entrance in a way that "renders passage to or from such a facility * * * unreasonably difficult or hazardous," 18 U.S.C. 248(e)(4), intends to interfere with access to the clinic. See S. Rep. No. 117, 103d Cong., 1st Sess. 24 n.39 (1993) (Senate Report on Access Act).

The district court also took into account that Defendants continued to block the clinic entrances even after police told them that they were violating D.C. Code Ann. § 22-1107, which provides that it is illegal "to crowd, obstruct, or incommode, the free use of any such street, avenue, alley, road, highway, or any of the foot pavements thereof, or the free entrance into any public or private building or inclosure." Even if it were plausible that Defendants were only accidentally impeding access to the clinic up to that point, they were put on notice that their actions were obstructing access to the clinic by the police warning. Nonetheless, they continued their obstruction (Order, J.A. 144-145).

Defendants' intent to block access to the clinic was further demonstrated by their passive resistance to officers' attempts to physically remove the obstruction. The district court found that every Defendant except Mahoney had to be carried by

police officers (Order, J.A. 145). It took 14 police officers up to two hours to clear passage to the clinic entrances (Order, J.A. 145).

Finally, the district court also knew that several of Defendants had previously engaged in similar obstructions seeking to block access to clinics.[8] For example, Defendant Gabriel had been arrested 40 times for similar behavior and convicted at least 17 times (Order, J.A. 158). Defendant Mahoney had been arrested approximately 25 times in connection with his abortion protest activities, convicted for such activities in 7 states, and also found civilly liable (Order, J.A. 159; Stipulation, J.A. 444 ¶ 4).[9]

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[8] See Order, J.A. 137 (Heldreth participated in protests at several clinics in past three years); Order, J.A. 175 (Benham had participated in "rescues" in at least a dozen cities nationwide); Order, J.A. 177 (White subject to a preliminary injunction in an unrelated Access Act case).

[9] Defendants object (App. Br. 26) that evidence of Defendants' prior clinic obstructions was "not competent to prove that the Appellants intended to obstruct access." They cite Fed. R. Evid. 404(a), but acknowledge (App. Br. 26) that the district court admitted the prior acts evidence to prove intent, as permitted by Rule 404(b) (Order, J.A. 158 n.10). They also assert (App. Br. 27) that evidence of their prior arrests and convictions for obstructing clinics does not prove that they intended to obstruct the clinic in this case, asserting that their prior obstructions only led to an "insignificant fine" whereas the conduct alleged in this case could have subjected them to more significant criminal sanctions under the Access Act. But this simply goes to the court's weighing of the evidence, not its admissibility.

2. Defendants Did Not Reasonably Believe They Were Invited To Protest In Front Of The Clinic Doors

In response, Defendants point (App. Br. 25, 35; Mahoney Br. 2) to their own self-serving and implausible assertions that they did not actually intend that their blockade would interfere with access to the clinic. They assert (App. Br. 80-81) that rather than attempting to prevent women seeking abortions from entering the Clinic, Defendants actually believed they were simply accepting an invitation to hold a peaceful vigil in an area designated for the protest by the Clinic and police, which just happened to be directly in front of the Clinic doors. They even go so far as to argue that it would be an unconstitutional denial of due process to sue them for accepting this invitation, pointing to the Supreme Court's decision in *Cox* v. *Louisiana*, 379 U.S. 559, 484-485 (1965). Their arguments are misguided as a matter of fact and law.

Not surprisingly, the district court did not believe Defendants' protestations of innocent intent and found, as a matter of fact, that there was "no evidence in the record * * * to support this contention" (Order, J.A. 162). See *Milk Wagon Drivers Union*, 312 U.S. at 294 ("We can reject such a determination only if we can say that it is so without warrant as to be a palpable evasion of the constitutional guarantee here invoked."). Even if Defendants actually did believe that they were

invited to kneel or lie down in front of the Clinic doors when they arrived, any misunderstanding surely was cleared up within 15 minutes of their arrival, when the police informed Defendants that they were illegally blocking the Clinic entrances and would be arrested if they did not move (see Order, J.A. 143-145).

Defendants argue (App. Br. 82) that it doesn't matter that the District Police made clear that any "invitation" to protest in front of the Clinic doors had been revoked, arguing that the Supreme Court in *Cox* held that such a revocation of an invitation was irrelevant. They misunderstand the case. In *Cox*, the police initially told protesters that they were not close enough to be in violation of an ordinance that prohibited picketing "near" a courthouse. They later ordered the picketers to disperse and then arrested the petitioner for being too close to the courthouse when the demonstrations continued. The Supreme Court held that this violated due process because the police had misled the protesters into thinking that they were not close enough to be in violation of the ordinance. However, the Court made clear that the reason the dispersal order did not "remove[] the prior grant of permission" was because the protester "was expressly ordered to leave, not because he was peacefully demonstrating too near the courthouse * * * but because officials erroneously concluded that what he said threatened a breach of the peace." *Id*. at

484-485. That is, the dispersal order did not make clear that the protesters were in an illegal location or that any implied invitation to picket there had been revoked. In this case, the police gave Defendants clear and repeated warnings that they were protesting in an illegal location and manner, yet Defendants ignored them.

3. The District Court Did Not Violate The First Amendment In Considering Defendants' Statements And Beliefs As Evidence Of Their Intent

Defendants argue (App. Br. 23-24) that the district court impermissibly relied on their expressions of beliefs about abortion in determining their intent, violating their First Amendment rights. To the extent Defendants are arguing that the First Amendment prohibits a court from relying on expressions of belief to determine intent or motive, they are simply wrong as a matter of law. Nothing in the First Amendment or the Access Act precludes a court from considering, or even relying exclusively upon, a defendant's expressions of belief to determine intent. See, *e.g.*, *Wisconsin* v. *Mitchel*, 508 U.S. 476, 489 (1993) ("The First Amendment, moreover, does not prohibit the evidentiary use of speech * * * to prove motive or intent."); *Haupt* v. *United States*, 330 U.S. 631, 642 (1947). Because intent frequently cannot be directly examined, courts routinely determine intent based on defendants' actions and statements. See, *e.g.*, *United States* v. *Jackson*, 513 F.2d

456, 461 (D.C. Cir. 1975). Defendants cite no authority for their broad assertion that their intent cannot be inferred from their statements or that the religious content or context of those statements somehow makes them inadmissable evidence to prove that their actions were intended to interfere with access to the Clinic.[10]

Considering such expressions of belief as evidence of intent is not tantamount to "penaliz[ing] the Appellants for their beliefs" and punishing them for using "guilty words" in prayer or protest (App. Br. 23-24). The district court rendered judgment against Defendants because of their illegal physical conduct, not because of their beliefs. Had Defendants expressed their beliefs and opinions without obstructing access to the clinic, there would have been no litigation much less a judgment against them. That the Access Act requires the government to prove that Defendants obstructed access to the clinic based on a certain intent and motive does not mean that Defendants are being impermissibly punished for their beliefs. See *Terry* v. *Reno*, 101 F.3d 1412, 1420-1421 (D.C. Cir. 1996) ("The

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[10] Moreover, to the extent Defendants are arguing that the district court relied solely on their expressions of belief to infer intent, they are also wrong as a matter of fact. As Defendants acknowledge elsewhere in their brief, the district court also relied on defendants' conduct at the blockade (App. Br. 28; Order, J.A. 156-161) and their prior conduct at similar blockades (App. Br. 26; Order, J.A. 158-159).

