UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

PETER D. KEISLER, ACTING ATTORNEY GENERAL OF THE UNITED STATES OF AMERICA,	:	CIVIL ACTION
Plaintiff,	:	
v.	:	
JOHN DUNKLE,	:	
Defendant.	:	No. 07-3577

ORDER

AND NOW, this day of , 2007, upon consideration of the "Response of Defendant, John Dunkle, to Plaintiff's Motion for Injunctive Relief" (docket entries 3 and 5) and the "Motion of Defendant, John Dunkle, to Dismiss Plaintiff's Complaint" (docket entry 6), and the Court having considered the Memorandum of Law in Further Support of the Motion of the Attorney General[1] for Preliminary Injunctive Relief and in Opposition to Defendant's Motion to Dismiss, it is hereby ORDERED that defendant's Motion to Dismiss is denied. It is further ORDERED that:

1. A preliminary injunction shall issue in the form proposed by the Attorney General, and

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[1] The caption now reflects the name of the Acting Attorney General, Peter D. Keisler, because, pursuant to Rule 25(d)(1) of the Federal Rules of Civil Procedure, when a public official brings suit in his official capacity but has ceased to hold office, that official's successor is automatically substituted as a party.

2. A hearing on whether the preliminary relief shall be made permanent as requested in the complaint of the Attorney General is hereby scheduled for ___ a.m./p.m on the _____ day of _____, 2007, in Courtroom _____ at the United States Courthouse located at _____ in _____, Pennsylvania at which time the Court will consider the evidence addressing issues raised in the verified complaint.

BY THE COURT:

_____
THOMAS M. GOLDEN, Judge, U.S.D.C.

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THE ATTORNEY GENERAL'S ANSWER
TO DEFENDANT'S MOTION TO DISMISS

The Attorney General of the United States of America (the "Attorney General") hereby answers plaintiff's Rule 12(b)(6) Motion to Dismiss in accordance with the numbered paragraphs thereof as follows:

1. Admitted.

2. Admitted.

3. Admitted.

4. Admitted, except the Attorney General denies ever having referred to the targeted physician's "ability 'to kill unborn children'."

5. Denied. Defendant's internet messages are "threats" under the Freedom of Access to Clinic Entrances Act ("FACE"), 18 U.S.C. § 248(c)(2); although some of those threats may have been published after defendant had already forced the targeted physician to abandon her position providing reproductive

health care out of fear for her life, the evidence will show that, preceding defendant's internet threats, he engaged in threatening and intimidating conduct directed specifically toward the targeted physician, and those threats occurred prior to the target's leaving her position.

6. Denied. The threats quoted in paragraph 15 of the complaint are published on defendant's internet webpage or webblog; defendant offers no support for his allegation that it was not him but some unidentified "contributor" who is responsible for those threats; additionally, nowhere has defendant cited authority that would absolve him of culpability for publishing an unidentified "contributor's" threats.

7. Denied. The decision in United States v. Dinwiddie, 76 F.3d 913 (8th Cir. 1996), which defendant cites, actually supports the conclusion that defendant published actionable threats within the meaning of FACE and should be enjoined from continuing to do so.

8. Denied as stated. Defendant's threats are also quoted in paragraph 16 of the verified complaint, but the full text of defendant's internet messages covers 76 pages and, thus, is not quoted in its entirety in the verified complaint.

9. Denied. The additional language defendant has chosen to quote fails to demonstrate the absence of a "threat" as alleged. Defendant indeed has quoted only part of a sentence

from his publication to the effect that "I am afraid to act on my own belief that only the use of force will once again protect the victims." Although defendant alleges that this portion of a sentence proves he "did not 'threaten' anyone," his entire sentence states that "Unless I have the support of others, I am afraid to act on my own belief that only the use of force will once again protect the victims"; this is evidence that defendant is not only publishing threats but also trying to incite his readers to engage in violence.

10. Denied. The complaint avers that, because of defendant's threats, the targeted physician left her chosen profession in the field of reproductive health care; the complaint, to state a legally cognizable claim, is not required to identify or plead the evidence that will be presented at an evidentiary hearing.

11. Denied.

12. Denied.

WHEREFORE, for the foregoing reasons as well as the reason set forth in the attached Memorandum of Law in Support hereof, incorporated herein, the Attorney General respectfully requests that this Court deny plaintiff's Motion to Dismiss.

