ORAL ARGUMENT REQUESTED
Nos. 13-3253, 13-3266

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellant-Cross-Appellee

v.

ANGEL DILLARD,

Defendant-Appellee-Cross-Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS, No. 11-cv-1098
THE HONORABLE J. THOMAS MARTEN

BRIEF FOR THE UNITED STATES AS APPELLANT-CROSS-APPELLEE

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STATEMENT OF RELATED CASES

There have been no prior or related appeals in this case.

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STATEMENT OF JURISDICTION

The United States brought this suit to enforce a provision of the Freedom of Access to Clinic Entrances Act (FACE or Act), 18 U.S.C. 248. The district court had jurisdiction under 18 U.S.C. 248(c)(2) and 28 U.S.C. 1345. The district court entered an order on August 15, 2013, granting defendant's motion for summary judgment. Aplt. App. at 348-372, Attachment A; see also Aplt. App. at 373

(judgment).[1] The United States filed a timely notice of appeal on October 10, 2013. Aplt. App. at 374-375. Defendant filed a cross-appeal on October 24, 2013. Aplt. App. at 376-377. This Court has jurisdiction under 28 U.S.C. 1291.

STATEMENT OF THE ISSUE

Whether the district court erred in concluding that, as a matter of law, defendant's letter to a doctor planning to open an abortion clinic stating, in part, "[y]ou will be checking under your car everyday [] because maybe today is the day someone places explosives under it," did not constitute a "true threat" and therefore was protected speech that could not be the basis of a violation of the Freedom of Access to Clinic Entrances Act (FACE), 18 U.S.C. 248(a)(1).

STATEMENT OF THE CASE

1. Procedural History

1. On April 7, 2011, the United States filed suit against Angel Dillard alleging that a letter she mailed to Dr. Mila Means on or about January 15, 2011, violated FACE because it constituted "a threat of force in order to * * * intimidate

[1] Those portions of the record below relevant to this appeal are contained in the three-volume appendix filed along with the government's opening brief. Because some documents were filed under seal (see note 3, *infra*), including the summary judgment papers, two of these volumes are filed under seal. We cite to the three volumes as follows: (1) citations to "Aplt. App. at __" are to page numbers in the one-volume Appendix containing documents not filed under seal; (2) citations to "Aplt. Sealed App. at __" are to page numbers in the consecutively numbered two-volume Sealed Appendix.

a person from providing reproductive health services." Aplt. App. at 21.[2] On May 10, 2011, the United States filed an amended complaint. Aplt. App. at 64-70. The amended complaint referred to the murder of Dr. George Tiller, a reproductive health care provider, by Scott Roeder in May 2009, and alleged that Dillard "is a well-known anti-abortion activist who became friendly with Scott Roeder after he killed Tiller, and has since visited Scott Roeder in prison, spoken to him on the phone, and exchanged letters with him." Aplt. App. at 65. The amended complaint also alleged that Dillard "has spoken publicly about her friendship with Roeder and her admiration for his conduct," and noted that "[s]ince Dr. Tiller's murder, no physician has openly performed abortions in Wichita." Aplt. App. at 65.

The amended complaint alleged that on or about January 15, 2011, Dillard "mailed a letter to Dr. Means in which she made a threat of force for the purpose of

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[2] As relevant here, Section 248(a)(1) of FACE provides:

> 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 * * * shall be subject to the * * * civil remedies provided [in the statute].

18 U.S.C. 248(a)(1). The Attorney General may commence a civil action in federal court if he "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." 18 U.S.C. 248(c)(2)(A).

intimidating Dr. Means from performing abortions in Wichita." Aplt. App. at 66. The complaint quoted from the letter (included herein as Attachment C) and alleged that the letter "intimidated Dr. Means and caused her to undertake numerous security measures, including having her car examined by a mechanic, parking her car where it is visible to her, installing door alarms, staying overnight at different locations, varying her route to and from work, and looking for a more secure building in which to practice." Aplt. App. at 66-67. The complaint sought injunctive relief, $5000 in compensatory damages, and a $15,000 civil penalty. Aplt. App. at 67-68.

2. On the same date that the United States filed its initial complaint, it filed a motion for a preliminary injunction enjoining Dillard from contacting Means or coming within 250 feet of her or her car, home, or place of business. Aplt. App. at 27-37. On April 19, 2011, defendant filed an opposition. Aplt. App. at 42-62. At the conclusion of a hearing (Aplt. App. at 134-231 (transcript of hearing)), at which Means testified, the district court denied the motion. Aplt. App. at 223-231; see Aplt. App. at 63 (order).

3. Dillard's April 19, 2011, opposition to the government's motion for a preliminary injunction included a motion to dismiss for failure to state a claim. Aplt. App. at 42-62. The United States opposed the motion. Aplt. App. at 73-97. On December 21, 2011, the district court denied the motion. Aplt. App. at 113-

133, Attachment B. Noting that the standard for a true threat is whether a reasonable listener, familiar with the context, would interpret the communication as a threat of injury, the court concluded that the issue was for the jury to decide. Aplt. App. at 131-132. The court stated that it "may find Dillard's speech was protected speech and not a true threat only if there is 'no question' as to the issue. * * * The burden effectively requires Dillard to demonstrate that no reasonable recipient of the letter could view it as a threat. Given the clear emphasis by the cases on reasonableness and context, this issue must be resolved by the jury." Aplt. App. at 131-132.

4. Dillard also filed a counterclaim against the United States. Aplt. App. at 232-246. She alleged that the government, by bringing this lawsuit and seeking a barrier zone prohibiting Dillard from coming within 250 feet of Means, violated her rights under the First, Fourth, Fifth, and Fourteenth Amendments. Aplt. App. at 244-246. In part, Dillard alleged that the barrier zone would prohibit her from attending a church near Means' office. Dillard sought damages (including punitive damages) and injunctive relief. The United States filed a motion to dismiss the counterclaim for lack of subject matter jurisdiction and failure to state a claim (Aplt. App. at 247-262), which the court granted (Aplt. App. at 328-340).

5. On May 4, 2012, Dillard filed a second motion to dismiss and, in the alternative, a motion for summary judgment. Aplt. App. at 263-265. Dillard

variously argued that there was no evidence that Dillard acted with the requisite intent to violate FACE and that Means was not an "aggrieved person" under the Act. Aplt. App. at 279-288. The United States opposed the motions, arguing that Dillard was procedurally barred from filing a second motion to dismiss, the government adequately alleged a violation of FACE, and Dillard had not established that she was entitled to judgment as a matter of law. Aplt. App. at 291-307; see also Aplt. App. at 308-327 (Dillard's reply). On August 7, 2012, the district court denied the motions. Aplt. App. at 336-340.

6. On May 17, 2013, Dillard filed a motion for summary judgment, asserting that the evidence established that no reasonable person could conclude that the letter constituted a true threat. Aplt. Sealed App. at 97-134.[3] Noting that discovery was complete,[4] Dillard asserted that uncontroverted evidence shows that the letter is not a true threat. Aplt. Sealed App. at 97. More particularly, Dillard

[3] This motion for summary judgment (Aplt. Sealed App. at 97-134), the United States' response (Aplt. Sealed App. at 326-352), and defendant's reply (Aplt. Sealed App. at 384-429), as well as defendant's exhibits (Aplt. Sealed App. at 220-325, 430-459), were filed under seal and remain under seal. These documents were sealed because they reference deposition testimony or documents containing privileged information or covered by the Privacy Act Protective Order. See Aplt. App. at 341-345 (Privacy Act Protective Order); Aplt. Sealed App. at 1-2 (Defendant's motion for leave to file under seal (sealed)); Aplt. App. at 346-347 (order granting motion to file under seal).

[4] Discovery included the depositions of Means, her office manager, Dillard, Dillard's husband, and FBI agent Sean Fitzgerald.

argued that there was insufficient evidence to show that the letter expressed *her own intent* to use unlawful force or that she subjectively intended the letter to be a threat of force. Aplt. Sealed App. at 101.[5]

The United States opposed the motion, asserting that the language of the letter warning that Means would find explosives under her car was a threat of force, and that the context in which the letter was written enhanced the threatening nature of the letter. Aplt. Sealed App. at 341-342. The United States noted that Scott Roeder had murdered Tiller two years earlier in Wichita and that Dillard was a friend and admirer of Roeder, providing relevant context in which Means received the letter. Aplt. Sealed App. at 342. Further, the United States asserted that Means' reaction to the letter reflected that she took the letter seriously and was intimidated by it, and that Dillard's attacks on Means' credibility simply demonstrated that this was a question for the jury. Aplt. Sealed App. at 344-345.