Act's motive requirement * * * does not make FACE an instrument for the suppression of speech. It merely narrow's the Act's reach."), cert. denied, 520 U.S. 1264 (1997).

II. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN ISSUING AN INJUNCTION

Defendants next argue (App. Br. 45-48) that even if they did violate the Access Act, the prospect of their violating it again is so remote that injunctive relief was not authorized. In fact, they believe that the likelihood of such violations is so remote that the case has actually become moot (App. Br. 48-50). Neither argument has merit.

"[A]n action for an injunction does not become moot merely because the conduct complained of has terminated." *Allee* v. *Medrano*, 416 U.S. 802, 810 (1974). "A case might become moot if subsequent events made it *absolutely clear* that the allegedly wrongful behavior could not reasonably be expected to recur." *United States* v. *Concentrated Phosphate Export Ass'n*, 393 U.S. 199, 203 (1968) (emphasis added). See also 13A Charles Allen Wright, et al., *Federal Practice and Procedure* § 3533.7 (2d ed. 1984). "The test for mootness in cases such as this is a stringent one," and the defendant bears a "heavy burden" of proof. *Concentrated*

Phosphate Export Ass'n, 393 U.S. at 203. *See also United States* v. *W.T. Grant Co.*, 345 U.S. 629, 633 (1953).

Defendants argue that the violation cannot recur because the Clinic has gone out of business. It may be that the case would have been moot if it had been brought by the Clinic to protect the Clinic itself from future violations of the Access Act. But the United States' claims are not mooted simply because any future violations of the Access Act will have to occur at a different facility. The United States' authority and obligations under the Access Act are much broader than those of a private party. The United States brought this case in its own name, as a sovereign entitled to insist on obedience to its laws. See 18 U.S.C. 248(c)(2). The injunction authorized in such cases, like the criminal and civil penalty provisions, is designed to "vindicate the public interest," 18 U.S.C. 248(c)(2), rather than simply remedy a private harm. See, *e.g.*, *Vermont Agency of Natural Resources* v. *United States*, 120 S. Ct. 1858, 1862 (2000) ("It is beyond doubt that the complaint asserts an injury to the United States [through] the injury to its sovereignty arising from violations of its laws."); *United States* v. *Dinwiddie*, 76 F.3d 913, 929 (8th Cir.) ("The government has a significant interest not only in safeguarding [the victims in this case], but also in protecting the staff and patients

of other reproductive-health facilities."), cert. denied, 519 U.S. 1043 (1996).[11] Therefore, the fact that Defendants no longer pose a risk toward CWC is of little relevance. "Having found [the defendant] guilty of a violation of [federal law], the District Court was empowered to fashion appropriate restraints on the [defendant's] future activities * * * to avoid a recurrence of the violation." *Nat'l Soc'y of Prof'l Eng'rs* v. *United States*, 435 U.S. 679, 697 (1978).

Defendants next argue (App. Br. 46-48), that even if the closure of the Clinic does not moot the case, their cessation of illegal conduct in the D.C. area while this litigation was pending showed that there was no risk of future violations and, therefore, no need for an injunction. "It is the duty of the courts to beware of efforts to defeat injunctive relief by protestations of repentance and reform, especially when abandonment seems timed to anticipate suit, and there is probability of resumption." *United States* v. *Oregon State Med. Soc'y*, 343 U.S. 326, 333 (1952). For this reason, "[a]long with its power to hear the case, the court's power to grant injunctive relief survives discontinuance of the illegal conduct." *W.T. Grant Co.*, 345 U.S. at 633. In this case, the fact that Defendants

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[11] Thus, Defendants' reliance on *Lucero* v. *Trosch*, 121 F.3d 591 (11th Cir. 1997), is misplaced. A portion of that case became moot when the clinic went out of business, but only because plaintiff clinic could only seek an injunction to protect *itself* against future obstructions. *Id*. at 596.

may have ceased their illegal conduct during the pendency of the trial does not prevent the district court from issuing an injunction to ensure that Defendants continue to comply with the law once the immediate threat of pending litigation is lifted. "The necessary determination is that there exists some cognizable danger of recurrent violation." *Ibid*. That is, there must be "a *reasonable likelihood* of further violation[s] in the future." *SEC* v. *Savoy Indust., Inc.*, 587 F.2d 1149, 1168 (D.C. Cir. 1978) (emphasis in original) (citation omitted). This determination is one for the district court to make "based on all the circumstances." *W.T. Grant Co.*, 345 U.S. at 633. The district court's "discretion is necessarily broad and a strong showing of abuse must be made to reverse it." *Ibid.*

In this case, the district court did not abuse its discretion in concluding that, based on all the evidence, there was a cognizable danger that the Defendants would violate the Access Act again in the future (Order, J.A. 175-177). Defendants were not individuals who, on a whim, violated the Access Act in a one-time, aberrant excess of enthusiasm. Instead, the district court found that the current violation of the Access Act was planned and premeditated. It was but one in a pattern of clinic protests by many of Defendants throughout the country.[12] Several were leaders of

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[12] See Order, J.A. 137 (Heldreth participated in protests at several clinics in past

(continued...)

anti-abortion organizations and some had organized similar blockades in the past.[13] They violated the Access Act in this case because they believed their cause justified their actions.[14] Many believed so strongly in the justice of their actions that they traveled long distances to participate in the obstruction.[15] They gave no reason to suppose that those same strongly held beliefs would not lead them again to violate the law in the future. In fact, Defendants continue to insist that they have a legal right to do again exactly what they did in this case (see App. Br. 22-45).

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[12](...continued)
three years); Order, J.A. 175 (Benham had participated in "rescues" in at least a dozen cities nationwide); Order, J.A. 137, 176 (Gabriel arrested at least 40 times and convicted at least seventeen times for abortion-related protest activities); Order, J.A. 176-177 (Mahoney organizes annual demonstrations at clinics in the District and has been arrested approximately 25 times around the country in connection with protests at clinics); Order, J.A. 177 (White is subject to a preliminary injunction in an unrelated Access Act case).

[13] See, *e.g.*, Order, J.A. 175-176 (Benham was Director of Operation Rescue National and helped organize the blockade in this case); Order, J.A. 176 (Mahoney is Director of the Christian Defense Coalition "which organizes annual demonstrations in front of abortion clinics on the anniversary of *Roe v. Wade*."); Order, J.A. 177 (Newman is Director of Operation Rescue West).

[14] See, *e.g.*, Order, J.A. 138 ("Defendants Newman and White both state that 'abortion is murder . . . [r]escuing these children is required both legally and morally.'") (citing Ex. 24 at No. 15, Ex. 28 at No. 15).