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MEMORANDUM OF LAW IN FURTHER SUPPORT OF THE MOTION OF THE ATTORNEY GENERAL FOR PRELIMINARY INJUNCTIVE RELIEF AND IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS

I. Summary of the relevant background

On August 28, 2007, Alberto R. Gonzales, then-Attorney General of the United States of America (the "Attorney General")[2] filed a verified complaint seeking preliminary and permanent injunctive relief under the Freedom of Access to Clinic Entrances Act ("FACE"), 18 U.S.C. § 248(c)(2), against defendant John Dunkle .

The Attorney General simultaneously moved the Court Pursuant to Rule 65 of the Federal Rules of Civil Procedure and FACE for an order preliminarily enjoining Dunkle from publishing, either orally or in writing, in paper or electronic form, in

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[2] Pursuant to Rule 25(d)(1) of the Federal Rules of Civil Procedure, when a public official brings suit in his official capacity but has ceased to hold office, that official's successor is automatically substituted as a party.

whole or in substantial part, the messages appearing on his internet webpage and webblog (hereafter sometimes referred to as the "web site") to the effect that recipients and readers of his message should murder a specifically identified physician to stop her from performing abortions at reproductive heath care clinics. In support of the motion for preliminary relief, the Attorney General filed a memorandum of law in support thereof, incorporated herein.

The specific threatening language is set forth in paragraphs 15 and 16 of the Attorney General's verified complaint. The Attorney General seeks in this action both preliminarily and permanently to enjoin Dunkle from publishing in any form equivalent threats that contain the names, addresses or photographs of reproductive health clinic physicians, staff, or patients with the intent to intimidate and threaten physical harm to prevent them from obtaining or providing reproductive health services.

Dunkle has opposed the motion for preliminary injunctive relief and also seeks to dismiss the complaint. He purports to oppose the Attorney General's motion with the support of his un-notarized "affidavit" wherein he alleges that none his activities "involved me threatening or intimidating" the targeted physician (Dunkle's "affidavit" at ¶ 2). He alleges that "I have never intended for my activities to cause those involved in the

killing of unborn children to be injured, intimidated, or to fear for their lives" (id. at ¶ 18).

Dunkle's purported affidavit also alleges that he "never, ever 'placed in danger' or 'threatened'" the targeted physician (id. at ¶ 19); that he "never explicitly encouraged the readers of SKYP to kill" the targeted physician; that some of the illegal messages are "the words of a third party" (id. at ¶ 21); and that his publications are merely "stating a fact" because "the only killers of unborn children I am aware of who have stopped killing unborn children (prior to [name of the targeted physician omitted]) are those who were themselves killed" (id. at ¶ 23). Dunkle's motion to dismiss the complaint essentially raises the same arguments, none of which have any merit.

II. Legal discussion

A. The Attorney General has satisfied the requirements for preliminary injunctive relief and Dunkle's arguments to the contrary, and his arguments to dismiss the complaint, are both unsupported and unsupportable.

Dunkle's opposition to preliminary relief argues that the publications are not "threats" under FACE for several reasons, including the fact that the target of the threats identified in paragraph 15 of the complaint left reproductive health care "prior to the posting" on the internet. See Dunkle's Memorandum of Law in Opposition to Plaintiff's Motion for a Preliminary Injunction ("Dunkle's Brief") at 3. Dunkle does not mention that, preceding his internet threats, he engaged in

threatening and intimidating conduct directed specifically toward the targeted physician, and that occurred prior to the target's leaving her position in reproductive health care.

He argues that -- in any event -- the threatening language quoted in paragraph 15 of the complaint is "not actually [Dunkle's] statements, but those of a contributor to SKYP." Id. at 3. Dunkle offers no support for this allegation. He cites no authority that would absolve him of culpability for purportedly publishing an unidentified "contributor's" actionable threats.