7. On August 15, 2013, the court granted Dillard's motion for summary judgment. Aplt. App. at 348-372, Attachment A. The court set forth "Findings of Fact." Aplt. App. at 350-359. The court also incorporated its findings concerning

[5] Dillard filed a separate motion for partial summary judgment on the government's claim for injunctive relief, stating that there was no likelihood of future harm. Aplt. Sealed App. at 3-96. Because the district court granted defendant's motion for summary judgment finding that there was no violation of FACE, the court denied that motion as moot. Aplt. App. at 368.

the sending and receipt of the letter from its order denying defendant's motion to dismiss. Aplt. App. at 350.

The court concluded that the evidence established that the letter "falls short of a true threat, and that summary judgment is therefore warranted." Aplt. App. at 363. The court stated that the applicable standard is whether "a reasonable recipient" would take the communication "as a serious expression of violence." Aplt. App. at 360. The court found that "the government's claim is fatally flawed because it lacks any proof as to two essential components of the objective portion of the true threat analysis": (1) it did not threaten any *imminent* and *unconditional* violence, and (2) it did not suggest that *the sender* (Dillard) was a participant in the violence. Aplt. App. at 361; see generally Aplt. App. at 361-367.[6]

First, the court found that Dillard's letter is "predictive and contingent, and addresses a danger which is not imminent in nature." Aplt. App. at 364. The court stated that the letter makes no reference to any "imminent danger," lacks a specific time frame, and is "doubly conditional" because "the danger is intendant on the

[6] As a result, the district court did not address whether, in addressing First Amendment protections, the test for a true threat contains a subjective element, *i.e.*, that the sender intended to cause the recipient to fear bodily injury or death. Aplt. App. at 359-361 (noting conflicting law on this issue). Therefore, although FACE itself requires a showing of subjective intent to intimidate, so that the government would be required to prove this element on remand to establish a violation, the question of Dillard's subjective intent in sending the letter is not relevant to this appeal.

establishment of the planned clinic (which could take months or years)" and "even then, the letter proposes only a possibility, that 'maybe' such a bomb will be placed." Aplt. App. at 364. The court concluded that the threat of a car bomb cannot be "objectively viewed as imminent, likely, and unconditional." Aplt. App. at 365.

Second, the court stated that "the communication must reasonably suggest that *the sender* is a participant in the proposed violence." Aplt. App. at 363. The court explained that the threat must communicate the sender's own intent, purpose, or goal of engaging in violence; "[t]here must be context linking the sender to the prospective violence." Aplt. App. at 363. Communications "which are predictions of violence by others are not true threats." Aplt. App. at 363. The court concluded that the letter suggests "that at some indefinite, future time, 'someone' may act violently against Dr. Means," but "makes no reference to any violent action by Dillard, and is largely devoted to pragmatic and religious arguments against providing abortion services." Aplt. App. at 365-366. The court added that it is not enough "simply to point to witness speculation that violence is 'quite possible,'" and that there "is simply nothing to show * * * that Dillard intended to convey her *own* intent" to engage in violence. Aplt. App. at 366 (internal quotation mark omitted).

The court concluded: "Dillard's letter * * * is not a true threat. It suggests neither likely and imminent violence, nor does it suggest that Dillard herself will engage in violence against Dr. Means. After full discovery, the government has supplied no additional evidence of any threatening context which would add to the language of the letter itself. Accordingly, summary judgment in favor of the [defendant] is warranted." Aplt. App. at 367; see also Aplt. App. at 373 (Judgment).

8. On October 10, 2013, the United States filed a notice of appeal. Aplt. App. at 374-375. On October 24, 2013, defendant filed a notice of cross-appeal of the district court's order dated August 7, 2012 (Aplt. App. at 328-340 (dismissing her counterclaim against the United States)). Aplt. App. at 376-377.

2. The Facts

The underlying facts that gave rise to this case are not in dispute.[7] In 2010, it became publicly known that Dr. Mila Means, a family practitioner in Wichita,

[7] For this reason, we largely cite to the facts recited by the district court in its decisions denying defendant's motion to dismiss and granting defendant's motion for summary judgment. See Aplt. App. at 113-133, 348-372, Attachments A and B. We otherwise cite to: (1) the transcript of testimony at the hearing on the government's motion for a preliminary injunction, see page 4, *supra*; Aplt. App. at 134-231, which is extensively cited in the parties' summary judgment filings and the district court's decisions; and (2) portions of Means' deposition, which are variously attached to the summary judgment papers (see Aplt. Sealed App. at 220-325, 430-459). As discussed below, the ultimate fact whether the

(continued…)

Kansas, was training to perform abortion services in Wichita. Aplt. App. at 113, 123. Wichita has a long and violent history of protest against providers of abortion services. Aplt. App. at 354; see also Aplt. Sealed App. at 241. Dr. George Tiller was a local physician who provided abortion services; he had been subject to numerous protests and attacks, and in 2009 he was shot to death in church by Scott Roeder to prevent him from performing abortions. Aplt. App. at 113, 131, 143, 226; see also Aplt. Sealed App. at 237, 242. Means had been a friend of Tiller, and described him as "a mentor and a very admired colleague." Aplt. App. at 142; see also Aplt. App. at 113, 123. Tiller's murder left Wichita without a provider of abortion services. Aplt. App. at 137, 123. Means' services as an abortion provider would fill that void; to that end, she purchased some of Tiller's equipment. Aplt. Sealed App. at 238, 254; Aplt. App. 123.

On or about January 15, 2011, Angel Dillard sent a letter to Means at her office. See Aplt. App. at 71, Attachment C (a copy of the letter); see also Aplt. App. at 71-72, 113, 348. The letter was in an envelope bearing Dillard's name and address, and the letter is signed "Angel Dillard." Aplt. App. at 71-72. This letter, which refers to Tiller's death, states in part (emphasis added):

(…continued)
letter constitutes a true threat *is* in dispute, and should have been decided by the jury, therefore precluding summary judgment.

> It has come to our attention that you are planning to do abortions at your Harry St. location. I am stunned that you would take your career in this direction. Fewer people than ever before are pro-abortion, quality physicians wouldn't even consider associating themselves with it, and more Americans than ever are unwilling to turn a blind eye to the killing of a baby when the ratio for adoption is 36 couples to 1 baby. Maybe you don't realize the consequences of killing the innocent. If Tiller could speak from hell, he would tell you what a soulless existence you are purposefully considering, all in the name of greed. Thousands of people are already looking into your background, not just in Wichita, but from all over the U.S. They will know your habits and routines. They know where you shop, who your friends are, what you drive, where you live. *You will be checking under your car every day – because maybe today is the day someone places an explosive under it.* People will be picketing your home, your office. You will come under greater scrutiny than you've ever known, legally and professionally. * * *
>
> I urge you to think very carefully about the choices you are making. There are 3 churches within 1 block of your practice, and many others who must take a stand. *We will not let this abomination continue without doing everything we can to stop it.* We pray you will either make the right choice and use your medical practice to heal instead of kill, or that God would bring judgment on you, the likes of which you cannot imagine. We don't want you killing our children in our community. Good people are tired of this rampant evil, and will stand against you every step of the way. Do the world a favor and ABORT this stupid plan of yours. It's not too late to change your mind. Angel Dillard.

Aplt. App. at 71, Attachment C.

Means' office manager, Andrea Hamel, opened the letter. Aplt. App. at 123. She immediately notified the Wichita police. Aplt. App. at 123. The FBI was also given the letter. Aplt. App. at 123. Both the FBI and the Wichita police spoke with Means about the letter, but they did not take steps that suggest they believed Means was in imminent danger. See Aplt. App. at 351-352.

After reading the letter, Means felt anxious and concerned. Aplt. App. at 354. She took several security precautions, including having her car examined by a mechanic; she had experienced some difficulty with the car, and asked the mechanic if it was natural wear or tear or some kind of sabotage that might be related to Dillard's letter. Aplt. App. at 123, 355. She also parked her car where it would be visible to her, traveled home by different routes, and stayed overnight at other locations. Aplt. App. at 123, 354-355. Further, she installed door alarms at her office, and began looking for a more secure building in which to practice. Aplt. App. at 23. Means' office manager also found the letter to be threatening; she no longer felt safe at "home or anywhere" she went because she was always wondering if someone was following her or "there was an explosive under [her] car." Aplt. App. at 355.

Means knew that, in the past, abortion clinics had been the target of numerous protests and that Tiller had driven around in an armored vehicle. Aplt. App. at 354. She was also familiar with an article about Operation Rescue in which the organization stated that it would do everything it could to prevent the opening of an abortion clinic in Wichita. Aplt. App. at 354. Further, she knew that protesters had obtained her car registration (Aplt. App. at 354), and that "thousands of people" were looking into her background (Aplt. App. at 71-72). See also Aplt. Sealed App. at 238. Also, protesters began showing up at her home and business.

Aplt. Sealed App. at 238. Finally, Means learned that Dillard lived nearby, which added to her anxiety about the letter. Aplt. App. at 141-142; Aplt. Sealed App. 250.