[15] Order, J.A. 176 (Benham traveled from Texas); Order, J.A. 176 (Gabriel traveled from Wisconsin); Order, J.A. 176 (Heldreth traveled from Illinois); Order, J.A. 177 (White traveled from California).

The district court also rightly noted the special significance of the District of Columbia as the staging ground for annual anti-abortion protests on the anniversary of the Supreme Court's decision in *Roe* v. *Wade*, protests that regularly include obstruction of reproductive health clinics (Order, J.A. 177-178). Cf. *Nat'l Org. for Women* v. *Operation Rescue*, 37 F.3d 646, 649-650 (D.C. Cir. 1994) (discussing history of clinic blockades in the District during annual *Roe* v. *Wade* anniversary demonstrations). Defendants' blockade in this case was arranged to coincide with this annual event (Order, J.A. 175-176; J.A. Supp. 240).

In such circumstances, the district court rightly concluded that Defendants were likely to repeat actions that they insist are both morally required and legally permissible. See *United States* v. *White*, 893 F.Supp. 1423, 1438 (C.D.Cal.1995).

III. THE INJUNCTION DOES NOT VIOLATE DEFENDANTS' FIRST AMENDMENT RIGHTS

The district court's injunction does not violate the First Amendment. The injunction is a narrowly tailored limitation on Defendants' conduct that restricts no more speech than is necessary to protect the public from future violations of the Act. Defendants remain free to "express their opposition to abortion by various means – by silent witness, polite offers of information, prayer, urgent entreaties, pointed criticisms, emotional exclamations" (App. Br. 52). They simply may not

do so while blockading clinic entrances or engaging in other physical conduct prohibited by the order (see J.A. 130).

A. The Injunction Is Not A Prior Restraint On Speech

Defendants first argue (App. Br. 51-55) that the injunction is an unconstitutional prior restraint of speech. The Supreme Court has repeatedly rejected this argument in the context of similar injunctions. In *Madsen* v. *Women's Health Center, Inc.*, 512 U.S. 753, 763 n.2 (1994), the Court worte:

> We also decline to adopt the prior restraint analysis urged by petitioners. * * * Not all injunctions that may incidentally affect expression * * * are "prior restraints" * * * * Here, petitioners are not prevented from expressing their message in any one of several different ways; they are simply prohibited from expressing it within the 36-foot buffer zone. Moreover, the injunction was issued not because of the content of petitioner's expression, as was the case in [the prior restraint cases], but because of their prior unlawful conduct.

See also *Schenck* v. *Pro-Choice Network of Western N.Y.*, 519 U.S. 357, 374 n.6 (1997) (accord).

Defendants attempt to distinguish these cases by arguing (App. Br. 52) that, in this case, Defendants' speech includes "religious expression and pro-life advocacy [that] 'is entitled to the fullest possible measure of constitutional

protection.'" But so did the speech of the protesters in *Madsen* and *Schenk*.[16] The Supreme Court did not reject the prior restraint arguments in *Madsen* or *Schenk* because the protesters had engaged in "fighting words" or other unprotected speech (App. Br. 52). Instead, it rejected the argument because, like the injunction in this case, the court orders simply had an incidental effect on expression insofar as they limited the place and manner of the protesters' activities based on the protesters' past unlawful conduct, and left protesters alternative channels of communication. *Madsen*, 512 U.S. at 763 n.2; *Schenk*, 519 U.S. at 374 n.6. See also *Lucero* v. *Trosch*, 121 F.3d 591, 600-601 (11th Cir. 1997) (similar injunction not a prior restraint).

B. The Injunction Burdens No More Speech Than Necessary To Serve A Significant Government Interest

Although Defendants attempt (App. Br. 56-63) to turn a simple standard into an overlapping ten-part test, the proper standard for evaluating a content-neutral injunction is simply "whether the challenged provisions of the injunction burden no more speech than necessary to serve a significant government interest." *Madsen*,

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[16] In fact, both cases involved some of the same organizations involved in the blockade in this case. See *Madsen*, 512 U.S. at 759 n.1 (case involved Pat Mahoney and Operation Rescue); *Schenk*, 519 U.S. at 362 (case involved Operation Rescue); Order, J.A. 136-138 (Defendants include Pat Mahoney and officers of Operation Rescue).

512 U.S. at 765. Even under heightened First Amendment review, the district court's determination of what measures are necessary to effectuate the government's interests is entitled to "some deference." *Id*. at 769-770. See also *Schenck*, 519 U.S. at 381.

Defendants do not contest the significance of the government interests served by the injunction in this case.[17] Nor do they challenge the portions of the injunction prohibiting future obstruction of reproductive health facilities, or inducing or directing others to do so. Instead Defendants argue that the injunction burdens more speech than is necessary primarily[18] because their conduct did not justify the imposition of fixed buffer zones or an injunction applicable throughout the D.C. metropolitan area (App. Br. 61). Neither objection bears scrutiny.

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[17] Nor could they. *Madsen* makes clear that an injunction seeking to prevent unlawful obstruction of reproductive health clinics easily meets this standard. See 512 U.S. at 767-768. See also *Nat'l Org. for Women* v. *Operation Rescue*, 37 F.3d 646, 655 (D.C. Cir. 1994).

[18] Defendants also raise a host of other complaints under the guise of a *Madsen* analysis, most of which simply repeat objections made elsewhere in their briefs. They argue (App. Br. 62-63), for example, that the only narrowly tailored injunction possible is no injunction at all because they did not violate the Access Act (App. Br. 56, 60, 62) and because there is no threat of future violations (App. Br. 57, 62-63), both issues discussed *supra*.

1. Fixed Buffer Zones

Within the D.C. metropolitan area, the injunction prohibits Defendants from "[c]oming within a twenty-foot radius of any reproductive health facility" (J.A. 130). Defendants do not quibble with the size of the buffer zones,[19] but instead argue that the district court violated the First Amendment by imposing any buffer zone at all.

Defendants argue (App. Br. 64-65) that a buffer zone is only appropriate in light of circumstances more egregious than the simple obstruction conducted in this case. They assert that the Supreme Court only approved a buffer zone in *Schenck*, for instance, because the defendants in that case had aggressively harassed and physically assaulted patients. That is not true. The Supreme Court approved the buffer zone in *Schenk* as necessary to protect access to the clinic, not because it was needed to prevent physical assaults (although it surely served that purpose as well):

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[19] Even if they did, the Supreme Court has approved similar, or even larger, fixed buffer zones as a narrowly tailored remedy to obstructive behavior. See *Madsen*, 512 U.S. at 768-769 (approving a 36-foot buffer zone); *Schenck*, 519 U.S. at 380-381 (approving 15-foot buffer zone). In doing so, the Court has instructed that courts are to "defer to the District Court's reasonable assessment of the number of feet necessary to keep the entrances clear." *Schenck*, 519 U.S. at 381.

> These 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. As in *Madsen*, the record shows that protesters purposefully or effectively blocked or hindered people from entering and exiting the clinic doorways * * * and from driving in and out of clinic parking lots. *Based on this conduct* * * * the District Court was entitled to conclude that the only way to ensure access was to move back the demonstrations away from the driveways and parking lot entrances.

