SCHEDULED FOR ORAL ARGUMENT MARCH 20, 2003

No. 02-5103
Consolidated with No. 02-5104

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.* Appellants purport to seek review of the following rulings of the district court:

1. Opinion and Order on Motion to Dismiss, dated December 8, 1999;
2. Permanent Injunction and Memorandum Opinion, dated January 21, 2000; and
3. Order and Memorandum Opinion, dated January 17, 2002.

C. *Related Cases.* This Court has consolidated two appeals arising from the same case in the district court, Nos. 02-5103 and 02-5104. There are no other related cases pending. This Court previously heard appeals from the underlying district court case in *United States* v. *Mahoney*, No. 00-5035, which was consolidated with Nos. 00-5036, 00-5055, 00-5090, and 00-5148.

GLOSSARY

1st Opinion	refers to the district court's initial opinion in this case (R. 204)
App.	refers to the Joint Appendix in this appeal
Br.	refers to the Joint Brief for Appellants in this appeal
CWC	refers to the Capitol Women's Center
GH Opp.	refers to Defendants Gabriel and Heldreths' Opposition to Plaintiff's Motion for Entry of Order on Remand (R. 225)
M Prior Br.	refers to Brief for Patrick Mahoney filed in the prior appeal, No. 00-5035
M Opp.	refers to Opposition of Reverend Patrick Mahoney to Government's Motion on Remand (R. 221)
Order	refers to the district court's injunction on remand (R. 228)
Prior Br.	refers to the Joint Brief for Appellants filed in prior appeal, No. 00-5035

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ISSUES PRESENTED

1. Whether the district court erred in finding that Defendants were sufficiently likely to violate the Freedom of Access to Clinic Entrances Act, 18 U.S.C. 248 (Access Act), in the future to warrant issuing an injunction;

2. Whether injunctive relief under the Access Act must be predicated upon pervasive, egregious, unlawful conduct;

3. Whether injunctive relief is prohibited if civil penalties are available to deter future illegal conduct;

4. Whether the injunction issued on remand violates the First Amendment because it prohibits otherwise lawful expressive conduct;

5. Whether the district court was required by the First Amendment to prohibit only acts committed with the *mens rea* necessary to prove a violation of the Access Act;

6. Whether the injunction is unconstitutionally overbroad because it is not tailored to each covered facility;

7. Whether the injunction is unconstitutional because it does not permit Defendants to sit, stand or kneel alone in front of the entrances of covered facilities.

STATUTES AND REGULATIONS

The Freedom of Access to Clinic Entrances Act, 18 U.S.C. 248, is reproduced as Addendum A.

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 Facility), a reproductive health facility in the District of Columbia. The district

court found that during this demonstration, each of the Appellants[1] violated the Freedom of Access to Clinic Entrances Act (Access Act or FACE), 18 U.S.C. 248. See *United States* v. *Mahoney*, 247 F.3d 279, 282 (D.C. Cir. 2001). The court issued an injunction, enjoining defendants from, among other things, coming within a 20-foot radius of any reproductive health facility (as the term is defined in the Access Act) located inside the boundaries of the Capitol Beltway. See *id*. at 285. Defendants appealed.

Before this Court, Defendants argued (Prior Br. 22-45, App. 160-183) that they did not violate the Access Act; that even if they did violate the Act, no injunction should issue (Prior Br. 45-50, App. 183-188); and that the particular terms of the district court's injunction violated the First Amendment (Prior Br. 50-66, App. 188-204). On May 1, 2001, this Court affirmed the district court on liability and upheld the issuance of an injunction, but concluded that certain portions of the injunction were "considerably overbroad," in violation of the First Amendment. See *Mahoney*, 247 F.3d at 279-287. This Court rejected all other challenges to the district court's judgment and injunction, advising that "those defense arguments not specifically addressed [were] considered and found so

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[1] References to "Appellants" refer to the present appellants in this appeal (Defendants Mahoney, Gabriel and Heldreth). Several Defendants below who were appellants in the first appeal have not joined in the present appeal.

untenable that they do not warrant comment." *Id*. at 282. Defendants Gabriel and Heldreth filed a petition for rehearing on June 14, 2002, which was denied on July 13, 2002. The mandate issued on August 1, 2001.

After receiving the mandate, the district court scheduled a status conference for October 16, 2001 (see App. 19 (docket sheet)). The Government then filed a Motion For Entry Of Order On Remand on October 11, 2001 (see R. 219, App. 246-249), asking the district court to enter a new injunction consistent with the order and opinion of this Court. Defendants filed oppositions, but submitted no evidence, and no party requested an evidentiary hearing. Defendants Heldreth and Gabriel again argued (GH Opp. 4, App. 273)[2] that they had not violated the Access Act and that their conduct "fell within the protections of * * * the First Amendment." All Defendants argued (GH Opp. 11-12, App. 280-281; M Opp. 1-8, App. 250-257)[3] that no injunction should issue because there was no risk of further violations. Defendant Mahoney also repeated, almost verbatim, the First Amendment objections he made to the initial injunction in the prior appeal (compare Prior Br. 51-66, App. 189-204 with M Opp. 8-19, App. 257-268).

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[2] "GH Opp." refers to Defendants Gabriel's and Heldreth's Opposition to Plaintiff's Motion for "Entry of Order on Remand," R. 225.