After receiving the letter, Means conducted some Internet research and discovered an AP article about Dillard indicating that Dillard had befriended Scott Roeder, exchanged letters with him, and admired him for his convictions, which Means understood to mean that Dillard admired the fact that Roeder had murdered Dr. Tiller. Aplt. Sealed App. 250; Aplt. App. at 124, 355-356.[8] At the same time, the article noted that Dillard stated that she did not plan any violence. Aplt. App. at 124. Means testified at the preliminary injunction hearing that she was sure Dillard didn't have any plans for violence at the time of the article, but "people's tendency to move toward violence happens over time." Aplt. App. at 124, 157. Means also testified that she believed Dillard admired Roeder because Roeder was a person who actually did something to stop abortions. Aplt. App. at 143.

[8] Although Dillard corresponded with Scott Roeder when he was in prison, the district court found that there was no evidence "that the fact of that correspondence was public information at the time that the letter was sent." Aplt. App. at 355. That conclusion is contradicted by the record. Means' testimony at the preliminary injunction hearing makes clear that the AP article reporting on Dillard's letters to Roeder was published before Dillard sent the letter to Means. Aplt. App. at 153-154.

Means acknowledged that, from the text of the letter, she did not know Dillard's actual intentions and it was unclear who would perform certain acts. Aplt. App. at 350. Means also acknowledged that Dillard did not write in the letter that *she* was going to put a bomb under the doctor's car or even do anything, she did not know if Dillard had any propensity for violence, and she did not know whether Dillard was a spokesperson for any group. Aplt. App. at 350-351. But Means also stated that Dillard "made references that she was part of a 'they' group and this 'we' group, so I don't know what her intentions in her brain were." Aplt. App. at 350. She further testified that "a particular person wrote this [letter] to me, and there's not a way to know if it's her or her cronies that feel like they would do anything to prevent * * * abortions from returning to Wichita, Kansas." Aplt. App. at 350. In addition, she testified that the letter's references to scrutiny by "'[t]housands of people,' and that local groups 'must take a stand' meant that '[i]t's quite possible she is [a] spokesperson" for others. Aplt. App. at 124. She similarly testified that "I didn't know that she specifically would be the violent one, but I couldn't rule it out." Aplt. App. at 124.

Finally, six months after the letter was sent, and three months after this lawsuit was filed, a New York Times article reported that, after receiving the letter, "rather than lower her profile, Dr. Means raised it by buying a car that nobody could miss, a bright yellow Mini Cooper" with red lightning bolts. Means told the

reporter: "It's partly an in-your-face response. * * * You're looking for me, I'm here." Aplt. App. at 354; Aplt. Sealed App. 235. Means explained that "they were going to know my car anyway, so I decided I should have the vehicle I wanted to have." Aplt. Sealed App. 235.

After receiving the letter, and before trial, Means abandoned her plans to open the planned abortion facility in Wichita, in part due to changes in State law. Aplt. App. at 357; see also Aplt. Sealed App. at 228, 240, 450.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

This action was brought by the United States under the civil enforcement provisions of FACE. The United States sought injunctive and other relief against Angel Dillard based on a letter she sent to Dr. Mila Means in response to Means' announced plans to open an abortion services clinic in Wichita, Kansas. After the murder of Dr. Tiller in 2009, there were no abortion providers in Wichita. The United States asserted that the letter constituted a threat of force intended to intimidate Means from performing abortions. The district court granted defendant's motion for summary judgment, concluding that, as a matter of law, no reasonable jury could conclude that the letter constituted a "true threat," and that it therefore was constitutionally protected speech. In so doing, the court erred. The question whether the letter constituted a true threat is a question for the jury to decide.

In reaching its conclusion, the district court incorrectly applied the test for a true threat. Instead of focusing on the ultimate issue of whether a reasonable person in Means' position would interpret Dillard's letter as a threat of injury, the court found that the letter was not a true threat because: (1) the threat was not "imminent, likely, and unconditional," and (2) the threatened violence was not by Dillard or persons with whom she associated or controlled.

As to the first point, the court applied the wrong legal standard in requiring that the threatened violence be imminent and unconditional. Of course, the likelihood that the threatened violence will occur is relevant to the true threat analysis. But even a threat that is contingent and not necessarily imminent may reasonably be perceived as likely to happen in the future. Therefore, such a threat could be a true threat creating harms that place it outside the protections of the First Amendment.

As to the second point, the district court misapplied the requirement to the facts of this case, *i.e.*, a reasonable person could read the letter to suggest that Dillard would be a participant in the threatened violence and that the letter was not merely a prediction of harm at the hands of others. Dillard's letter, after stating that "[y]ou will be checking under your car everyday – because maybe today is the day someone places explosives under it," states that "*[w]e* will not let this abomination continue without doing everything *we* can to stop it" (emphasis

added). The letter then states that "[w]e pray" that you will "make the right choice," or that "God would bring judgment on you, the likes of which you cannot imagine." Drawing all reasonable inferences from the evidence in the light most favorable to the government, and given the context of the previous murder of an abortion provider in Wichita and Dillard's admiration of the murderer, a jury could conclude that a reasonable person in Means' place would construe the letter as a serious threat of violence by Dillard or someone with whom she was associated. Indeed, after receiving the letter, Means took various safety precautions.

In short, this Court need not – and should not – decide whether the letter constituted a true threat. Rather, the Court should set forth the correct legal standard for a true threat, and remand the case for a jury to determine whether, given the text of the letter and the context in which it was sent, a reasonable recipient could view it as a serious threat of violence.

ARGUMENT

THE DISTRICT COURT ERRED IN CONCLUDING THAT, AS A MATTER OF LAW, DEFENDANT'S LETTER TO DR. MEANS DID NOT CONSTITUTE A TRUE THREAT THAT COULD BE THE BASIS OF A VIOLATION OF THE FREEDOM OF ACCESS TO CLINIC ENTRANCES ACT (FACE)

A. Standard Of Review

The Court reviews a grant of summary judgment *de novo*, "applying the same legal standard used by the district court." *Fierro* v. *Norton*, 152 F. App'x

725, 726 (10th Cir. 2005). "Our summary judgment standard of review requires us to determine * * * whether there is any genuine disputed issue of material fact and whether the prevailing party was entitled to judgment as a matter of law." *Gonzalez* v. *United States Air Force*, 88 F. App'x 371, 373 (10th Cir. 2004) (citation omitted). The Court views "the evidence and reasonable inferences that can be drawn from that evidence in the light most favorable to * * * the non-moving party," here the United States. *Shayesteh* v. *Raty*, 404 F. App'x 298, 300 (10th Cir. 2010). The Court's role "is simply to determine whether the evidence proffered by the plaintiff would be sufficient[,] if believed by the ultimate factfinder, to sustain [its] claim." *Carter* v. *Mineta*, 125 F. App'x 231, 234 (10th Cir. 2005) (citation omitted).

B. A Reasonable Person Receiving The Letter, And Familiar With The Context In Which It Was Sent, Could Construe The Letter As A Serious Expression Of The Intent To Inflict Bodily Harm

1. True Threats Are Not Protected By The First Amendment And May Violate FACE

Section 248(a)(1) of FACE provides for civil liability for any person who, by "threat of force," intentionally "intimidates or interferes with or attempts to * * * intimidate or interfere with," any person "in order to intimidate such person" from "providing reproductive health services." 18 U.S.C. 248(a)(1). The statute defines "intimidate" to mean "to place a person in reasonable apprehension of bodily harm to him- or herself or to another." 18 U.S.C. 248(e)(3). FACE

includes a savings clause providing that it does not prohibit "expressive conduct" protected by the First Amendment. 18 U.S.C. 248(d)(1). Therefore, where the underlying conduct involves speech, there may be a question whether defendant's conduct constitutes protected speech outside the reach of FACE.

Although the First Amendment protects speech that is distasteful, discomforting, offensive, and even "fraught with evil consequences," *Virginia* v. *Black*, 538 U.S. 343, 358 (2003) (citation omitted), its protections are not absolute and the government may regulate certain categories of expression consistent with the Constitution. One such category is "true threats" of violence. As this Court has stated, "[u]nder the First Amendment, threatening expression can be criminally punished if the communication at issue is a true threat." *United States* v. *Ream*, 506 F. App'x 842, 845 (10th Cir. 2013); see also *Black*, 538 U.S. at 359; *Watts* v. *United States*, 394 U.S. 705, 708 (1969); *United States* v. *Wolff*, 370 F. App'x 888, 891-892 (10th Cir. 2010). As another court recently explained, "objective threats of violence contribute nothing to public discourse and enjoy no First Amendment protection." *United States* v. *Martinez*, 736 F.3d 981, 984-989 (11th Cir. 2013) (discussing origin of true threats doctrine as a category of unprotected speech), petition for cert. pending, No. 13-8837 (filed Feb. 21, 2014).