519 U.S. at 380 (emphasis added). The district court found the same conduct in this case – "protesters purposefully or effectively block[ing] or hinder[ing] people from entering and exiting the clinic doorways." *Ibid.* (see also Order, J.A. 172).[20] And based on this conduct, the district court was entitled to conclude that a buffer zone was needed to prevent Defendants' legal protests from becoming illegal obstructions.

Nor was the district court required, as Defendants suggest (App. Br. 61), to first issue an even more limited injunction before imposing a buffer zone. While "[t]he failure of [a prior] order to accomplish its purpose *may be taken into consideration* in evaluating the constitutionality of the broader order," *Madsen*, 512 U.S. at 770 (emphasis added), this is but one of many factors to be considered by

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[20] Defendants inexplicably assert (App. Br. 65) that "Judge Kessler, however, made no finding that buffer zones were necessary to ensure access." This is simply untrue. The court specifically found that "[t]he buffer zone is necessary to ensure compliance with the FACE statute by moving Defendants away from the clinics, thereby allowing access to those entrances" (Order, J.A. 172).

the district court. At any rate, the district court in this case *did* take into account the past failure of state laws and ordinances, as well as prior court orders and the Access Act itself, to deter these particular Defendants from obstructing clinic entrances. Several Defendants have been repeatedly arrested, convicted, and/or subject to court orders for similar obstructive activities in the past.[21] All of Defendants knew that their obstructive activities in this case were illegal and would subject them to arrest, yet they engaged in them regardless (see Order, J.A. 143-145). The district court had ample reason to conclude that simply prohibiting Defendants from violating the Access Act or obstructing clinics in the future would not be sufficient.

2. Injunction Covering D.C. Metropolitan Area

The district court did not abuse its discretion in concluding that to be effective, the injunction should cover all reproductive health facilities within the

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[21] See Order, J.A. 137 (Heldreth participated in protests at several clinics in past three years); Order, J.A. 175 (Benham had participated in "rescues" in at least a dozen cities nationwide); Order, J.A. 137, 176 (Gabriel arrested at least 40 times and convicted at least seventeen times for abortion-related protest activities); Order, J.A. 176-177 (Mahoney organizes annual demonstrations at clinics in the District and has been arrested approximately 25 times around the country in connection with protests at clinics); Order, J.A. 138, 177 (citing J.A. Supp. 575-577) (Newman has stated that he will continue to conduct "rescues" regardless of any federal court order); Order, J.A. 177 (White subject to a preliminary injunction in an unrelated Access Act case).

D.C. metropolitan area. As discussed above, the interest to be protected in this case is the United States' interest in ensuring compliance with the nation's laws, *Vermont Agency of Natural Resources* v. *United States*, 120 S. Ct. 1858, 1862 (2000), and in "protecting a woman's freedom to seek lawful medical or counseling services in connection with her pregnancy," *Madsen*, 512 U.S. at 767. There was no evidence to indicate that Defendants' willingness to violate the Access Act, or likelihood of violating the Access Act again in the future, was tied to any particular clinic. Many Defendants had engaged in protests at numerous clinics throughout the country (Order, J.A. 136-139). For this reason, the district court properly refused to limit the injunction to future obstructions of the particular clinic giving rise to the violations in this case (Order, J.A. 170-171). See *United States* v. *Dinwiddie*, 76 F.3d 913, 929 (8th Cir.), cert. denied, 519 U.S. 1043 (1996).

Instead, the geographic scope of the injunction was narrowly tailored to the risk of future violations found by the district court. The court found that

> [t]he nation's Capital is the site of the National Right to Life Week, which is organized annually to protest the *Roe v. Wade* decision. Defendants have admitted that protests at local clinics are organized annually during this event, and there is every reason to believe that other area clinics will be targeted this year and in the future

(Order, J.A. 170-171; see also J.A. Supp. 236-238). For this reason, the district court reasonably concluded that if the injunction were limited to one or a few clinics in the area, Defendants would simply pick another to obstruct during the annual Right to Life Week (Order, J.A. 170-171). See also *Dinwiddie*, 76 F.3d at 929.

Courts have upheld injunctions and statutes of much greater geographic scope. In *Schenk*, for example, the Supreme Court upheld buffer zones around the driveways and entrances of "any facility * * * at which abortions are performed in the Western District of New York." 519 U.S. at 366 n.3, 380. Similarly, in *United States* v. *Dinwiddie*, the court of appeals affirmed a nationwide injunction, acknowledging that the government's interest in preventing violations of federal law is not limited to particular sites and that "a geographically narrow injunction would be insufficient to advance this interest." 76 F.3d at 929.

C. The Injunction Is Not Impermissibly Vague

Defendants also argue (App. Br. 57-60) that the injunction is impermissibly vague because it does not identify by name all the facilities in the metropolitan area at which the injunction applies.

Under the Federal Rules of Civil Procedure, an injunction must "be specific in terms" and "describe in reasonable detail * * * the act or acts sought to be restrained." Fed. R. Civ. P. 65(d). Due process similarly requires that a "person of ordinary intelligence [must have] a reasonable opportunity to know what was prohibited." *Nat'l Org. for Women v. Operation Rescue*, 37 F.3d at 657-658 (quoting *Grayned* v. *City of Rockford*, 408 U.S. 104, 108 (1972)). This is the same constitutional standard applied to a statutory prohibition. See *Terry* v. *Reno*, 101 F.3d 1412, 1421 (D.C. Cir. 1996) ("A statute is unconstitutionally vague if it does not give a person of ordinary intelligence a reasonable opportunity to know what is prohibited.") (citation and quotation marks omitted), cert. denied, 520 U.S. 1264 (1997). "In determining whether an order is sufficiently clear * * * we apply an objective standard that takes into account both the language of the order and the objective circumstances surrounding the issuance of the order." *United States* v. *Young*, 107 F.3d 903, 907 (D.C. Cir. 1997) . Thus, "the fair notice requirement of Rule 65(d) must be applied in light of the circumstances surrounding the injunction's entry: the relief sought by the moving party, the evidence produced at the hearing on the injunction, and the mischief that the injunction seeks to prevent."

Common Cause v. *Nuclear Regulatory Comm'n*, 674 F.2d 921, 927 (D.C. Cir. 1982) (citation and internal punctuation omitted).

The injunction in this case describes the conduct prohibited in generally applicable terms that are reasonably specific. It proscribes certain conduct at any "hospital, clinic, physician's office, or other facility that provides medical, surgical, counseling, or referral services relating to the human reproductive system, including services relating to pregnancy, or the termination of pregnancy" (J.A. 130). This is the same definition of a "reproductive health facility" as is used in the Access Act. Compare J.A. 130 with 18 U.S.C. 248(e)(1), (5). Thus, the injunction is no more vague or ambiguous than the Access Act itself. In *Terry* v. *Reno*, this Court rejected a vagueness challenge to the Access Act, concluding that "FACE defines its terms narrowly and in clearly understandable language." 101 F.3d at 1421.[22]

Nonetheless, Defendants' hypothesize (App. Br. 58) that they may be held in contempt for accidentally violating the buffer zone by, for example, walking past a general office building that, unknown to them, contains a reproductive health

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[22] The challenge in that case was to the words "interfere with," and "intimidate," 101 F.3d at 1421, but the phrase "reproductive health facility," as defined in the statute and injunction, is at least as concrete and understandable as those words.

facility. They also postulate (App. Br. 60) that there may be some uncertainty regarding whether any known medical facility (such as a hospital or physician's office) actually provides reproductive health services.