[3] "M Opp." refers to Opposition of Reverend Patrick Mahoney To Government's Motion on Remand, R. 221.

On January 17, 2002, the district court decided that an injunction was still necessary. See *United States* v. *Alaw*, 180 F. Supp. 2d 197, 199-200 (D.D.C. 2002). In response to this Court's opinion, the district court modified the injunction (1) to apply only to facilities that perform abortions; (2) to prohibit only intentional incursions into the buffer zones; and (3) to clarify that in the case of a covered facility in a multistory building, the buffer zone was to be measured from the entrance of the covered facility, not the entrance to the multistory building. *Id.* at 200. This appeal followed.

STATEMENT OF THE FACTS

In late January 1998, Defendants traveled to the District of Columbia for demonstrations relating to the anniversary of the Supreme Court's decision in *Roe* v. *Wade*. See *United States* v. *Mahoney*, 247 F.3d at 281. On January 24, 1998, pursuant to a plan developed the night before, Defendants participated in a blockade of the Capitol Women's Center, a facility that provided reproductive health services, including family planning and abortions. *Ibid.* Defendant Gabriel helped lead protesters to the Facility, where Defendants Gabriel and Heldreth knelt with others on the south walkway approximately five feet in front of the doors and immediately in front of volunteers who were attempting to protect the main entrance to the facility. *Id.* at 281, 283. Other demonstrators surrounded

the other entrances and exits (see 1st Opinion 11, App. 68).[4] Because the front door was impassable, patients had to be escorted into the Facility through a gauntlet of protesters in the tight confines of the back alley, leaving many "visibly shaken, angry, confused, or frightened" (*id*. at 14, App. 71).

The blockade did not end until the police physically removed Defendants from the entrances to the facility. District police warned Defendants three times that if they did not vacate the area, they would be arrested. 247 F.3d at 281-282. After a third warning, the volunteers left the area, but Defendants Gabriel and Heldreth remained "sitting, kneeling, or lying down directly in front of the south clinic door" (1st Opinion 12, App. 69). At that point, Defendant Mahoney proceeded through the police line and knelt in front of the Facility's other front entrance. 247 F.3d at 282. Defendants remained in these positions until arrested. *Ibid*. Defendants Gabriel and Heldreth had to be physically removed from the entrances by the police. *Id*. at 283.

Defendants pleaded guilty to violating a City ordinance and paid a $50 fine. *Id*. at 282. After being released, Defendants Gabriel and Heldreth returned to the

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[4] "1st Opinion" refers to the Memorandum Opinion issued by the district court on January 21, 2000, R. 204.

Facility, walked inside, and began protesting again (1st Opinion 15, App. 72). They did not leave until the office manager threatened to call the police (*ibid.*).

SUMMARY OF THE ARGUMENT

In the prior appeal in this case, this Court affirmed the district court's finding that Appellants intentionally violated the Access Act. Although Defendants argued that there should be no injunction and objected to the terms of the district court's particular injunction, this Court reversed the district court on only one portion of the injunction (creating buffer zones), and only in three particular respects. All of Defendants' other objections were rejected without further discussion. On remand, the district court reconsidered whether an injunction remained appropriate, concluded that it did, and then remedied each of the deficiencies in the prior injunction identified by this Court.

Defendants present no serious argument that the district court failed to remedy the specific problems identified in the last appeal. Instead, Defendants raise a host of objections to the issuance of any injunction at all and to aspects of the injunction found unobjectionable by this Court in the prior appeal. None of these objections is properly before this Court. Most are barred by law of the case because this Court considered and rejected the same argument in the last appeal. Others are waived because Defendants failed to raise them when they had the

opportunity to do so in the first appeal. The few remaining claims were never presented to the district court.

In any event, Defendants' objections are without merit. The district court properly concluded that injunctive relief remained appropriate, and the injunction it imposed burdens no more speech than necessary to prevent Defendants from repeating their illegal acts.

ARGUMENT

I. DEFENDANTS MAY NOT RAISE ARGUMENTS THEY MADE, OR COULD HAVE MADE, IN THE PRIOR APPEAL, OR ARGUMENTS THEY FAILED TO MAKE IN THE DISTRICT COURT

Most of Defendants' arguments in this appeal are barred by law of the case and related doctrines. "When there are multiple appeals taken in the course of a single piece of litigation, law-of-the-case doctrine holds that decisions rendered on the first appeal should not be revisited on later trips to the appellate court." *Crocker* v. *Piedmont Aviation, Inc.*, 49 F.3d 735, 739 (D.C. Cir. 1995), cert. denied, 516 U.S. 865 (1995). See also *LaShawn* v. *Barry*, 87 F.3d 1389, 1395 (D.C. Cir. 1996), cert. denied, 520 U.S. 1264 (1997); *United States Office of Pers. Mgmt.* v. *Federal Labor Relations Auth.*, 905 F.2d 430, 434 (D.C. Cir. 1990); *Christianson* v. *Colt Indus. Operating Corp.*, 486 U.S. 800, 816 (1988). This rule applies to issues decided "explicitly or by necessary implication." *Crocker*, 49

F.3d at 739. The doctrine "promotes the finality and efficiency of the judicial process by protecting against the agitation of settled issues." *Christianson*, 486 U.S. at 816 (citation and quotation marks omitted). "[T]here would be no end to a suit if every obstinate litigant could, by repeated appeals, compel a court to listen to criticisms on their opinions or speculate of chances from changes in its members." *White* v. *Murtha*, 377 F.2d 428, 431 (5th Cir. 1967) (citation and quotation marks omitted). Thus, "[n]ot only does the doctrine promote judicial efficiency but it also discourages 'panel shopping' at the circuit level." *Federal Labor Relations Auth.*, 905 F.2d at 434 (citation and quotation marks omitted).