Dunkle alleges that the other threatening language quoted in paragraph 16 of the complaint, which he concedes are his own statements, is not a threat under FACE because no one has been murdered as a result of such publications, as was the case in a decision cited by the Attorney General, Planned Parenthood of the Columbia/Willamette, Inc. v. American Coalition of Life Activists, 290 F.3d 1058 (9th Cir. 2002). According to Dunkle, American Coalition of Life Activists is not applicable, and the decision cannot support injunctive relief from threats under FACE, unless a provider of reproductive health care has already been murdered as a result of the same or virtually identical threats. Dunkle's Brief at 4. Dunkle argues that the Court should disregard American Coalition of Life Activists and should rely on the decision United States v. Dinwiddie, 76 F.3d 913 (8th Cir. 1996).

However, the conclusion that Dunkle's messages are "threats of force" that "intimidated" the targeted physician is actually supported by Dinwiddie, the case on which Dunkle has heavily relied. At issue in Dinwiddie was conduct that caused targeted members of a Planned Parenthood staff "to fear for their personal safety." Dinwiddie, 76 F.3d at 918. Because of that fear, a clinic physician wore a bullet-proof vest, being aware that Dinwiddie was "a well-known advocate of the viewpoint that it is appropriate to use lethal force to prevent a doctor from performing abortions." Id. The district court had noted in issuing a permanent injunction that Dinwiddie had also signed a petition defending a person convicted of killing a physician who performed abortions. Id. at 18 & n.2.

Here too the complaint against Dunkle and the motion for preliminary injunctive relief aver that the targeted physician feared for her personal safety and thus abandoned her positions at reproductive health care clinics. See Verified Complaint at ¶¶ 11, 18. The message conveyed in Dunkle's web site acknowledges that the targeted physician to escape detection

and thus danger wore a disguise and probably also a bullet proof vest. See complaint at ¶ 15 (quoting Dunkle's threats). As in Dinwiddie,[3] there will be evidence here showing that Dunkle joined in a declaration supporting a dangerously radical anti-abortionist (James Kopp) who was convicted of murdering Dr. Barnett A. Slepian, an abortion provider, by fatally shooting Dr. Slepian in 1998 in his own home.

Dunkle argues the verified complaint has quoted his statements "completely out of context, and fails to include the entire contents of the [d]efendant's actual statements." Dunkle's Brief at 7. However, quoting the "entire contents" of

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[3] Dinwiddie does not in other respects help Dunkle. In that case, the court held that, in assessing the presence or absence of a FACE threat, a court should consider a number of evidentiary factors. The Dinwiddie decision is not inconsistent with other authority and indeed holds that no single consideration is determinative of whether a "threat" under FACE has occurred. Dunkle moreover has not addressed other significant legal authority cited by the Attorney General such as Madsen v. Women's Health Center, 512 U.S. 753, 773 (1994), which holds that "threats . . . however communicated, are proscribable under the First Amendment . . . ." Although "a privately communicated threat is generally more likely to be taken seriously than a diffuse public one, this cannot be said of a threat that is made publicly but is about a specifically identified doctor." American Coalition of Life Advocates, 290 F.3d at 1086. The court in American Coalition of Life Advocates noted that evidence of a "threat" is very persuasive if the threat was in "the same format that had previously resulted in the death" doctors who had been publicly and specifically, targeted. Id. However, American Coalition of Life Advocates certainly does not stand for the proposition, as urged by Dunkle, that a previous murder is a prerequisite to finding a FACE violation in the context of a threatening publication.

Dunkle's internet publication -- rather than his actionable threats -- would be impracticable because the entirety of the text excerpted in paragraph 15 of the complaint covers 76 pages of print. There was no justification for trying to reproduce all 76 pages of Dunkle's web site in paragraph 15 of the compliant.

Moreover, the additional language Dunkle has chosen to quote fails to demonstrate the absence of a "threat" as Dunkle alleges. Dunkle indeed has quoted only part of a sentence from his publication to the effect that "I am afraid to act on my own belief that only the use of force will once again protect the victims." Dunkle's Brief at 8. Although Dunkle argues that this portion of a sentence proves he "did not 'threaten' anyone" (id.), had he quoted the entire sentence, the Court likely would reach a different conclusion.

Dunkle's full sentence states that "Unless I have the support of others, I am afraid to act on my own belief that only the use of force will once again protect the victims." This language further supports the conclusion that Dunkle explicitly encouraged his readers to support his belief in violence by killing the targeted physician identified in his web site.