"[W]hile there is little doubt that imagination can conjure up hypothetical cases in which the meaning of these terms will be in nice question, because we are condemned to the use of words, we can never expect mathematical certainty from our language." *Hill* v. *Colorado*, 120 S. Ct. 2480, 2498 (2000) (citation and internal punctuation omitted). Under Defendants' theory, even if the district court had simply enjoined them from violating the Access Act in the future, its order would have been impermissibly vague because the statute does not identify specific reproductive health facilities by name. And if that is correct, Congress could never pass a statute of general applicability because such statutes always require citizens to determine whether the general requirements of the law apply to a particular situation.

In any case, Defendants' fear of accidental violations of the injunction is easily avoided. Any attempt to hold Defendants in criminal contempt would require proof, beyond a reasonable doubt, that Defendants willfully violated the order. See *United States* v. *Young*, 107 F.3d 903, 907 (D.C. Cir. 1997). Such a

showing could not be made (if it were even attempted) if Defendants unknowingly wandered into the immediate vicinity of a reproductive health facility. Moreover, in light of the "the mischief that the injunction seeks to prevent," *Common Cause*, 647 F.2d at 927, the injunction is reasonably interpreted to require only that Defendants avoid incursions of the buffer zones surrounding facilities they know, or reasonably should know, provide reproductive health services within the meaning of the Access Act and the injunction. Cf., *Madsen*, 512 U.S. at 808 (Scalia, J., dissenting). See also *Nat'l Org. for Women* v. *Operation Rescue*, 37 F.3d at 657-658 (reading injunction to avoid vagueness problem).

IV. DEFENDANTS WERE NOT ENTITLED TO A JURY TRIAL IN A CASE SEEKING SOLELY INJUNCTIVE RELIEF UNDER THE ACCESS ACT

The district court properly found that Defendants had no right to a jury trial in this case seeking solely equitable relief.

The United States' original complaint requested an injunction, civil penalties, and statutory damages (J.A. 34). Defendants demanded a jury trial pursuant to Fed. R. Civ. P. 38(b), on the grounds that the request for civil penalties and statutory damages created a right to a jury trial. The United States subsequently sought, and was granted, leave to amend its complaint to remove the

request for civil penalties and statutory damages, leaving only claims for equitable relief (J.A. 83).[23] As a result, the district court struck Defendants' jury demand (J.A. 83).

A. Defendants Had No "Vested" Right To A Jury Trial Based On Prior Versions Of The United States' Complaint

Defendants first complain (App. Br. 66) that the district court should not have stricken their jury demand because their right to a jury trial had "vested" prior to the United States' amendment of its complaint. However, the Federal Rules provide that:

> [t]he trial of all issues so demanded shall be by jury, unless (1) the parties or their attorneys of record * * * consent to trial by the court sitting without a jury or (2) the court upon motion or of its own initiative finds that a right of trial by jury of some or all of those issues does not exist under the Constitution or statutes of the United States.

Fed. R. Civ. P. 39(a). In this case, the district court determined that without the claims for civil penalties and statutory damages, Defendants' right to a jury trial did not exist and struck the jury demand as required by the second subsection of Rule

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[23] Defendants do not appeal the district court's granting of the United States motion to amend its complaint to remove its request for civil penalties and statutory damages, but simply insist (App. Br. 66) that permitting the amendment should not have deprived them of a jury trial.

39(a) (see J.A. 83).[24]

Defendants argue (App. Br. 66), however, that irrespective of Fed. R. Civ. P. 39(a)(2), the district court lacked authority to strike the jury demand because doing so unfairly denied Defendants' their chance for the jury trial they had already requested. But the plain language of the Rule, and the relevant case law, make clear that Defendants' right to a jury trial depended on the issues to be tried, not those originally pleaded. See, *e.g.*, *Armco* v. *Armco Burglar Alarm Co.,* 693 F.2d 1155, 1158 (5th Cir. 1982); *Francis* v. *Dietrick*, 682 F.2d 485, 486-487 (4th Cir. 1982); *Anti-Monopoly, Inc.* v. *General Mills Fun Group*, 611 F.2d 296, 307 (9th Cir. 1979).[25]

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[24] Defendants ignore this second subsection of Rule 39(a), wrongly claiming (App. Br. 66) that once a jury demand has been made, "it may be waived only on consent of the parties."

[25] Contrary to Defendants' suggestion (App. Br. 66), the Fifth Circuit's decision in *Johnson* v. *Penrod Drilling Co.*, 469 F.2d 897 (1972), aff'd in relevant part en banc, 510 F.2d 234 (1975), did not reach the opposite result with respect to "a similar motion." That case was decided in the unusual context of a seaman's claim under the Jones Act, 46 U.S.C. 688, under which plaintiffs are permitted to unilaterally designate their case as being brought under maritime jurisdiction (in which case there is no right to a jury) or under federal question jurisdiction (in which case there is). See generally, 9 Charles Alan Wright & Arthur Miller, *Federal Practice and Procedure* §§ 2308, 2315 (2d ed. 1995). *Johnson* held that in these unique circumstances, a plaintiff may not simply change the jurisdictional designation without any change in the substance of the claims simply to avoid a

(continued...)

B. Defendants Had No Constitutional Right To A Jury Trial Under The Amended Complaint

Defendants next argue (App. Br. 67-71) that even without the claim for civil penalties and statutory damages, the United States' amended complaint was still a "suit at common law" within the meaning of the Seventh Amendment, thereby requiring a jury trial at Defendants' request.

The Seventh Amendment right is limited to "suits in which legal rights are to be ascertained and determined, in contradistinction to those where equitable rights alone are recognized, and equitable remedies are administered." *Chauffeurs, Teamsters & Helpers* v. *Terry*, 494 U.S. 558, 564 (1990) (citation and internal punctuation omitted). The Supreme Court has instructed that

> [t]o determine whether a particular action will resolve legal rights, we examine both the nature of the issues involved and the remedy sought. First, we compare the statutory action to 18th-century actions brought in the courts of England prior to the merger of the courts of law and equity. Second, we examine the remedy sought and determine whether it is legal or equitable in nature.

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[25](...continued)
jury trial the plaintiff had previously requested. See 469 F.2d at 903. The rule in that case has been limited to its special circumstances. See *Moser* v. *Texas Trailer Corp.*, 623 F.2d 1006, 1011 (5th Cir. 1980). In cases not involving maritime jurisdiction, the Fifth Circuit has held that a plaintiff may withdraw a claim for legal relief and, thereby, remove the right to a jury trial. See *Armco*, 693 F.2d at 1158.