The Supreme Court has explained that true threats "encompass those statements where the speaker means to communicate a serious expression of an

intent to commit an act of unlawful violence to a particular individual or group of individuals." *Black*, 538 U.S. at 359; see also *Ream*, 506 F. App'x at 845 (same). "The speaker need not actually intend to carry out the threat. Rather a prohibition on true threats protects individuals *from the fear of violence and from the disruption that fear engenders*, in addition to protecting people from the *possibility* that the threatened violence will occur." *Black*, 538 U.S. at 359-360 (internal quotation marks and brackets omitted) (emphasis added); see also *United States* v. *Magleby*, 420 F.3d 1136, 1139 (10th Cir. 2005) ("An intent to threaten is enough; the further intent to carry out the threat is unnecessary."). This Court has characterized a true threat "as a declaration of intention, purpose, design, goal, or determination to inflict punishment, loss, or pain on another, or to injure another or his property by the commission of some unlawful act." *Wolff*, 370 F. App'x at 892 (internal quotation marks omitted; citing cases).

This Court applies an objective test for true threats: "The question is whether those who hear or read the threat reasonably consider that an actual threat has been made." *United States* v. *Viefhaus*, 168 F.3d 392, 396 (10th Cir. 1999) (emphasis omitted); see also *Ream*, 506 F. App'x at 845 (same); *Wolff*, 370 F. App'x at 892 (same); *United States* v. *Martin*, 163 F.3d 1212, 1216 (10th Cir. 1998) (same). The Eleventh Circuit, in a criminal case, has explained: A communication is a threat when it would have "a reasonable tendency to create

apprehension that its originator will act according to its tenor. In other words, the inquiry is whether there was sufficient evidence to prove beyond a reasonable doubt that the defendant intentionally made the statement under such circumstances that a reasonable person would construe [it] as a serious expression of an intention to inflict bodily harm[]. Thus, the offending remarks must be measured by an objective standard." *United States* v. *Alaboud*, 347 F.3d 1293, 1296-1297 (11th Cir. 2003) (internal quotation marks and citations omitted); see also *Martinez*, 736 F.3d at 988 ("A true threat is determined from the position of an objective, reasonable person.").

The "reasonable person" is one "familiar with the context of the communication," *i.e.*, one who stands in the shoes of the victim. *United States* v. *Floyd*, 458 F.3d 844, 849 (8th Cir. 2006); see also *Nielander* v. *Board of Cnty. Comm'rs*, 582 F.3d 1155, 1167-1168 (10th Cir. 2009) (true threat inquiry depends on the context in which the statements are made). As one court has explained, "[t]he communication must be viewed using an objective standard[] – that is, whether an ordinary, reasonable person *who is familiar with the context* of the communication would interpret it as a threat of injury." *United States* v. *Napa*, 370 F. App'x 402, 404 (4th Cir. 2010) (citation, internal quotation mark and alterations omitted; emphasis added); see also *United States* v. *Turner*, 720 F.3d 411, 420 (2nd Cir. 2013) ("whether an ordinary, reasonable recipient who is familiar with

the context of the communication would interpret it as a threat of injury") (citation and brackets omitted), petition for cert. pending, No. 13-1129 (filed Mar. 14, 2014); *United States* v. *Hart*, 212 F.3d 1067, 1072 (8th Cir. 2000) (determining whether jury could reasonably believe conduct a threat "in light of the surrounding circumstances").

This Court has "consistently * * * held that whether a defendant's statement is a true threat or mere political speech is a question for the jury." *Viefhaus*, 168 F.3d at 397; see also *Wolff*, 370 F. App'x at 892 (the trier of fact must decide whether a reasonable person would find that the threat existed); *United States* v. *Pinson*, 542 F.3d 822, 832 (10th Cir. 2008) (question for jury is whether "a reasonable person" would regard the words as a threat); *Martin*, 163 F.3d at 1216; Aplt. App. at 131-132 (district court decision denying defendant's motion to dismiss; citing cases). Indeed, deciding this issue requires a "fact-intensive inquiry, in which the language, the context in which the statements are made, as well as the recipients' responses are all relevant." *Nielander*, 582 F.3d at 1167-1168; see also *United States* v. *Judd*, 315 F. App'x 35, 39 (10th Cir. 2008) ("Evidence of a recipient's response is relevant to whether a true threat exists.") (citation and brackets omitted). As one court has explained, "[t]he fact that the victim acts as if he believed the threat is evidence that he did believe it, and the fact that he believed it is evidence that it could reasonably be believed and

therefore that it *is* a threat." *United States* v. *Schneider*, 910 F.2d 1569, 1571 (7th Cir. 1990). Other factors include whether the statement is expressly conditional, the reaction of the listeners, whether the threat was communicated directly to its victim, whether the maker of the threat had made similar threats in the past, and whether the victim of the threat had reason to believe that the maker of the threat had a propensity for violence. *Watts*, 394 U.S. at 708.

Under these standards, which focus on objective reasonableness and context, the court can grant summary judgment for the defendant only if it finds that, as a matter of law, no reasonable recipient of the letter could view it as a serious threat of violence. As set forth below, the district court granted summary judgment for two independent reasons. Both reasons are wrong. The question whether the letter constituted a true threat is a question for a jury to decide.

2. The District Court Erred In Concluding That, As A Matter Of Law, Dillard's Letter Did Not Constitute A True Threat

The district court held that no reasonable jury could find Dillard's letter to be a true threat because: (1) it did not threaten any *imminent* and *unconditional* violence, and (2) it did not suggest that *the sender* (Dillard) was a participant in the violence. Aplt. App. at 361-367. As to the former, the court applied the wrong legal standard and, under the correct legal standard, there was sufficient evidence from which a juror could conclude that the threatened violence was sufficiently likely to constitute a true threat. As to the latter, there was sufficient evidence,

drawing all reasonable inferences in favor of the government, from which a juror could conclude that a reasonable person in Means' position would view the letter as a serious threat by Dillard, or someone with whom she is associated, to inflict bodily harm. Accordingly, the district court's grant of defendant's motion for summary judgment must be reversed.

a. The District Court Applied The Wrong Legal Standard In Concluding That The Letter Was Not A True Threat Because The Threatened Conduct Was Not Imminent And Unconditional

i. The district court erred in applying the wrong legal standard in requiring that a true threat must be imminent and unconditional. This Court has characterized a true threat as conveying a "likelihood of execution." *Nielander*, 582 F.3d at 1168. The Court has also explained that a threat may convey a likelihood of execution "even though it is subject to a possible contingency in the maker's control." *Wolff*, 370 F. App'x at 893 (internal quotation marks and citation omitted).

For example, in *Nielander*, the Court concluded that the statement that "he *would* bring a gun *the next time* he went to a Commissioners' meeting" could be reasonably construed as a true threat. 582 F.3d at 1168-1169. Likewise, in *United States* v. *Crews*, 781 F.2d 826, 829, 832 n.3 (10th Cir. 1986), a jury found that the statement that "[i]f Reagan came to Sheridan [Wyoming], I would shoot him" was a true threat, and this Court upheld defendant's conviction, even though "it was

contingent on President Reagan coming" to that town. See also *Martin*, 163 F.3d at 1216 (affirmatively citing case where "recipient of the threat reasonably feared violence, even though the defendant was incarcerated, because he might inflict harm upon his release"); *United States* v. *Leaverton*, 835 F.2d 254, 256 n.4 (10th Cir. 1987) (noting Ninth Circuit case rejecting jury instruction that threat must be without condition and noting that conditional language does not always negate a threat); *United States* v. *Welch*, 745 F.2d 614 (10th Cir. 1984) (upholding conviction for threatening President; statement that if Reagan were in town he would get a rifle and shoot him not protected speech even though conditional).