When a subsequent appeal is heard by a different panel, the law-of-the-circuit doctrine also prevents the new panel from declining to follow the legal rulings of the panel in the first appeal. See *LaShawn*, 87 F.3d at 1395. "Were matters otherwise, the finality of our appellate decisions would yield to constant conflicts within the circuit." *Ibid*. When both law-of-the-case and law-of-the-circuit "doctrines are at work, the law-of-the-circuit doctrine should increase a panel's reluctance to reconsider a decision made in an earlier appeal in the same case." *Ibid*.

Although law of the case technically applies only to issues *actually decided* by the court in a prior appeal, courts have extended "these principles beyond their

core application" so that "appellate courts are precluded from revisiting not just prior *appellate* decisions but also those prior rulings of the *trial* court that could have been but were not challenged in an earlier appeal." *Crocker*, 49 F.3d at 739 (emphasis in original). Thus, when a party could have raised a challenge in a prior appeal, but did not, that party is "deemed to have waived the right to challenge that decision at a later time." *Williamsburg Wax Museum, Inc.* v. *Historic Figures, Inc.*, 810 F.2d 243, 250 (D.C. Cir. 1987). See also *Palmer* v. *Kelly*, 17 F.3d 1490, 1495-1496 (D.C. Cir. 1994). This waiver rule is required to promote "judicial economy, as it channels into the first appeal issues whose early resolution might obviate the need for later rounds of remands and appeals." *Crocker*, 49 F.3d at 740.

Finally, "[a]bsent 'exceptional circumstances,' the court of appeals is not a forum in which a litigant can present legal theories that it neglected to raise in a timely manner in proceedings below." *Grant* v. *United States Air Force*, 197 F.3d 539, 542 (D.C. Cir. 1999) (quoting *Tomasello* v. *Rubin*, 167 F.3d 612, 618 n.6 (D.C. Cir. 1999). See also *First Eastern Corp.* v. *Mainwaring*, 21 F.3d 465, 466-467 (D.C. Cir. 1994). "Enormous confusion and interminable delay would result if counsel were permitted to appeal upon points not presented to the court below.

Almost every case would in effect be tried twice under any such practice." *District of Columbia* v. *Air Fla., Inc.*, 750 F.2d 1077, 1084-1085 (D.C. Cir. 1984).

Combined, these doctrines prevent Defendants from raising arguments in this appeal that they either raised, or could have raised, in the first appeal, as well as arguments they failed to present to the district court. As shown below, each of Defendants' arguments in this appeal falls into one or more of these categories.

II. THE DISTRICT COURT DID NOT ERR IN ISSUING AN INJUNCTION ON REMAND

Although this Court upheld the district court's decision to issue an injunction in the last appeal, Defendants argue that the district court erred in ordering equitable relief on remand. This argument is barred by law of the case and is without merit as well.

A. This Court In The Prior Appeal Affirmed The District Court's Decision To Issue An Injunction And That Decision Is Law Of The Case

In the last appeal, Defendants spent a substantial portion of their brief arguing (Prior Br. 45-64, App. 183-202) that even if they were found to have violated the Access Act, no injunction could be appropriately issued against them. This Court did not accept that argument, or even discuss it. See 247 F.3d at 282 (stating that "those defense arguments not specifically addressed" were rejected).

To the extent this Court even referred indirectly to Defendants' argument against any injunctive relief, it was to observe that "[w]e do not reject the proposition that an injunction may be appropriate in this case to ensure that women in the Washington, D.C. metropolitan area can continue to exercise their constitutional rights." 247 F.3d at 287.

Defendants argued below (see GH Opp. 2, App. 271; M Opp. 3, App. 252) that this statement left open the possibility that the district court erred in issuing any injunction at all, but that reading is implausible. Had this Court agreed with Defendants that no injunctive relief was appropriate, there would have been no purpose in considering the particular flaws of the injunction that was issued. Yet this Court devoted a substantial portion of its opinion to the terms of the injunction, giving particular instructions about how the injunction should be modified on remand to bring it into compliance with the First Amendment. See generally *id*. at 285-287. For example, this Court ordered that "[s]ome element of intent must be inserted in the injunction," *id*. at 286, an instruction that presumes that an injunction would be reissued on remand. And this Court considered how the buffer zones should apply to a multistory building, an issue this Court concluded "must be clarified" on remand. *Id*. at 287.