Id. at 565 (quotation marks and citation omitted).

Defendants argue (App. Br. 69-70) that civil Access Act claims "sound in tort" and therefore fall within the scope of the Seventh Amendment regardless of the type of relief sought.[26] But the fact that the conduct giving rise to an Access Act violation also gives rise to certain common law torts does not mean an Access Act case is necessarily legal within the meaning of the Seventh Amendment. In determining whether the United States' action involves "legal rights, we examine *both* the nature of the issues involved *and* the remedy sought." *Chauffeurs,* 494 U.S. at 565 (emphasis added). And, as the Supreme Court has made clear, "[t]he second inquiry is the more important in our analysis." *Ibid*. This is because in the 18th century, the remedy requested was frequently dispositive in determining the jurisdiction of the common law courts. "Actions for injunctions are equitable in nature and were unknown to the common law courts. Because of this history, there is no constitutional right to a jury trial on a claim for an injunction." 9 Charles Alan Wright & Arthur Miller, *Federal Practice and Procedure* § 2308 (2d Ed.

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[26] At one point (App. Br. 70), Defendants even seem to suggest that any case in which motive or intent is an issue necessarily must be decided by a jury because they are "classical legal issues for a jury to decide." If that were true, almost no case seeking injunctive relief could be decided without a jury, for almost every case involves some fact issue that could be analogized to facts frequently decided by juries in criminal or common law cases.

1995). See also, *e.g.*, *Great American Fed. Sav. & Loan Ass'n* v. *Novotny*, 442 U.S. 366, 375 (1979); *United States* v. *Louisiana*, 339 U.S. 699, 706 (1950).[27]

That an Access Act claim may "sound in tort" does not change this result. As Justice Scalia explained in a case cited by Defendants (App. Br. 70):

> Since the merger of law and equity, any type of relief, including purely equitable relief, can be sought in a tort suit – so that I can file a tort action seeking only an injunction against a nuisance. If I should do so, the fact that I seek only equitable relief would disentitle me to a jury. * * * So also here: Some § 1983 suits do not require a jury because only equitable relief is sought.

City of Monterey v. *Del Monte Dunes at Monteray, Ltd.*, 526 U.S. 687, 726 n.1 (1999) (Scalia, J., concurring).[28]

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[27] The same is not true of a declaratory judgment action. Declaratory judgments are remedies of recent, statutory creation that are not considered equitable relief for Seventh Amendment purposes. See *Beacon Theaters, Inc.* v. *Westover*, 359 U.S. 500, 504 (1959); 9 Charles Alan Wright and Arthur Miller, *Federal Practice and Procedure* § 2313 (2d ed. 1995). In cases seeking declaratory relief, the court determines the nature of the claims in the underlying dispute and provides a jury trial if the underlying claim is legal. See, *e.g.*, *Beacon Theaters*, 359 U.S. at 504; *Simler* v. *Conner*, 372 U.S. 221, 223 (1963). However, none of the cases regarding declaratory relief draw into question the settled proposition that a request for an injunction is an equitable claim for which there is no right to a jury trial. See *Beacon Theaters*, 359 U.S. at 508 (in case seeking both declaratory relief on a legal claim and an injunction, the claim for an injunction is to be decided by the court).

[28] Not surprisingly, therefore, Defendants have failed to cite a single case providing for a jury trial in a suit seeking solely injunctive relief. Some of the cases they cite involve money damages. See, *e.g.*, *Chauffeurs,* 494 U.S. at 570

(continued...)

And so also here: the United States' Access Act suit did not require a jury because only equitable relief was sought.

V. THE DISTRICT COURT HAD PERSONAL JURISDICTION OVER DEFENDANTS BENHAM AND TYREE

Defendants Benham and Tyree, who reside outside of the District, argue (App. Br. 71-76) that the district court lacked personal jurisdiction over them. The district court was authorized to assert personal jurisdiction over nonresidents so long as doing so was consistent with the demands of due process and authorized by the long-arm statute of the District of Columbia. *United States* v. *Ferrara*, 54 F.3d 825, 828 (D.C. Cir. 1995). Because the District of Columbia Court of Appeals has interpreted the District's long-arm statute to provide for personal jurisdiction "to the fullest extent permissible under the due process clause," *Mouzavires* v. *Baxter*, 434 A.2d 998, 990-991 (1981), cert. denied, 455 U.S. 1006 (1982), "the statutory and constitutional jurisdictional questions, which are usually distinct, merge into a single inquiry here." *Ferrar*, 54 F.3d at 828. See also *World-Wide Volkswagen Corp.* v. *Woodson*, 444 U.S. 286, 290 (1980); *Mouzavires*, 424 A.2d at 992; *Chan*

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[28](...continued)
(involving a "request for compensatory damages representing backpay and benefits"); *Simler*, 372 U.S. at 222 (suit over unpaid legal fees). Others involve litigation raising both legal and equitable claims, an issue of no relevance here. See *Ross* v. *Bernhard*, 396 U.S. 531 (1970); *Beacon Theaters*, *supra*.

v. *Soc'y Expeditions, Inc.*, 39 F.3d 1398, 1405 (9th Cir. 1994), cert. denied, 514 U.S. 1004 (1995); *Ghanem* v. *Kay*, 624 F. Supp. 23, 24 (D.D.C. 1984); *Textile Museum* v. *F. Eberstadt & Co.,* 440 F. Supp. 30, 31 (D.D.C. 1977).

A. Defendants Benham and Tyree Established Sufficient "Minimum Contacts" With The District By Traveling To The District To Blockade A Local Business In Violation Of Local And Federal Law

"A court's jurisdiction over a defendant satisfies the demands of due process when there are 'minimum contacts' between the defendant and the forum 'such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice.'" *Ferrara*, 54 F.3d at 828 (quoting *International Shoe Co.* v. *Washington*, 326 U.S. 310, 316 (1945)). The frequency of contacts is not determinative. Instead, "the defendant's conduct and connection with the forum State [must be] such that he should reasonably anticipate being haled into court there." *World-Wide Volkswagen Corp.*, 444 U.S. at 297.

Defendants cannot seriously assert that they did not expect, or could not fairly be expected, to be subject to lawsuits in the District of Columbia when they traveled to the District for the purposes of violating District and federal law by obstructing access to a District business and interfering with the medical care of District residents, requiring the deployment of dozens of District police officers to

arrest and physically remove them from the scene. Minimum contacts are effected when a defendant "exercises the privilege of conducting activities within a state" and "enjoys the benefits and protection of the laws of that state." *International Shoe*, 326 U.S. at 319. See *also Hanson* v. *Denckla*, 357 U.S. 235, 253 (1958). The same must be true when a defendant conducts activities in the State for the purpose of violating those laws. A nonresident driver passing through a state may be hailed into that states' courts for driving negligently on the jurisdiction's roads. See *Hess* v. *Pawloski*, 274 U.S. 352, 356 (1927); *Liberty Mut. Ins. Co.* v. *Burgess*, 308 A.2d 775, 778 (D.C. 1973). Surely it is less offensive to "traditional notions of fair play and substantial justice," *International Shoe*, 326 U.S. at 316, to exercise jurisdiction over nonresidents who come to the jurisdiction *intentionally* to cause injuries to District residents.