Other circuits also recognize that there may be a true threat even if it expresses an intent to injure that is in the future or premised on a contingency. Most recently, in *United States* v. *Elonis*, 730 F.3d 321 (3d Cir. 2013), petition for cert. pending, No. 13-983 (Feb. 14, 2014), the court upheld a conviction for posting violent threats on the Internet, rejecting the argument that the threats could not be true threats because they were conditional. The court noted that although defendant's statement "only conveys a vague timeline or condition, * * * taken as a whole[] a jury could have found defendant was threatening to use explosives on officers who '[t]ry to enforce an Order' of protection that was granted to his wife." *Id.* at 334. The court stated that "there is no rule that a conditional statement

cannot be a true threat," and that "the words and context can demonstrate whether the statement was a serious expression of intent to harm." *Ibid.*

Similarly, the Seventh Circuit, in upholding a conviction under 18 U.S.C. 876 for sending a threatening letter to a judge, explained that the fact that the threat was conditional – to be carried out only if the judges to whom it was sent failed to correct the targeted judge's conduct and nullify his orders – was "immaterial." *Schneider*, 910 F.2d at 1570. The court stated that "[m]ost threats are conditional; they are designed to accomplish something; the threatener hopes that they *will* accomplish it, so that he won't have to carry out the threats. * * * They are threats nonetheless." *Ibid.*[9]; see also *United States* v. *Vaksman*, 472 F. App'x 447, 448 (9th Cir.), cert. denied, 133 S. Ct. 777 (2012) (noting that use of conditional language is not dispositive in true threat analysis); *United States* v. *Armel*, 585 F.3d 182, 183-185 (4th Cir. 2009) (upholding conviction where defendant threatened violence if the FBI did not pay defendant money within three days); *United States* v. *Stevenson*, 126 F.3d 662, 665 (5th Cir. 1997) (fact that defendant in jail when he made threat is irrelevant "given that a reasonable person could fear that the threatened violence would occur upon [defendant's] release"); *United States* v. *Bellrichard*, 994 F.2d 1318, 1322 (8th Cir. 1993) (conditional nature of

[9] The court in *Schneider* also stated that if a threat is ambiguous, the task of interpretation is for the jury. 910 F.2d at 1570.

threats did not bring them within protection of First Amendment; conviction affirmed); *United States* v. *Lockhart*, 382 F.3d 447, 449 (4th Cir. 2004) (noting President Bush's involvement in Iraq War, letter states that "[i]f George Bush refuses to see the truth and uphold the Constitution I will personally put a bullet in his head"; conviction affirmed); *United States* v. *Dinwiddie*, 76 F.3d 913, 925 (8th Cir. 1996) (suggesting true threat may express determination to injure in the future or be premised on a contingency).

To be sure, a conditional statement may be *more likely* than an unconditional one to be protected by the First Amendment. See, *e.g.*, *Watts*, 394 U.S. at 708 (not a true threat in part because it was "expressly conditional [in] nature"); *Spitzer* v. *Operation Rescue Nat'l*, 273 F.3d 184, 196 (2nd Cir. 2001) (threat must be "so unequivocal, unconditional, immediate and specific as to the person threatened, as to convey a gravity of purpose and imminent prospect of execution") (citation omitted); *Viefhaus*, 168 F.3d at 396 (noting that threat conveyed that bombings were "imminent"); *Napa*, 370 F. App'x at 405 (upholding conviction for making threat in part because "the threat of such violence was imminent and not conditional"). But, as the decisions cited above demonstrate, it is not the case that a conditional statement can never be a true threat. Indeed, such a rule would be inconsistent with the underlying reason why true threats are not protected by the First Amendment. As the Supreme Court in *Black* stated, "a prohibition on true

threats protects individuals from the fear of violence and from the disruption that fear engenders, in addition to protecting people from the possibility that the threatened violence will occur. Intimidation in the constitutionally proscribable sense of the word is a type of true threat, where a speaker directs a threat to a person or group of persons with the intent of placing the victim in fear of bodily harm or death." 538 U.S. at 360 (internal quotation marks, citation, and brackets omitted); see also *United States* v. *Barlow*, 341 F. App'x 466, 468 (10th Cir. 2009) (upholding jury instruction that true threat is a "serious statement expressing an intention to injure any person, which under the circumstances would cause apprehension in a reasonable person").

Likewise, although it may be relevant in the totality of the circumstances, there is no requirement that the violence threatened must be imminent. See *Vaksman*, 472 F. App'x at 449 (rejecting argument that email was not objectively a true threat because it contained no threat of imminent action).[10] Rather, the

[10] The notion that the threatened harm must be "imminent" may have been erroneously borrowed from decisions addressing speech inciting others to violence. In *Brandenburg* v. *Ohio*, 395 U.S. 444, 447 (1969), the Court held that speech inciting others to violence can be proscribed only if it is likely to cause "imminent lawless action." Although some decisions may suggest a similar imminence requirement applies to threats of violence by the speaker, see *Spitzer*, 273 F.3d at 196, that requirement finds no support in the Supreme Court decisions in *Watts* and *Black* and has been rejected by other circuits. See, *e.g.*, *Vaksman*, 472 F. App'x at 449 (rejecting argument that email was not objectively a true threat because it contained no threat of imminent action; "[t]he government need only prove

(continued…)

communication must reflect a serious threat of violence that, under the circumstances, is likely so that a reasonable person, in the shoes of the recipient, would reasonably feel threatened by violence. In other words, the touchstone of a true threat is a reasonable fear of likely bodily injury, not imminence. Where a threat results in a reasonable fear of bodily injury it is not dispositive whether the threatened violence may occur the next day, the next week, or the next month. The threat has had its intended effect; it has placed the recipient in fear, disrupted her life, and possibly dissuaded her from doing what she intended to do. See *Schneider*, 910 F.2d at 1570. As the Sixth Circuit has explained, "once the government shows that a reasonable person would perceive the threat as real, any concern about the risk of unduly chilling protected speech has been answered. For if an individual makes a true threat to another, the government has the right, if not the duty, to protect individuals from the fear of violence, from the disruption that fear engenders, and from the possibility that the threatened violence will occur, all of which places the menacing words and symbols outside the First Amendment." *United States* v. *Jeffries*, 692 F.3d 473, 478 (6th Cir. 2012) (internal quotation marks, citation, and brackets omitted), cert. denied, 134 S. Ct. 59 (2013); see also

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(…continued)
imminency where a speaker incites others to commit violence" (citing *Brandenburg*)); *United States* v. *Landham*, 251 F.3d 1072, 1080 n.5 (6th Cir. 2001).

Planned Parenthood of the Columbia/Willamette, Inc. v. *American Coal. of Life Activists*, 290 F.3d 1058, 1090 (9th Cir. 2002) (en banc) ("statements that are intimidating, even coercive, are protected by the First Amendment, so long as the speaker does not threaten that he, or someone acting in concert with him, will resort to violence if the warning is not heeded") (Kozinski, J., dissenting).

In short, the conditional nature and imminence of a threat are factors that cannot be considered in a vacuum. Even if the threatened violence is contingent on specific future conduct, and is not necessarily imminent, if that conduct is something the speaker has indicated she intends to do that is not merely speculative, there can be a serious threat of likely harm that would put a reasonable person, familiar with the context, in apprehension of violence. In such a case, the communication should not be considered protected speech simply because the speaker has given the recipient some time to accept a way out. For these reasons, the district court, by requiring the facts to show that the threatened violence was imminent and unconditional, applied an incorrect standard.

ii. Under the correct standard, the question whether Dillard's letter threatens violence sufficiently likely to constitute a true threat is an issue for the jury, precluding summary judgment. Viewing Means' receipt of the letter in context, and drawing all reasonable inferences in favor of the government, a jury could find

that someone in Means' position could reasonably construe the threatened violence as not merely speculative but as a serious threat of harm.

As the facts make clear, Wichita has a history of violent protests against abortion providers. Tiller, an abortion provider in Wichita, was murdered by Scott Roeder, and Dillard had exchanged letters with Roeder and admired the fact that Roeder followed his convictions. Means was a friend of Tiller. She knew Tiller drove in an armored vehicle. She also knew protesters had obtained her car registration. The letter refers to Tiller, and disparagingly characterizes him as being in hell. The letter then asserts that thousands of people are looking into Means' background and they will know her "habits and routines" and where she lives and what she drives. Next, the letter states: "You will be checking under your car every day – because maybe today is the day someone places explosives under it." Finally, the letter urges her to "think very carefully about the choices [she is] making," states that "[w]e will not let this abomination continue without doing everything we can to stop it," and hopes she will "make the right choice" or otherwise "God would bring judgment on you, the likes of which you cannot imagine." See Attachment C.

Against the backdrop of the Wichita abortion clashes and the murder of Tiller, and with the knowledge of Dillard's correspondence with and admiration of Tiller's killer, a reasonable person planning to open an abortion clinic in Wichita

could believe that such a letter was a credible threat of harm likely to occur. As the cases discussed above indicate, the fact that the prospect of an explosive placed under Means' car is in the future, and likely to occur only if she in fact opens her clinic, does not mean it cannot be a true threat. Indeed, in this regard, the fact that Dillard's letter warned of violence only if Means began providing abortions is consistent with the paradigmatic use of a threat to intimidate; *i.e.*, most threats are conditional because they are intended to change a course of behavior so that the threat need not be carried out. See *Schneider*, 910 F.2d at 1570.