Because this Court has already held that the district court was authorized to issue an injunction, Defendants' arguments about why no injunction properly could issue are barred by law of the case. See *Crocker*, 49 F.3d at 739; *LaShawn*, 87 F.3d at 1395. There are exceptions to the law-of-the-case doctrine, but Defendants have not attempted to show that any apply here, either in this Court or in the district court. It is too late in the day for them to attempt to do so now.[5] In any case, none of the traditional exceptions applies. Defendants can point to no "changes in governing law" that warrant reconsideration of the prior decision. *In re Multi-Piece Rim Prods. Liab. Litig.*, 653 F.2d 671, 678 (D.C. Cir. 1981). Nor can they show that the earlier decision of this Court was "'clearly erroneous' and that adherence to the law of the case in these instances 'would work a manifest injustice.'" *Laffey* v. *Northwest Airlines, Inc.*, 740 F.2d 1071, 1082 (D.C. Cir 1984), cert. denied, 469 U.S. 1181 (1985). See also *Laffey* v. *Northwest Airlines, Inc.*, 642 F.2d 578, 585 (D.C. Cir. 1980). And because there was no new evidence presented below by any party, Defendants cannot point to any "newly discovered

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[5] See *Vidimos, Inc.* v. *Wysong Laser Co.*, 179 F.3d 1063, 1065 (7th Cir.), cert. denied, 528 U.S. 1061 (1999) (failure to argue exceptions to law of the case waives their application); *Grant* v. *United States Air Force*, 197 F.3d 539, 542 (D.C. Cir. 1999) (arguments not made to district court may not be raised in court of appeals); *id.* at 542 n.6 ("[O]ur caselaw makes clear that an argument first made in a reply brief comes too late.").

evidence" that warrants reconsideration of this Court's prior opinion. *In re Multi-Piece Rim Prods. Liab. Litig.*, 653 F.2d at 678.[6]

Even if the general question of whether an injunction should issue were still open, the particular arguments Defendants raise against injunctive relief are either barred by law of the case or waived. Thus, Defendants have argued in both this appeal and the last appeal that the district court erred in issuing an injunction because:

1. Defendants lack a history of prior violations of the Access Act (Br. 15-16, 23) (raised in prior appeal at Prior Br. 26-28, App. 164-166);
2. The circumstances of each Defendant's violation of the Act shows that an injunction is unwarranted (Br. 16 & n.16, 25-28) (raised in prior appeal at Prior Br. 30-45, App. 168-183);

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[6] Defendants did assert in their briefs below (GH Opp. 11, App. 280; M Opp 4, App. 253), that they had not violated the Access Act during the last appeal and remand. This assertion is not evidence and Defendants made no attempt to introduce competent evidence in the district court regarding their behavior. In any case, even if there were evidence in the record that Defendants had not violated the Access Act during this litigation, that fact is insufficiently material to invoke the "newly discovered evidence" exception to law of the case. See *White* v. *Murtha*, 377 F.2d 428, 431-432 (5th Cir. 1967) (new evidence must be "substantially different"); *Suel* v. *Secretary HHS*, 192 F.3d 981, 986 (Fed. Cir. 1999) (stating that "the new evidence relied upon to override law of the case must be substantial, even conclusive"). As discussed below, see p. 19 *infra*, Defendants' compliant behavior during the pendency of litigation would be of little value in demonstrating that they would comply with the law if unrestrained.

3. Defendants have demonstrated good faith and a willingness to comply with the law (Br. 16 & n.16, 25-26) (raised in prior appeal at Prior Br. 46-48, App. 184-186);

4. Defendants have not violated the Act since the original blockade (Br. 16, 20-21, 29) (raised in prior appeal at Prior Br. 46-47, App. 184-185);[7]

5. Injunctive relief must be predicated on pervasive, egregious, unlawful conduct, which was not shown here (Br. 18-22) (raised in prior appeal at Prior Br. 61, 64-66, App. 199, 202-204).

Even if this Court concluded that some of these arguments were not actually made in the prior appeal, Defendants clearly *could* have raised them at that time and have, therefore, forfeited the right to raise them in this subsequent appeal. See *Crocker*, 49 F.3d at 739; *Palmer*, 17 F.3d at 1495-1496. Defendants also could have raised three additional arguments that they raise for the first time in this appeal:

6. The Government failed to prove a continuing conspiracy to violate the Access Act (Br. 16);

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[7] See *supra* n. 6.

7. The district court could not issue an injunction because civil penalties would have been a sufficient deterrent to future violations (Br. 17-18);

8. Defendants Heldreth and Gabriel pose no risk of future violations because they do not live in the area (Br. 23).

These arguments, therefore, are also waived. See *Palmer*, 17 F.3d at 1495-1496.

Finally, Defendants make two arguments that were not made, and could not have been made, in the prior appeal. They assert that:

9. The Government's delay in moving for a new injunction on remand shows that no injunction was necessary (Br. 24); and

10. The district court did not hold an evidentiary hearing (Br. 29).

In the district court, however, Defendants did not point to the timing of the Government's motion as a basis for denying an injunction and never requested an evidentiary hearing (see M. Opp., App 250-269; GH Opp., App. 270-283).[8] By failing to raise the issues in the district court, they waived these arguments for purposes of the appeal. See *Grant*, 197 F.3d at 542.

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[8] The closest any Defendant came to asking for an evidentiary hearing was Defendant Mahoney's request (M Opp. 19, App. 268) that the court order the Government to "set forth in particularity the factual predicate of any claimed need for injunctive relief." None of Defendants submitted any evidence to the district court.