B. Defendants Benham and Tyree Were Subject To The District Of Columbia's Long-Arm Statute

Because exercising personal jurisdiction over Defendants Benham and Tyree was consistent with due process, it was also consistent with the District's long-arm statute. See *Ferrar*, 54 F.3d at 828; *Mouzavires*, 434 A.2d at 990-991. But even if a separate statutory discussion were required, it is clear that Defendants fell comfortably within the act's purview.

The District's statute provides, in relevant part, for personal jurisdiction "over a person, who acts directly or by an agent, as to a claim for relief arising from the person's * * * causing tortious injury in the District of Columbia by an act or omission in the District of Columbia." D.C. Code Ann. § 13-423(a)(3). Defendants' blockade of the clinic caused a "tortious injury" within the meaning of the statute. Defendants themselves have argued (App. Br. 70) that "[c]ivil FACE claims * * * sound in tort." As the district court observed (J.A. 120), Defendants' actions in violation of the Access Act were analogous to the traditional torts of "assault and battery, trespass, and intentional interference with business." See *Planned Parenthood* v. *Am. Coalition of Life Activists*, 945 F. Supp. 1355, 1368 (D. Or. 1996) (acts prohibited by the Access Act are "tortious-type conduct"); *Am. Life League, Inc.* v. *Reno*, 855 F. Supp. 137, 142 (E.D. Va. 1994) (accord), aff'd, 47 F.3d 642 (4th Cir. 1995).

Defendants argue (App. Br. 71-74), however, that the United States did not prove any such torts, or any "tortious injury," because "no one was prevented from obtaining medical services" during the blockade and because the complaint did not allege that the Clinic suffered any pecuniary losses. Defendants confuse the concept of "tortious injury" with "damages." In tort law, the word "injury" means

"the invasion of any legally protected interest of another." Restatement (Second) of Torts § 7(1) (1965). See also Black's Law Dictionary 541 (6th ed. 1991) (same). Thus, "there may be an injury although no harm is done." Restatement (Second) of Torts § 7(1), cmt. a (1965). Likewise, there may be a tort, such as trespass, although no damages are inflicted. See Restatement (Second) of Torts § 163 (1965) ("One who intentionally enters land in the possession of another is subject to liability to the possessor for a trespass, although his presence on the land causes no harm to the land, its possessor, or to any thing or person in whose security the possessor has a legally protected interest."). That is, "any intrusion upon land in the possession of another *is an injury*, and, if not privileged, gives rise to a cause of action." *Id*. at § 7, cmt. a (emphasis added).

Similarly, Defendants in this case committed a trespass at common law and also invaded the legal interests created by the Access Act for the Clinic and its patients by obstructing the clinic entrances.. And while the United States surely demonstrated that this tortious conduct harmed and damaged both the Clinic and the patients,[29] the violation of those legal interests was enough in itself to create

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[29] The Clinic was forced to lock its doors and divert personnel and resources to responding to the blockade (Order, J.A. 140, 146). The patients were "forced to [enter the Clinic] through the crowded and chaotic back alley" (Order, J.A. 156)

(continued...)

personal jurisdiction under the District's long-arm statute. Moreover, adopting Defendants' narrow interpretation of the statute would be inconsistent with the D.C. Court of Appeals' authoritative interpretation of the statute as extending to the full breadth permitted by the due process clause. See *Mouzavires*, 434 A.2d at 990-991.

VI. DEFENDANTS OTHER MISCELLANEOUS OBJECTIONS TO THE CONDUCT OF THE TRIAL ARE MERITLESS

Defendants also raise a number of evidentiary and other objections regarding the conduct of the trial.

A. The Deposition of Defendant Benham Was Properly Admitted

Defendant Benham argues (App. Br. 77-79) that the district court committed reversible error in admitting the transcript of his deposition into evidence. This Court "review[s] a trial court's evidentiary rulings for abuse of discretion. Even if we find error, we will not reverse an otherwise valid judgment unless appellant demonstrates that such error affected her 'substantial rights.'" *Whitbeck* v. *Vital Signs, Inc.*, 159 F.3d 1369, 1372 (D.C. Cir. 1998) (citation omitted).

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[29](...continued)
leaving them "visibly shaken, angry, confused, or frightened" (Order, J.A. 146).

Defendant Benham claims (App. Br. 78) that the transcript was inadmissable because the United States stated before trial that it intended to call Benham as a witness at trial. Although the United States wanted to call Defendant Benham as a witness at the trial, it was unable to do so because he resided outside the 100-mile range of the court's jurisdiction for issuing subpoenas (J.A. 845) and did not voluntarily appear for trial (J.A. 839-840). For that reason, the district court properly concluded that Defendant Benham was unavailable and properly admitted the deposition transcript as permitted by Fed. R. Evid. 804(a)(5), (b)(1) and Fed. R. Civ. P. 32(a)(3)(B) (see J.A. 845).

Second, Defendant argues (App. Br. 78) that his answers to a number of discrete questions in the deposition were irrelevant because "the questions directed to Benham were specifically related to Operation Rescue National (a non-party), and not to Benham himself as an individual." But the purposes, viewpoints, and activities of Operation Rescue National under Defendant Benham's direction were clearly relevant to, among other things, proving that Defendant Benham did not accidentally obstruct access to the Clinic for reasons having nothing to do with its provision of reproductive health services, but instead intended to obstruct access because he hoped to prevent women from obtaining abortions that day. See 18 U.S.C. 248(a)(1). In any event, even if some of the admitted passages were

irrelevant, Defendant has not even attempted to show that the admission was anything more than harmless error. See Fed. R. Civ. P. 61.

B. The District Court Did Not Abuse Its Discretion In Reopening The Record After Trial

Defendant Newman objects (App. Br. 32-33) to the district court's decision to reopen the record after the close of trial to admit a newsletter Newman had published on the internet after trial. Such decisions are addressed to the "sound discretion" of the trial court. *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 401 U.S. 321, 331 (1971). See also *Washington Mobilization Comm.* v. *Jefferson*, 617 F.2d 848, 850-851 (D.C. Cir. 1980). In this case, the court did not abuse its discretion. The newsletter was unavailable at the time of trial (J.A. 127). It was relevant to important issues in the case (J.A. 127). For example, in the newsletter Defendant Newman stated, among other things, that he intended to return to the District for the annual *Roe* v. *Wade* protests. This evidence was relevant to the risk of future Access Act violations, an important factor in the appropriateness of issuing injunctive relief (see pp. 30-35, *supra*). These reasons were a sufficient basis for admission of the evidence.