For this reason, the fact that it was unclear when the clinic would be open, and that the letter used the word "maybe" in connection with the use of an explosive, is largely beside the point. Dillard wrote the letter because Means was planning to open the clinic, and the letter threatens Means with the likelihood of a car explosive if she does.[11] That "conditional" nature of the threat is no different from the kinds of threats courts have upheld as true threats against the President. Moreover, Means' reaction to the letter shows that she took the threat seriously (and the same for her office manager, Andrea Hamel). Means immediately notified the police, felt anxious, and took numerous security precautions, including

[11] Also, the word "maybe" modifies the word "today," and therefore could reasonably be interpreted to indicate *when* the violence might occur, not *if* it will occur, particularly in light of the fact that the letter previously states that "thousands of people are already looking into your background."

having her car examined by a mechanic, parking her car where it was visible to her, installing door alarms, and staying away from home.[12]

In sum, the district court's requirement that the threat must be "imminent, likely, and unconditional" (see, *e.g.*, Aplt. App. at 361) is overly narrow and at odds with decisions of this Court and others recognizing that in some cases there may be a true threat even where the threatened violence is contingent, conditional, and not imminent. Further, given the context in which the letter was sent, there is ample evidence from which a jury could conclude that a reasonable person in Means' position could believe the threatened violence was likely to occur. Therefore, the court erred in concluding that, as a matter of law, the letter did not sufficiently allege violence that was imminent and unconditional to constitute a true threat.

[12] Means' statement to a newspaper that her purchase of a yellow car was an "in your face response," to the extent relevant given that the statement was made six months after the letter was sent and three months after this case was filed, simply indicates that there is a question of fact for the jury concerning whether Means' reactions to the letter support the conclusion that a reasonable person, in her situation, would reasonably feel threatened by the letter. Likewise, Means' research indicating that, although Dillard admired Roeder, Dillard did not plan any violence herself, is relevant to a jury determination of whether Means took the letter as a serious threat.

b. The District Court Erred In Concluding That There Was Insufficient Evidence That Dillard Would Be A Participant In The Threatened Violence.

The district court stated that to be a true threat, a communication must reasonably suggest that *the sender* is a participant in the proposed violence. The court also concluded that, in this case, the letter did not satisfy that standard because the letter does not refer to any violent action *by Dillard*. Assuming that, as a general matter, a true threat must suggest that the violence will be executed by the sender, *or* a co-conspirator or someone the speaker controls, the letter here can reasonably be read to suggest Dillard's *involvement in* the threatened violence. Therefore, this issue is appropriately one for the jury, precluding summary judgment for the defendant.

i. Although most true threats refer to action by the speaker, a true threat does not have to state expressly that the speaker is personally going to carry out the threat. As numerous cases make clear, it is sufficient that the recipient could reasonably believe that the speaker is in some way responsible for the violence, *e.g.*, as a co-conspirator, by exerting control over others who commit the violence, or where the speaker's commands have been carried out in the past. See, *e.g.*, *United States* v. *White*, 670 F.3d 498, 513-514 (4th Cir. 2012) (distinguishing a call that others commit violence, which is not a true threat, with a threat of violence by the sender, someone the sender controls, or where the speaker's

"violent commands in the past had predictably been carried out"); *Spitzer*, 273 F.3d at 196 (threat must be by speaker or co-conspirator; not sufficient to assert that recipient is in danger from third party); see also *Turner*, 720 F.3d at 422-424 (upholding jury verdict that blog post asserting that court of appeals judges deserved to die was a true threat even though writer never explicitly asserted that he would kill the judges or that he personally intended to take violent action).

These cases distinguish threats by the speaker (or co-conspirators or persons the speaker controls) from exhortations or warnings about others committing violence. In determining which category applies to a particular threat, the court must again consider the entire context of the threat and whether a reasonable person in the position of the recipient would view the statements as a serious threat of injury. For example, in *Viefhaus*, 168 F.3d at 396, where the defendant repeated the threat of another party, this Court stated that "[t]here is no requirement that the defendant convey an intent to carry out the threatened conduct himself." This Court noted the objective test focusing on how a reasonable person would interpret the statement. *Ibid.* Likewise, in *Alaboud*, 347 F.3d at 1297, the court rejected the argument that statements could not be a true threat because defendant never asserted he would personally carry them out. The court stated that the "fact-finder must look at the context in which the communication was made to determine if the communication would cause a reasonable person to construe it as a serious

intention to inflict bodily harm." *Ibid.* Further, in *Bellrichard*, 994 F.2d at 1321-1324, the court affirmed a conviction for sending threatening communications through the mail even though the sender did not directly state that he intended to cause harm and some of the threats suggested that God or a third party would carry out the threats.[13] See also *Dinwiddie*, 76 F.3d at 926 n.9 (action for injunctive relief under FACE; "the fact that Mrs. Dinwiddie did not specifically say to Dr. Crist that *she* would injure him does not mean that [her] comments were not 'threats of force'") (citing *Bellrichard*).[14]

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[13] In rejecting defendant's argument that his language did not convey that he would carry out the threats, the court upheld the convictions for the statements "[d]on't ever fuck with me again and God will let you live!" and "[b]eing jailed is what your deserve but, if you persist, being shot is what you'll all get." 994 F.2d at 1323.

[14] One court has adopted a standard focusing on what "*a reasonable speaker* would foresee the *listener's* reaction to be under the circumstances." *American Coal. of Life Activists*, 290 F.3d at 1076. In that case, the Ninth Circuit held, en banc, that various posters circulated by anti-abortion protesters were true threats that were unprotected by the First Amendment and violated FACE. The posters included "wanted" and "guilty" posters identifying specific doctors who provided abortions, and a list of doctors defendants anticipated might one day be put on trial for crimes against humanity. See *id.* at 1062. These posters were circulated in the wake of a series of other "wanted" and "unwanted" posters that identified doctors who performed abortions before they were murdered. *Ibid.* The court concluded that, given the entire factual context, the posters were true threats because "they connote something they do not literally say, yet both the actor and the recipient get the message. To the doctor who performs abortions, these posters meant 'You're Wanted or You're Guilty; You'll be shot or killed.'" *Id.* at 1085. Judge Kozinski dissented, and stated that to be a true threat, "it must send the message that the speakers themselves – or individuals acting in concert with them – will engage in

(continued…)

ii. In this case, viewing the evidence in the light most favorable to the government, a reasonable jury could conclude that, viewed as a whole and in context, Dillard's letter crossed the line from a mere prediction of violence by third parties to an impermissible threat. First, the letter refers to the placement of an explosive under Means' car: "[y]ou will be checking under your car everyday – because maybe today is the day someone places explosives under it." This reference to a specific and unusual type of attack could reasonably be interpreted to suggest that the author, or persons associated with or known to her, had some intent to carry out the violent act. Second, immediately before the reference to the car bomb, the letter states that "[t]housands of people are already looking into your background" and "[t]hey know where you shop, who your friends are, what you drive, and where you live." This claimed awareness of the activities of people who knew "what [Means] dr[o]ve" reinforces the inference that Dillard was acting in concert with the persons who would carry out the threatened bombing.

(…continued)
physical violence. *Id.* at 1091 (Kozinski, J., dissenting). The majority's standard – focusing on how a reasonable *speaker* would foresee the effect of his statement, rather than on how a reasonable *listener* would react to it – is not entirely consistent with the objective test as applied by this Court. In any event, under either formulation a reasonable jury could find that Dillard's letter was a true threat, thereby precluding summary judgment. The letter also satisfies Judge Kozinski's formulation.

Further, the end of the letter transfers to the first person, asserting that "*[w]e* will not let this abomination continue without doing everything *we* can to stop it." (emphasis added).[15] The letter then states that "[w]e pray" that you will "make the right choice," or that "God would bring judgment on you, the likes of which you cannot imagine." Given the context of the previous murder of an abortion provider in Wichita, and Dillard's admiration of Roeder, a jury could conclude that the letter constituted a threat of violence by Dillard or someone with whom she was associated. In the highly charged atmosphere of Wichita, Dillard should not be able to escape culpability simply because she used the word "someone" in warning of the placing of a car explosive.

In sum, a reasonable jury could conclude that the letter is not simply a prediction of violence by others, but includes Dillard's involvement. Therefore,

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[15] The district court, in its decision denying defendant's motion to dismiss, concluded that this statement referred only to nonviolent activities. Aplt. App. at 125. But given the letter's explicit reference to a car bomb, and the murder of Tiller, a reasonable reader could have interpreted "everything we can" to include violence. Cf. *Dinwiddie*, 76 F.3d at 917 (holding that a statement by a protester urging an abortion provider to "remember" another doctor who had been murdered and warning that "[t]his could happen to you" constituted a true threat). The district court also stated that the letter, in referring to three churches within a block of Means' practice and "we will not let this abomination continue," did not indicate that Dillard would personally act in concert with the churches or personally engage in any particular activity. Aplt. App. at 356-357. Again, a reasonable recipient of the letter could conclude that Dillard would be involved in the threatened violent bombing.

the district court erred in granting summary judgment. The ultimate question whether the letter constitutes a true threat should have been left to the jury.

CONCLUSION

The judgment of the district court should be reversed and the case remanded for further proceedings.