B. All Of Defendants' Arguments Against Issuance Of The Injunction Are Without Merit

Even though this Court's mandate did not require the district court to reconsider whether injunctive relief was appropriate, the district court nonetheless entertained Defendants' objection to issuing any injunction, considered the extensive factual record before it, applied the correct legal standards, and reached the proper conclusion that an injunction should issue. See 180 F. Supp. 2d at 199-200.

The district court properly concluded that injunctive relief was appropriate because there was "a reasonable likelihood of further violations in the future." 180 F. Supp. 2d at 199 (quoting *SEC* v. *Savoy Indus., Inc.*, 587 F.2d 1149, 1168 (D.C. Cir. 1978), cert. denied, 440 U.S. 913 (1979)) (internal punctuation omitted). There is no basis for this Court to overturn that factual determination. The district court found that "the illegal blockade of the [Facility] was deliberate and planned; Defendants traveled from across the country to blockade the [Facility] on the anniversary of *Roe* v. *Wade*, 410 U.S. 113 (1973), despite their numerous convictions for similar activities around other clinics throughout the country." 180 F. Supp. 2d at 200. And although Defendants assert that their violation of the Act was simply a good-faith mistake, the facts of the case and the

findings of the district court demonstrate otherwise. Defendants Mahoney and Gabriel played leading roles in the blockade. See 247 F.3d at 281. Long after the police ordered Defendants to leave their position in front of the Facility doors, Defendants Heldreth and Gabriel remained and had to be carried off as they offered passive resistance to the efforts of the police to restore access to and from the Facility. See 247 F.3d at 283. After paying their fines, these two Defendants returned to the Facility and refused to leave until the office manager threatened to call the police (see 1st Opinion 15, App. 72).[9]

Defendants assert that they have acted in "good faith" and have shown a "willingness to act lawfully" (Br. 15-16 & n.16, 25-26), but at the same time they have repeatedly insisted that they have a legal right to do again what they were

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[9] Defendants' proven violation of the Access Act renders their reliance on *New York ex rel. Spitzer* v. *Operation Rescue National*, 273 F.3d 184, 197-198 (2d Cir. 2001), unavailing. In that case, the Court found there was insufficient evidence to support a preliminary injunction against a Defendant who had never violated the Act, but had engaged in prior protest activities. The Second Circuit specifically stated that an "injunction might have been warranted if the District Court had made particularized findings that Warren orchestrated, planned, or incited protest activities that violated F.A.C.E., even if undertaken by unnamed defendants." *Id.* at 198 n.8. Here Defendants directly engaged in violations of the Act, and Defendant Mahoney was found to have participated in organizing the blockade. See 247 F.3d at 283-284.

found liable for doing in this case.[10] "A defendant's persistence in claiming that (and acting as if) his conduct is blameless is an important factor in deciding whether future violations are sufficiently likely to warrant injunctive relief." *Federal Elections Comm'n* v. *Furgatch*, 869 F. 2d 1256, 1262 (9th Cir. 1989).

Defendants' compliant behavior during the pendency of this litigation is not grounds for concluding that no injunction was warranted (Br. 16, 20-21, 29). See *United States* v. *Oregon State Med. Soc'y*, 343 U.S. 326, 333 (1952). The question was whether Defendants were likely to violate the Act when there is no pending litigation. The district court was entitled to conclude that this risk was very real, in light of Defendants' past conduct and continued insistence that they had a legal right to repeat their blockade in the future.[11]

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[10] See GH Opp. 2-11, App. 271-280; M Opp. 12, App. 271-280. See also Br. 16 n.16, 25 n.22, 26 n.24, 27 n.25.

[11] The Government's alleged "five months" delay in seeking an injunction remand (Br. 24) also provides no basis for overturning the district court's decision. The United States' filed its motion approximately two months after this Court's mandate issued on August 1, 2001. See *United States* v. *DeFries*, 129 F.3d 1293, 1302-1303 (D.C. Cir. 1997) (district court lacks jurisdiction over the case until mandate released). During two-month period, many government functions were disrupted by the events of September 11 and the subsequent anthrax attacks. Moreover, the Government understood that the district court was well aware of its obligation to follow the mandate of this Court and hold further proceedings. And, in fact, the district court did so, ordering a scheduling conference within a relatively short time in light of the circumstances and the court's busy docket.

Nor was the district court prohibited from issuing an injunction simply because the Access Act also authorizes, and the United States initially sought, civil penalties (Br. 17-18).[12] In enacting the Access Act, Congress clearly contemplated that relief could include either, or both, civil penalties and injunctive relief. See 18 U.S.C. 248(c)(2)(B) ("[T]he court may award appropriate relief, including * * * injunctive relief * * * . The court, to vindicate the public interest, *may also* assess a civil penalty against each respondent.") (emphasis added). Defendants nonetheless assert that the district court lacked the equitable discretion to issue an injunction, citing three Supreme Court cases. But none of these cases supports Defendants' contention. Instead, each case stands for the principle that unless Congress clearly indicates otherwise, courts are to apply traditional principles of equity in issuing injunctions. See *United States* v. *Oakland Cannabis Buyers' Coop.*, 532 U.S. 483, 496 (2001); *Rondeau* v. *Mosinee Paper Corp.*, 422 U.S. 49, 61 (1975); *Hecht Co.* v. *Bowles*, 321 U.S. 321, 330 (1944). None of these

