

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO**

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

UNITED STATES OF AMERICA,

Plaintiff,

v.

KENNETH SCOTT and
JO ANN SCOTT,

Defendants.

**UNITED STATES' OPPOSITION TO DEFENDANT
KENNETH SCOTT'S MOTION IN LIMINE**

The United States of America (the "United States") hereby opposes Defendant Kenneth Scott's ("Defendant's") Motion in Limine ("Motion"), Dkt. 163. Defendant's arguments are without merit and not properly the subject of a motion in limine. Defendant's motion should therefore be denied.

I. Defendant's Evidence-Driven Motion is Improper as a Motion in Limine

Defendant's Motion, which is based on speculation about the United States' testimonial evidence, is an inappropriate motion in limine. Defendant seeks to exclude evidence and testimony about certain incidents and by certain individuals based merely on what evidence he believes will or will not be offered by the United States. "Motions *in limine* are discouraged when the motion is evidence driven and cannot be resolved until evidence is presented at trial." Judge Brimmer's Civil Practice Standards, III.E. See also Deghand v. Wal-Mart Stores, Inc., 980 F.Supp. 1176, 1179-80 (D. Kan. 1997) (denying motion in limine because "[i]f the

admissibility of certain evidence turns upon what facts are developed at trial, it is the better practice to wait until trial to decide the objections.”).

II. The United States is Not Required to Prove that Person(s) who Defendant Interfered with were in Fact Obtaining or Providing Reproductive Health Services

The Freedom of Access to Clinic Entrances Act does not require the United States to identify victims of Defendant’s obstructions who were providing or obtaining reproductive health services. Rather, the focus is on the Defendant’s perception of what the victim is doing. See United States’ Opposition to Defendant’s Renewed Motion to Dismiss, Dkt. 81 at 4-6; United States v. Retta, No. 11-1280 (JEB) (D.D.C. Jan. 12, 2012), at 4-8 (attached as Exhibit 1 to the United States’ Notice of Supplemental Authority, Dkt. 161) (finding that FACE focuses on “defendant’s motive, not the targets’ conduct,” and therefore a FACE complaint must establish only “that a defendant acted under the belief that his alleged victims were obtaining or providing reproductive health services; allegations that [the alleged victims] were in fact doing so, accordingly, are not required”). This issue has already been fully briefed by both parties.

III. Planned Parenthood of the Rocky Mountains Employees Provide Reproductive Health Services

Defendant asks this Court to exclude testimony from anyone who, in Defendant’s opinion, was not seeking or providing reproductive health services. Even though it is the Defendant’s perception that is relevant, as discussed in Section II, the United States will present testimony that Defendant interfered with person(s) who were in fact seeking or providing reproductive health services.

The PPRM employees who will testify in this case were, in fact, providing reproductive health services. The PPRM employees are not doctors; however, volunteers, escorts, and even maintenance workers have been found to be covered under FACE, for the duties they perform

are essential to the provision of medical services. See Dkt. 81 at 4-5. If the statute were to be interpreted differently, it would lead to the absurd result that protestors could obstruct, threaten, and use force against all sorts of clinic employees, so long as they were not doctors, which would of course lead to the consequence that the clinic could not function. This issue has also been fully briefed by both parties.

IV. The United States is Entitled to Present Evidence for Each Incident of Defendant's Physical Obstruction

The United States has provided Defendant with video for each of Defendant's 10 incidents of physical obstruction listed in the Complaint. The United States is entitled to properly authenticate and offer this video evidence at the preliminary injunction hearing. Similarly, the United States is entitled to offer eyewitness testimony from witnesses who have been disclosed to Defendant.

V. Rule 404(b) Evidence is proper to Show Motive and Intent in FACE cases

Evidence of other crimes, wrongs or acts is admissible to show proof of motive, intent, and absence of mistake or accident. Fed. R. Evid. 404(b). Motive is an element of a FACE violation. United States v. Wilson, 2 F. Supp. 2d 1170, 1171 (E.D. Wis. 1998), aff'd, 154 F.3d 658 (7th Cir. 2000), cert. denied, 525 U.S. 1081 (1999) (explaining motive element of FACE claim). Therefore, Rule 404(b) evidence is admissible in this case. See, e.g., New York ex rel. Spitzer v. Cain, 418 F.Supp.2d 457, 461 (S.D.N.Y. 2006) (in FACE case, evidence of other violations of law in course of protest activities admissible as to intent and motive under Fed. R. Evid. 404(b)). In any event, until such evidence is offered, it would be premature for the Court to rule on it. See United States v. Cline, 188 F.Supp.2d 1287, 1292 (D. Kan. 2002) (denying motion in limine to exclude 404(b) evidence because "the admissibility of Rule 404(b) evidence

will generally be a fact-bound determination, depending to a significant degree on the character of the other evidence admitted at trial, all of which requires a balancing of probative value versus unfair prejudice at trial”) (internal quotation and citation omitted).

Defendant’s arguments were previously briefed by the parties; are improper in the context of a motion in limine; and are without merit. Defendant’s Motion therefore should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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

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