Respectfully submitted,

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STATEMENT SUPPORTING REQUEST FOR ORAL ARGUMENT

This case arises from the United States' enforcement of the Freedom of Access to Clinic Entrances Act (FACE), 18 U.S.C. 248, in the context of a threatening letter to a doctor planning to open an abortion services clinic in Wichita, Kansas. The specific question on appeal concerns application of the First Amendment's "true threat" doctrine to the facts of this case; *i.e.*, whether the undisputed facts are sufficient to create a jury question on whether a reasonable recipient of the letter, familiar with its context, would view it as a serious expression of intent to harm. Because this case implicates the application of an important federal civil rights statute in the context of First Amendment protections, we believe that oral argument is appropriate and will be helpful to the Court.

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief does not exceed the type-volume limitation imposed by Federal Rule of Appellate Procedure 32(a)(7)(B). The brief was prepared using Microsoft Office Word 2007 and contains 10,3331 words of proportionally spaced text. The typeface is Times New Roman, 14-point font.

s/ Thomas E. Chandler
THOMAS E. CHANDLER
Attorney

Date: April 2, 2014

CERTIFICATE OF DIGITAL SUBMISSION

I certify that the electronic version of the foregoing Brief for the United States as Appellant-Cross-Appellee, prepared for submission via ECF, complies with all required privacy redactions per Tenth Circuit Rule 25.5, is an exact copy of the paper copies submitted to the Tenth Circuit Court of Appeals, and has been scanned with the most recent version of Trend Micro Office Scan (version 8.0) and is virus-free.

s/ Thomas E. Chandler
THOMAS E. CHANDLER
Attorney

Date: April 2, 2014

CERTIFICATE OF SERVICE

I hereby certify that on April 2, 2014, I electronically filed the foregoing Brief for the United States as Appellant-Cross-Appellee with the United States Court of Appeals for the Tenth Circuit by using the CM/ECF system. All participants in this case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

s/ Thomas E. Chandler
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ATTACHMENT A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

United States of America,

Plaintiff,

vs. Case No. 11-1098-JTM

Angel Dillard,

Defendant.

MEMORANDUM AND ORDER

On January 19, 2011, Angel Dillard wrote a letter to Dr. Mila Means, who had publicly announced plans to open an abortion services clinic in Wichita, Kansas. Most of the letter centers on arguments from Scripture, appeals to conscience, and the practical disadvantages and difficulties associated with such a clinic. But in the body of the letter, Dillard also wrote that "You will be checking under your car everyday—because maybe today is the day someone places an explosive under it."[1] The United States instituted this civil action against Dillard alleging a violation of the Freedom of Access to Clinic Entrances Act (FACE), 18 U.S.C. § 248(a)(1).

The court has previously denied Dillard's motion to dismiss, accepting the government's contention that additional discovery could supply additional context establishing that Dillard's letter was a "true threat" which may be sanctioned under FACE, rather than constitutionally protected speech. With the completion of discovery, Dillard has

[1] The full text of the letter is set forth in the court's Order of December 21, 2011, which denied Dillard's motion to dismiss. *United States v. Dillard*, 835 F.Supp.2d 1120, 1121-22 (D. Kan. 2011). *See also United States v. Dillard*, 884 F.Supp.2d 1177 (D. Kan. 2012).

moved for summary judgment, arguing that the communication cannot be deemed a true threat under existing law.[2] The court reviews the evidence and finds that in two essential respects, the government has failed to demonstrate the existence of a true threat, and so grants the motion for summary judgment.

Summary judgment is proper where the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show there is no genuine issue as to any material fact, and that the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c). In considering a motion for summary judgment, the court must examine all evidence in a light most favorable to the opposing party. *Bertsch v. Overstock.com*, 684 F.3d 1023, 1027 (10th Cir. 2012). The party moving for summary judgment must demonstrate its entitlement to summary judgment beyond a reasonable doubt. *Ellis v. El Paso Natural Gas Co.*, 754 F.2d 884, 885 (10th Cir. 1985). The moving party need not disprove plaintiff's claim; it need only establish that the factual allegations have no legal significance. *Dayton Hudson Corp. v. Macerich Real Estate Co.*, 812 F.2d 1319, 1323 (10th Cir. 1987).

In resisting a motion for summary judgment, the opposing party may not rely upon mere allegations or denials contained in its pleadings or briefs. Rather, the nonmoving party must come forward with specific facts showing the presence of a genuine issue of material fact for trial and significant probative evidence supporting the allegation. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256 (1986). Once the moving party has carried its burden under Rule 56(c), the party opposing summary judgment must do more than simply show there is some metaphysical doubt as to the material facts. "In the language of the Rule, the nonmoving party must come forward with 'specific facts showing that

[2]Alternatively, Dillard has moved for partial summary judgment on the government's request for permanent injunctive relief, given Dr. Means' decision to discontinue her clinic plans.

there is a **genuine issue for trial**.'" *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) (quoting Fed.R.Civ.P. 56(e)) (emphasis in *Matsushita*). One of the principal purposes of the summary judgment rule is to isolate and dispose of factually unsupported claims or defenses, and the rule should be interpreted in a way that allows it to accomplish this purpose. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-24 (1986).

Findings of Fact

The court made initial findings of fact as to the background of the action in its Order of December 21, 2011. 835 F.Supp.2d at 1126-1128. The facts reflect the initial sending of Dillard's letter, its text, and Dr. Means' reaction to it. Neither party challenges or seeks modification of these findings, and they are adopted herein. Rather, the parties supplement these determinations with the results of the discovery conducted since the court's hearing on the preliminary injunction and the motion to dismiss.

During cross-examination at the preliminary injunction hearing, Dr. Means was asked to agree that Dillard did not write in the letter that she would personally place a bomb under Dr. Means' car. Dr. Means agreed that the writer "carefully didn't say she was going to do anything," and instead spoke to "[w]hat some unknown entities" would do. She was asked if the letter spoke about "a possibility that somebody in the future might put a bomb under your car?" and she agreed, "Right, but that's pretty threatening."

She stated she did not know Dillard's actual intentions from the text of the letter, and stressed the lack of clarity in the letter as to who would perform certain acts:

> She did not make a specific reference that, "I am going to shoot you." She made references that she was part of a "they" group and this "we" group, so I don't know what her intentions in her brain were.

She stated that "a particular person wrote this [letter] to me, and there's not a way to know if it's her or her cronies that feel like they would do anything to prevent ... prevent abortions from returning to Wichita, Kansas."

Dr. Means was asked about whether she inferred a risk of violence on the part of Dillard due to the acts of other anti-abortion activists. She responded:

> I'm not – I'm not sure that I know Angel Dillard's propensity but because there was implication of others in two places above thousands of people looking into your background, et cetera, and down here, many others who must take a stand, it's quite possible that she is a spokesperson that would incite others to violence.

Dr. Means was not aware of any ongoing plans by Dillard that would constitute a threat to her, and had no evidence of such a threat at time of the hearing. Dr. Means has explicitly acknowledged that she knows nothing of Dillard's current or ongoing plans, does not know that she has any propensity to violence, and does not know that she is the spokesperson for any group.

The Wichita Police Department was given a copy of the letter on January 19, 2011. The officer receiving the letter noted in his report that some person (the report is illegible) "states that she does perceive the letter to be a threat," but that the officer's inspection found "there was not a direct threat against ... Dr. Means."

The defendant further asserts as a proposed finding of fact that"[t]here is no evidence that the Wichita Police Department took any further action," about the letter other than filing the report. However, at summary judgment, the burden is on the movant to supply evidence in support of each factual contention. Accordingly, the requested finding, which fails to actually prove no further action was taken, is denied.

After the letter had been forwarded to the FBI, Agent Sean Fitzgerald called Dillard. Dillard told Fitzgerald that "she was not threatening Doctor Means," but only "trying to educate [her] on how her life will change once she begins to provide abortions." Agent Fitzgerald was asked what he would have done, after the telephone call, if he believed that Dillard was "an active threat." He testified there were:

> probably a host of things we would have done if we determined Mrs. Dillard to be a threat. There would have had to have been many notifications go up through the Attorney General's Office and DOJ, but I don't know what we would have done, to be honest.

Fitzgerald agreed that the FBI took none of the actions he described.

In addition, the defendant cites Fitzgerald's affirmative response to whether he agreed with court's ruling that "the letter did not portray a true threat." The evidence fails to support the defendant, because it both misstates Fitzgerald's answer,[3] and relies on a question which was itself a misstatement of the court's ruling. The court did not find that the letter could not constitute a true threat, only that the government had not met its heavy burden of showing that it would likely succeed on the merits.

Dillard testified that she initially thought the call from Agent Fitzgerald, which occurred on April 1, 2011, was an April Fools Day joke. According to Dillard, after Fitzgerald told her about the contents of the letter, she told him that it was "a little vague," and Fitzgerald (allegedly) told her, "It really is no big deal, there isn't anything criminal, all they're wanting is a C.Y.A." She further testified Fitzgerald

> said the D.O.J. was pursuing this, that he had recommended that they not do it because it was counterproductive to what they were doing in Wichita and that it would ruin the relationship that they had with the community and would be counterproductive to their mission.
>
> ....
>
> He said, "There was nothing there, it's not a threat. The D.O.J. is wanting to pursue it and I recommended they not do that, but they're doing it anyway."