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[12] Defendants do not actually assert that civil penalties *would have* been a sufficient deterrent in this case, perhaps because they do not actually believe that civil penalties would have been available if the United States had pursued them. In fact, Defendant Mahoney argued in the district court that civil penalties were *not* available against him in this case (see, *e.g.*, R. 102-12-13). Moreover, there is little reason to believe that such penalties would be a sufficient deterrent in this case. Defendants deliberately chose to violate the Access Act even though they were on notice that such conduct could subject them to civil penalties, or even criminal prosecution. See 18 U.S.C. 248(b), (c)(2)(B). They were not deterred.

cases even mentions civil penalties, much less holds that courts may not exercise their traditional discretion to issue an injunction if civil penalties are otherwise available.

III. THE MODIFIED INJUNCTION CURED THE DEFECTS IDENTIFIED BY THIS COURT IN THE PRIOR APPEAL AND FULLY COMPLIES WITH THE FIRST AMENDMENT

Defendants argue (Br. 29-40) that the injunction, as modified, violates the First Amendment because it prohibits otherwise lawful expressive conduct, because it does not incorporate the *mens rea* requirements for proving a violation of the Access Act, and because it is not sufficiently tailored to each facility and Defendant. In making these arguments, Defendants largely ignore this Court's prior decision, which considered and rejected many of the same objections . In contrast, the district court on remand carefully considered this Court's instructions and modified the injunction to meet the only objections this Court found to have any merit.

A. The District Court Addressed All Deficiencies Identified By This Court In The Prior Appeal

In the prior appeal, this Court held that the district court's initial injunction "serve[d] a significant government interest," but that one aspect of the injunction (the fixed buffer zones) burdened more speech than was necessary because "it

lacks the necessary correlation between the provision and the government interests." 247 F. 3d at 286. This Court identified three discrete ways in which the injunction lacked this correlation and, therefore, was rendered "considerably overbroad." *Id*. at 287. On remand, the district court remedied each deficiency.

1. Definition Of Covered Facilities

The original injunction created fixed buffer zones around "reproductive facilities," as defined by the Access Act within the D.C. metropolitan area.[13] On appeal, this Court noted that this definition of a covered facility was "extraordinarily broad" because it included facilities such as the offices of a female defendant's gynecologist, a "place of religious worship where 'counseling' is provided to pregnant women considering an abortion," or an "Operation Rescue facility in the District of Columbia." *Id*. at 286. Because Defendants were unlikely to blockade these types of facilities, applying the buffer zone to the full spectrum of facilities covered by the Access Act created a burden on speech "unrelated to the interests in public order and unimpeded access to medical care reflected in the Access Act." *Ibid*. On remand, the district court modified the injunction to cover only facilities "where abortions are performed" (Order 2,

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[13] As this Court noted in the prior appeal, Defendants "have not challenged the geographic scope of the injunction * * * or its lack of any temporal limits." 247 F.3d at 286.

App. 116)[14]. The modification eliminated the possibility that the injunction would be applied to types of facilities that face no risk of obstruction by Defendants' anti-abortion protests.

2. Requirement Of "Some Element Of Intent"

The second flaw this Court found in the first injunction was the risk that "the injunction could be violated unknowingly" because it "contain[ed] no intent requirement." *Id*. at 286. A defendant might have technically violated the injunction if he "wandered within twenty feet of a covered facility." *Ibid*. As a result, this Court instructed that "[s]ome element of intent must be inserted in the injunction." *Ibid*. The district court complied with this requirement, amending the injunction to prohibit (Order 2, App. 116) only "*[i]ntentionally* coming within a twenty-foot radius of any [covered] facility" (emphasis added). Thus, the injunction would not be violated if a defendant simply "wandered within twenty feet of a covered facility" or was simply "walking down the street." 247 F.3d at 286. The injunction is only violated if Defendants intentionally enter the buffer zone in front of what they know to be a covered facility.

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[14] "Order" refers to the district court's injunction on remand (R. 228).

3. Operation Of Buffer Zone In Multistory Buildings

This Court's final criticism of the initial injunction was its failure to make clear how the buffer zones would be measured for covered facilities existing within a multistory building. 247 F.3d at 286-287. The district court clarified (Order 2, App. 116) that the zone would be measured from the "entrances and exits of the office where abortions are performed" rather than the main entrance to the building housing the facility.

B. The Injunction Does Not Violate The First Amendment And Is Not Unconstitutionally Overbroad Or Vague

For the most part, Defendants do not claim that the district court failed to remedy the three specific defects identified by this Court in the prior appeal. Instead, Defendants rely on a number of other objections to the revised order, all of which they either made, or could have made, to the initial injunction in the prior appeal, and none of which has any merit.

1. The Injunction May Properly Prohibit Some Otherwise Lawful Conduct In Order To Prevent Future Violations Of The Access Act

As they did in the last appeal, Defendants argue (Br. 35-38) that the injunction is overbroad because it prohibits some otherwise lawful or expressive activities within the buffer zones (see Prior Br. 54-55, App. 192-193). Had this

Court accepted the argument, it would have prohibited the district court from creating any buffer zones and would not have bothered critiquing the details of how the buffer zone would be measured or implemented. See, *e.g.*, 247 F.3d at 286-287. Defendants may not raise the same argument again in this appeal.