C. The District Court Properly Rejected Defendant Tyree's Request To Require The United States To Enter Into A Consent Decree

Finally, Defendant Tyree contends (App. Br. 76-77) that the district court erred in denying her motion to order "Compliance with the Mediation Order," by which she apparently meant ordering the United States to enter into a consent decree with her.[30] There is no basis in the record for Defendant's assertion (App. Br. 77) that she and United States had reached final agreement on the terms of a consent decree. To the contrary, as the United States informed the district court, the mediation failed to produce a settlement (J.A. 475-476).[31] In any case, Defendant cites no authority for her apparent suggestion that a court may order the executive branch of the federal government to enter into a consent decree against

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[30] To the extent Defendant Tyree was asking the district court to continue the trial for further negotiations, that decision is left to the sound discretion of the trial court and was not abused in this case. *United States* v. *Poston*, 902 F.2d 90, 96 (D.C. Cir. 1990). Defendant Tyree selectively quotes (App. Br. 76-77) the local rules to give the misimpression that this discretion is somehow limited when mediation has been ordered, asserting that "[t]he mediation concludes when the parties reach a mutually acceptable resolution." The rule states, in full, that "[t]he mediation concludes when the parties reach a mutually acceptable resolution, *when the parties fail to reach an agreement, or on the date the judge specified as the mediation deadline*." Local Rules, Appendix C, p. 2 (emphasis added). In this case, the parties failed to reach an agreement by the deadline set by the district court for the beginning of the trial (see J.A. 467, 475-477).

[31] The district court properly declined to resolve any factual disputes regarding the contents of the parties' negotiations (J.A. 476-477).

its will. In fact, the Supreme Court has made clear that "the District Court may not enter a 'consent' judgment without the actual consent of the Government." *United States* v. *Ward Baking Co.*, 376 U.S. 327, 334 (1964). See also *United States* v. *Gramer*, 418 F.2d 692, 694 (5th Cir. 1969) (same).

CONCLUSION

For the reasons stated above, the judgment and order of the district court should be affirmed.

Respectfully submitted,

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ADDENDUM A

42 U.S.C. § 248. Freedom of access to clinic entrances

(a) Prohibited activities.--Whoever--

(1) 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 person or any class of persons from, obtaining or providing reproductive health services;

(2) 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 lawfully exercising or seeking to exercise the First Amendment right of religious freedom at a place of religious worship; or

(3) intentionally damages or destroys the property of a facility, or attempts to do so, because such facility provides reproductive health services, or intentionally damages or destroys the property of a place of religious worship,

shall be subject to the penalties provided in subsection (b) and the civil remedies provided in subsection (c), except that a parent or legal guardian of a minor shall not be subject to any penalties or civil remedies under this section for such activities insofar as they are directed exclusively at that minor.

(b) Penalties.--Whoever violates this section shall--

(1) in the case of a first offense, be fined in accordance with this title, or imprisoned not more than one year, or both; and

(2) in the case of a second or subsequent offense after a prior conviction under this section, be fined in accordance with this title, or imprisoned not more than 3 years, or both;

except that for an offense involving exclusively a nonviolent physical obstruction, the fine shall be not more than $10,000 and the length of imprisonment shall be not more than six months, or both, for the first offense; and the fine shall, notwithstanding section 3571, be not more than $25,000 and the length of

imprisonment shall be not more than 18 months, or both, for a subsequent offense; and except that if bodily injury results, the length of imprisonment shall be not more than 10 years, and if death results, it shall be for any term of years or for life.

(c) Civil remedies.--

(1) Right of action.--

(A) In general.--Any person aggrieved by reason of the conduct prohibited by subsection (a) may commence a civil action for the relief set forth in subparagraph (B), except that such an action may be brought under subsection (a)(1) only by a person involved in providing or seeking to provide, or obtaining or seeking to obtain, services in a facility that provides reproductive health services, and such an action may be brought under subsection (a)(2) only by a person lawfully exercising or seeking to exercise the First Amendment right of religious freedom at a place of religious worship or by the entity that owns or operates such place of religious worship.

(B) Relief.--In any action under subparagraph (A), the court may award appropriate relief, including temporary, preliminary or permanent injunctive relief and compensatory and punitive damages, as well as the costs of suit and reasonable fees for attorneys and expert witnesses. With respect to compensatory damages, the plaintiff may elect, at any time prior to the rendering of final judgment, to recover, in lieu of actual damages, an award of statutory damages in the amount of $5,000 per violation.

(2) Action by Attorney General of the United States.--

(A) In general.--If the Attorney General of the United States 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 of this section, the Attorney General may commence a civil action in any appropriate United States District Court.

(B) Relief.--In any action under subparagraph (A), the court may award appropriate relief, including temporary, preliminary or permanent injunctive relief, and compensatory damages to persons aggrieved as described in paragraph (1)(B). The 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.

(3) Actions by State Attorneys General.–

(A) In general.--If the Attorney General of a State 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 of this section, such Attorney General may commence a civil action in the name of such State, as parens patriae on behalf of natural persons residing in such State, in any appropriate United States District Court.

(B) Relief.--In any action under subparagraph (A), the court may award appropriate relief, including temporary, preliminary or permanent injunctive relief, compensatory damages, and civil penalties as described in paragraph (2)(B).

(d) Rules of construction.--Nothing in this section shall be construed--

(1) to prohibit any expressive conduct (including peaceful picketing or other peaceful demonstration) protected from legal prohibition by the First Amendment to the Constitution;

(2) to create new remedies for interference with activities protected by the free speech or free exercise clauses of the First Amendment to the Constitution, occurring outside a facility, regardless of the point of view expressed, or to limit any existing legal remedies for such interference;

(3) to provide exclusive criminal penalties or civil remedies with respect to the conduct prohibited by this section, or to preempt State or local laws that may provide such penalties or remedies; or

(4) to interfere with the enforcement of State or local laws regulating the performance of abortions or other reproductive health services.

(e) Definitions.--As used in this section:

(1) Facility.--The term "facility" includes a hospital, clinic, physician's office, or other facility that provides reproductive health services, and includes the building or structure in which the facility is located.

(2) Interfere with.--The term "interfere with" means to restrict a person's freedom of movement.

(3) Intimidate.--The term "intimidate" means to place a person in reasonable apprehension of bodily harm to him- or herself or to another.

(4) Physical obstruction.--The term "physical obstruction" means rendering impassable ingress to or egress from a facility that provides reproductive health services or to or from a place of religious worship, or rendering passage to or from such a facility or place of religious worship unreasonably difficult or hazardous.

(5) Reproductive health services.--The term "reproductive health services" means reproductive health services provided in a hospital, clinic, physician's office, or other facility, and includes medical, surgical, counselling or referral services relating to the human reproductive system, including services relating to pregnancy or the termination of a pregnancy.

(6) State.--The term "State" includes a State of the United States, the District of Columbia, and any commonwealth, territory, or possession of the United States.

CERTIFICATE OF COMPLIANCE

Kevin K. Russell, a member of the bar of this Court, certifies that the foregoing brief contains 14,550 words, excluding those words permitted to be excluded under this Court's rules, and that the calculation of the number of words herein was made using the Corel WordPerfect 9 word processing program.

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CERTIFICATE OF SERVICE

I certify that copies of the foregoing Brief for the United States as Appellee were sent by overnight mail this 27th day of November, 2000, to the following counsel of record:

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