Dunkle claims that injunctive relief would only violate his First Amendment rights without serving the public interest because the public can still obtain reproductive health care services from other providers at clinics where the targeted

physician previously worked. Dunkle's Brief at 10. However, in that Dunkle's threats have already caused at least one physician to cease providing reproductive health services and thereafter to live in fear for her life, an injunction is necessary. An injunction here would not violate the First Amendment because, in directing Dunkle to stop violating FACE, an injunction would prohibit no more speech than is necessary to protect physicians, staff and patients of reproductive health care facilities.

The Attorney General has established a reasonable probability of success on the merits; the possibility of irreparable injury to the movant; that granting the relief will not result in even greater harm to the non-movant; and that granting the relief is in the public interest. Indeed, in affirming the district court's finding of a FACE violation in Dinwiddie, the Eighth Circuit stressed that "FACE furthers the government's interest in protecting women who obtain reproductive-health services and ensuring that reproductive-health services remain available." Dinwiddie, 76 F.3 at 924. Dunkle has misconstrued the legal principles governing relief under FACE.

He likewise misapprehends the standards for dismissing a complaint. A Rule 12(b)(6) motion precedes the development of a factual record. As such, it is not a proper mechanism to question or test the sufficiency of a party's anticipated

evidence. Such a motion appropriately challenges only whether the plaintiff has pled a legally cognizable cause of action. United States v. Stanley, 483 U.S. 669, 692, n.7 (1987). A motion to dismiss is proper only if "it appears to a certainty that no relief could be granted under any set of facts which could be proved." Morse v. Lower Merion School District, 132 F.3d 902, 906 (3d Cir. 1997).

Against this standard, Dunkle's motion to dismiss should be denied. A statement is a threat under FACE when "a reasonable person would foresee that the statement would be interpreted by those to whom the maker communicates the statement as a serious expression of intent to harm or assault others." American Coalition of Life Activists, 290 F.3d at 1075.

Here, the complaint avers that Dunkle explicitly encouraged his readers to kill the targeted physician by shooting her in the head; published the targeted physician's name, photograph, and home address; and published instructions regarding the specific means to kill the targeted individual, as well as how to escape detection upon the commission of her murder. The complaint avers that Dunkle's unlawful threats were intended to intimidate, interrupt, hinder and impede the ability of the targeted physician to provide reproductive health services. The complaint also avers that Dunkle succeeded.

This Court cannot properly consider before an evidentiary hearing the "whole factual context and all of the circumstances," American Coalition of Life Activists, 290 F.3d at 1078, based on Dunkle's bald arguments. Moreover, contrary to Dunkle's arguments, it is not necessary that a defendant intend to or be able to carry out the threat. The only intent requirement for a threat case is that "the defendant intentionally or knowingly communicate the threat." Id. at 1075. It is the making of "the threat with intent to intimidate" that makes a defendant's conduct unlawful under FACE. Id. at 1077.

The facts averred in the complaint state an actionable FACE violation. Dunkle's bald argument that there is no evidence to prove a FACE claim is an issue to be resolved after an evidentiary hearing, not in resolving a motion to dismiss.

B. The Court should schedule an evidentiary hearing to make permanent any preliminary injunctive relief and in any event to resolve the issues raised in the complaint.

The Attorney General requests the grant of a preliminary injunction enjoining Dunkle from violating FACE pending an evidentiary hearing on the merits of the complaint. Should the Court so proceed -- or, alternatively, even if preliminary relief is not forthcoming -- the Court should schedule an evidentiary hearing on whether to issue a permanent injunction. The Attorney General anticipates that such a hearing should consume no more than one full day.

III. CONCLUSION

For the foregoing reasons, the Attorney General respectfully requests that this Court issue a preliminary injunction, enjoining Dunkle and his representatives, agents, employees, and all others acting in concert or participating with him, from publishing threats within the meaning of FACE, and that this Court enter an order scheduling an evidentiary hearing on the merits of the verified complaint to determine whether to make the injunction permanent.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned attorney for the Attorney General certifies that she has this date caused service on defendant by first class mail, postage pre-paid, of true and correct copies of the foregoing Answer to Motion to Dismiss and the Memorandum of Law in Further Support of the Motion of the Attorney General for Preliminary Injunctive Relief and in Opposition to Defendant's Motion to Dismiss as follows:

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Reading, Pennsylvania 19602

Annetta Foster Givhan
Assistant United States Attorney

Dated: October 12, 2007