In any case, the Supreme Court has made abundantly clear that an injunction in response to illegal protest activities may restrict otherwise lawful expressive conduct so long as it "burden[s] no more speech than necessary." *Madsen* v. *Women's Health Ctr., Inc.*, 512 U.S. 753, 765 (1994). The Court in *Schenk* v. *Pro-Choice Network of Western New York*, 519 U.S. 357 (1997), specifically "rejected the argument that the court injunction on demonstrating within a fixed buffer zone around clinic entrances was unconstitutional because it banned even 'peaceful, nonobstructive demonstrations.'" *Hill* v. *Colorado*, 530 U.S. 703, 761 (2000) (Scalia, J., dissenting) (quoting 519 U.S. at 381). Instead, in both *Madsen* and *Schenk*, the Court approved buffer zones that proscribed otherwise lawful expressive conduct, concluding that the buffer zones were necessary for "protecting unfettered ingress to and egress from the clinic" in light of the defendants' past illegal conduct. *Madsen*, 512 U.S. at 769.[15] See also *id*. at 759-

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[15] Because the First Amendment does not bar the district court's injunction, Defendants' argument (Br. 33) that the injunction is prohibited by the Access Act (continued...)

760, 768-770 (upholding buffer zone); *Schenk*, 519 U.S. at 367 n.3, 380-383 (same); *Lucero* v. *Trosch*, 121 F.3d 591, 604-606 (11th Cir. 1997) (same); *New York ex rel. Spitzer* v. *Operation Rescue National*, 273 F.3d 184, 203, 210-211 (2d Cir. 2001) (same).[16]

2. The District Court Was Not Required To Incorporate The Access Act's Mens Rea Requirement Into The Injunction

Defendants' make a related objection when they assert (Br. 30-34) that the injunction is unconstitutional because it does not import the complete *mens rea* requirements of the Access Act. In their view, the district court could not prevent them from entering the buffer zone, or even from standing or kneeling in front of

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[15](...continued)
itself is also without merit. Although the Act does provide that "[n]othing in this Section shall be construed * * * to prohibit any conduct * * * protected from legal prohibition by the First Amendment," 18 U.S.C. 248(d)(1), nothing in the injunction prohibits any conduct "protected from legal prohibition by the First Amendment." Instead, as the Court in *Madsen* made clear, the First Amendment permits the restrictions imposed by this injunction because they burden no more speech than necessary to serve the significant government interest in protecting access to these facilities. See 512 U.S. at 765.

[16] Nor does the First Amendment prohibit any injunction except in the case of "pervasive" and "egregious unlawful conduct," such as acts of violence (Br. 18-22) . Defendants made (Prior Br. 61, 64-66, App. 199, 202-204), the United States responded to (U.S. Prior Br. 39-40, App. 177-178), and this Court rejected, this argument in the last appeal. In affirming the use of buffer zones in *Madsen* and *Schenk*, the Court relied on the need to ensure access to the facilities and did not make any other aspect of the protests in those cases a prerequisite for injunctive relief. See *Madsen*, 512 U.S. at 769; *Schenk*, 519 U.S. at 380.

the doors, unless the Government can prove that Defendants intended to obstruct someone's access to the facility because the person was seeking or providing reproductive health services. Defendants have waived this objection by not raising it in the original appeal or in the district court.

In any case, the argument is without merit. Defendants point to no legal authority requiring that a remedial injunction incorporate the *mens rea* requirements of the statute that gave rise to the need for equitable relief. This Court's decision certainly did not require the district court to import the Access Act's *mens rea* requirement into the injunction. It only required that "*[s]ome* element of intent must be inserted." 247 F.3d at 286 (emphasis added), in order to avoid penalizing accidental incursions into the buffer zones. See 247 F.3d at 286.

Moreover, neither of the buffer zones approved by the Supreme Court in *Schenk* or *Madsen* contained the type of intent and motive elements Defendants insist is constitutionally required. See *Madsen*, 512 U.S. at 759-760, 768; *Schenk*, 519 U.S. at 367 n.3. Again, the question is simply whether the terms of the injunction are a reasonable "means of protecting unfettered ingress to and egress from the clinic" that burden no more speech than necessary. *Madsen*, 512 U.S. at 769. See also *Schenk*, 519 U.S. at 380. In this case, as in *Madsen* and *Schenk*, prohibiting Defendants from entering a limited buffer zone in front of abortion

facilities regardless of their motive is a reasonable prophylactic measure to ensure access.

To require the Government to prove an obstructive motive would severely undermine the effectiveness of the injunction. Defendants in this case have maintained from the beginning (see Br. 16 & n.16;[17] Prior Br. 23-33, App. 161-171; GH Opp. 2-11, App. 271-280) that their blockade of the Facility in this case was not motivated by any desire to obstruct access. See, *e.g.*, 247 F.3d at 282. Disproving this "post hoc self-serving explanation," *id*. at 283, has entailed years of litigation that are not yet at an end. If the injunction were limited to prohibiting Defendants from seeking to block access within the buffer zones, there is a substantial risk that Defendants would feel justified in doing again exactly what they did at the beginning of this case, believing that they were not acting with the prohibited state of mind or that the Government could not disprove their assertions of benign motivation.

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[17] Defendants Gabriel and Heldreth's assertion (see Br. 16 n.16) that they simply made a good faith "error in judgment" is little more than a reassertion of their unsuccessful claim that they did not intend to interfere with access at the Facility (GH Opp. 2-11, App. 271-280).

3. The Injunction Is Not Unconstitutional For Being Insufficiently "Site Specific"

Defendants complain (Br. 38-39) that the injunction is not "site specific." To the extent Defendants are arguing that the injunction must identify each covered facility, they raised (Prior Br. 58-60, App. 196-198), and this Court rejected, the same argument in the last appeal. Moreover, to the extent Defendants complain that the failure to specify each covered facility creates a risk of accidental incursions into the buffer zones, this problem was addressed by the addition of an intent requirement. Defendants will not violate the injunction if they come within 20 feet of a facility that, unknown to them, performs abortions.

To the extent Defendants argue (Br. 39) that the district court was required to tailor the metes and bounds of the buffer zone to each covered facility, they failed to raise this objection in their prior appeal or before the district court.[18] Nor

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[18] Defendants also violate the confidentiality requirements of the district court mediation process by disclosing (Br. 39) the contents of the mediation in this case. See D.D.C. Local Rule App. C (IV)(C) ("[I]nformation about what transpires during mediation sessions will not at any time be made known to the Court."). See also D.C. Cir. Order Establishing Appellate Mediation Program (April 14, 1998) (establishing same confidentiality requirement for appellate mediation program). Even setting this breach aside, the Government's willingness to attempt to placate Defendants' insistence on naming the covered facilities during settlement negotiations does not show that this act was constitutionally mandated, any more than Defendants' willingness to consider agreeing to an injunction demonstrates that an injunction was required in this case.

is there any legal support for their objection. The injunction in this case is no less narrowly tailored than the injunction approved in *Schenk*, which imposed a uniform 15-foot buffer zone around the entrances of every abortion facility in the Western District of New York. See 519 U.S. at 367 n.3.[19] The Court did not require the district court to make separate findings regarding the appropriate size of the buffer zone for each covered facility. Instead, the Court made clear that "we defer to the District Court's reasonable assessment of the number of feet necessary to keep the entrances clear." *Id*. at 381. In this case, Defendants have failed to overcome the deference owed to the district court's reasonable assessment that a 20-foot buffer zone is appropriate for all covered facilities. Although it might be appropriate to tailor the buffer zone to a particular facility if there is reason to believe that the zone is problematic for that location, Defendants presented no evidence in the district court to suggest that any such alterations are necessary in this case.

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[19] See also *Operation Rescue Nat'l*, 273 F.3d at 210-211(approving modification of buffer zones throughout the Western District of New York); *United States* v. *Dinwiddie*, 76 F.3d 913 (8th Cir. 1996) (approving injunction applicable uniformly to every abortion facility in the nation), cert. denied, 519 U.S. 1043 (1996).

4. The Injunction Is Appropriate For Each Defendant

On a similar theme, Defendants argue (Br. 39-40) that the injunction is flawed because it was not "individualized for each Defendant in light of what each [sic] he or she did in violation of FACE." Defendants assert (Br. 40) that because they were found to have violated the Act as part of a group, the injunction should permit them to stand or kneel in front of a facility's doors "alone, or even with others, if, notwithstanding, there is adequate room left for other persons to enter and leave freely through that entrance." In the alternative, they suggest (Br. 40 n.30) an injunction under which they would be required to report to a special master for permission to sit, kneel or stand in front of a facility entrance.

Defendants failed to raise either argument in the district court or in the prior appeal. In the district court, Defendants simply insisted (See GH Opp. 12, App. 281; M Opp. 19, App. 268) that no injunction at all could issue, and never suggested any alternative terms. "It is the general rule, of course, that a federal appellate court does not consider an issue not passed upon below. * * * [T]his is essential in order that parties may have the opportunity to offer all the evidence they believe relevant to the issues." *Singleton* v. *Wulff*, 428 U.S. 106, 120 (1976) (citation and quotation marks omitted).

Had Defendants raised their objection and suggestion below, the United States could have shown, and the district court surely would have found, that such an injunction would be wholly ineffective in preventing future violations of the Act. As was true in *Schenk*, the district court would be entitled to conclude that if Defendants "were allowed close to the entrances [they] would continue right up to the entrance," 519 U.S. at 381, and would not "merely engage in stationary, nonobstructive demonstrations but would continue to do what they had done before." *Id*. at 381-382. When Defendants were last allowed near the CWC doors, they obstructed access to the Facility for several hours, requiring police action to remove them (indeed, Defendants Gabriel and Heldreth had to be carried from the entrances). See 247 F.3d at 283-284. And, as noted above, keeping Defendants away from facility entrances not only discourages future attempts to impede access, but also permits law enforcement personnel to intervene to stop an attempt at obstruction before it succeeds in preventing access to the facility.

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 7,374 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 two copies of the foregoing Final Brief for the United States as Appellee were sent by first class mail postage prepaid this 22nd day of October, 2002, to the following counsel of record:

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