The defendant's husband, Dr. Robert Dillard, testified similarly as to the April 1 call by Agent Fitzgerald. According to Dr. Dillard:

> I can't remember the exact phrase that he used, but I think it was something to the effect of that no derogatory findings were found on his investigation and that he had recommended against the suit itself but the Department of Justice was deciding to continue with that and so he had been asked to contact us.
>
> ....
>
> He told us that he personally and the F.B.I. in general were frustrated by the suit because they felt – and he told me that he had told the representative

[3] Fitzgerald responded: "You changed it up for me now, I think. Personally I did not disagree. Did I say that right? You're trying to get a double negative in on me."

> from the D.O.J. – that they felt this was undermining the trust and the relationships that they were trying to develop with people who were not extremists but were still pro-life.

Agent Fitzgerald was asked about this conversation, and he did not directly deny making such comments. He testified that he was "trying to build rapport [with the Dillards] and I probably did play into that a little bit more."

Dillard also cites Agent Fitzgerald's testimony about a prior F.B.I. threat assessment investigation two years earlier, which began after Dillard wrote to Scott Roder, who was imprisoned for the murder of Dr. George Tiller. The 2009 assessment reported:

> Investigation to date has revealed no indication that Dillard is involved in violations of criminal law.... She has cooperated fully with the assessment, she has continued communication with Roeder with full knowledge that his communications are monitored, and she has spoken openly to the press (and favorably) about being contacted by the FBI.

The assessment had also concluded no reason to continue investigation of Dillard. The investigation reported that Dillard felt that Scott Roeder had made a mistake.

Much of Dillard's motion rests on her own deposition testimony. She explains her own state of mind in writing the passage in the letter about Dr. Means having to check under her car:

> I was speaking to her state of mind at the point. Anybody who's passed fifth grade English knows that the way I worded that it can only mean one of two things, either I was forcing her to do it, which obviously wasn't the case, or I was predicting that that's what she will be thinking, that's what will be her mind set at the time.
>
> ....
>
> I was just telling her that she will be checking under her car because she is going to be in that state of mind. Abortionists tend to be paranoid, that people are after them all the time.

Dillard also states that she told the F.B.I. when they came to interview her that, while she was glad Dr. Tiller was no longer performing abortions, she had not wished for any harm to him. She believes that "we should do within the law whatever we can do to stop abortion." She believes that Christians opposed to abortion should do more than "just pray

about it," but this means engaging in the political process, performing sidewalk counseling, and other activities "within the bounds of the law." Asked if she believes Roeder's actions were "good and right," Dillard responded that "the consequences of what he did was good, saving children [but] I can't make that leap to where violence is a good thing, no."

Dillard has never engaged in any illegal violence, and did not intend any threat against Dr. Means. Asked about specific passages in the letter, she has stated that these refer purely to the public and professional opprobrium directed at abortion providers, and to actions of prayer and protest, or "whatever other legal means we [opponents of abortion] have at our disposal."

Dillard notes that Dr. Means was also in Wichita during the "Summer of Mercy," and knew that abortion clinics had been the target of numerous protestors in the past. She had seen protestors in Kansas City during her training, and knew that protestors had obtained her car registration. Dr. Means also knew that Dr. Tiller had driven an armored vehicle. She had also read an article about Operation Rescue in which the organization stated it would do everything it could to prevent the opening of an abortion clinic in Wichita. She did not view this as particularly threatening because it didn't sound like a specific threat.

The defendant also cites evidence which she suggests shows that Dr. Means did not take the letter as a serious threat. Thus, a July, 2011 story in the *New York Times* reported that, following the Dillard letter, "rather than lower her profile, Dr. Means raised it by buying a car that nobody could miss, a bright yellow Mini Cooper" with red lighting bolts. Dr. Means told the reporter: "'It's partly an in-your-face response,' she explained. 'You're looking for me, I'm here.'" Dr. Means has also spoken with other reporters since that time. She does not know anything of the likelihood of Dillard contacting her in the future.

Dr. Means has affirmatively testified that when she received the letter, she felt anxious and concerned. After receiving the letter, she took several security measures,

including parking her car in sight of her office; taking her car to the mechanic; installing door alarms; and staying away from her home. Andrea Hamel, Dr. Means' office manager at the time she received Defendant's letter, found the letter to be threatening. She testified that she could not "even feel safe at [her] home or anywhere" she went, because she had to "wonder if [she was] going to walk outside and if there was going to be someone out there following [her] or if there was an explosive under [her] car."

At some point, Dr. Means experienced difficulty with her vehicle and took it to a mechanic. She asked him if it was natural wear and tear of if it could have been some kind of sabotage or otherwise related to Dillard's letter. He told her that it was wear and tear. Dr. Means also testified at the preliminary injunction hearing that Dillard's warning letter is similar in content to what she had heard from family and friends. Such warnings did not bother her, she has testified, because of the clear intent behind them, since if the communication "is made out of concern for you, then your're not that — you're not scared about it."

Dillard stresses that Dr. Means did not receive any psychological or emotional counseling directly due to Dillard's letter, although she has discussed it in counseling sessions that were already ongoing. Since the 1990s, Dr. Means has taken an anti-depressant medication. Dillard also cites testimony from Hamel, who is no longer Dr. Means' office manager, that Dr. Means was not credible or trustworthy, and that her perception of reality is "a bit skewed."

In its response to Dillard's summary judgment motions, the government stresses that Dillard began corresponding to Scott Roeder while he was in prison for the murder of Dr. Tiller. There is no evidence, however, that the fact of that correspondence was public information at the time that the letter was sent. Nor does it appear that Dr. Means has ever learned the content of that correspondence. While Dr. Means learned from some reports that Dillard admired Roeder's convictions, the very same sources explain that Dillard has

publicly deplored his violent actions. There is nothing in the evidence before the court showing that Dillard ever supported Roeder's violent action.

Thus, Dillard has been quoted in a newspaper to the effect that "[w]ith one move [Scott Roeder] was able ... to accomplish what we had not been able to do.... So he followed his convictions and I admire that." But the article is also explicit: Dillard admired Roeder's "convictions," but she did not advocate the use of violence.

The government contends that Dillard sought by her letter to prevent Dr. Means from providing abortions in Wichita. The plaintiff agrees that she sought to dissuade Dr. Means from her announced course of action, but that she never indicated any intent to "prevent" such a course of action, with its implication that she block Dr. Means' will by force or threat. Asked if she intended "to stop Dr. Means from performing abortions," Dillard testified, "I didn't plan on doing anything to stop her from doing abortions. I wrote her a letter." The letter would "give her something to think about and hopefully influence her." Asked about the effect she wanted for the letter, Dillard testified, "I wanted her to thoughtfully consider it."

The government suggests that much of the letter — with its representations that Dillard would work with the Christian community in general and the local community in particular through legislation and picketing — was simply false. According to the government, in her deposition Dillard "admits that she has had no contact with any church or member of any congregation concerning Dr. Means." (Dkt. 188, at 6). Thus, according to the government, Dillard is not credible and the letter can only be seen "only as a threat." (*Id.*, at 11).

As a preliminary matter, it is hard to see how the government's evidence discredits Dillard, where the letter never indicates that Dillard would personally act in concert with *all three* of the local churches. Instead, the letter refers to collective action on the part of the anti-abortion movement in general, and never states that Dillard was going to personally

engage in any particular activity.[4]

Second, the letter simply indicated that the local Christian community would stand against Dr. Means "every step of the way," if she continued with her announced plans. Standing in the way, in this context, meant that the local anti-abortion community would "[p]ray, protest, [or use] whatever other legal means we have at our disposal." However, as will be discussed further in connection with Dillard's partial summary judgment motion, Dr. Means has not continued with her plans to open the planned abortion facilities in Wichita; she has abandoned them, largely due to recent changes in Kansas law. Accordingly, there was neither reason or place to picket.

Third, Dillard's decision to refrain from vigorous anti-abortion picketing or lobbying may be due to a chilling effect of calls and visits from the FBI, and the filing of the present action by the Department of Justice. Almost immediately after the sending the letter, Dillard became the target of investigations by the Wichita police and the F.B.I., followed by the present civil prosecution. Faced with such investigation and litigation, it is utterly unsurprising that Dillard has ceased political activity she might have otherwise undertaken. The government's contention that Dillard *never* intended to follow through with such activities is simply speculation.

More importantly, the government's underlying premise — that Dillard "admits" she has not engaged in any anti-abortion activity other than sending the letter to Dr. Means — is false. The evidence cited by the government does not support its claims. In her deposition, Dillard stated that she had no contact with two of the three local churches identified in the letter (Maranatha Church and Revelation Ministries). But Dillard expressly

[4] The evidence from Dillard's deposition is that the "we" in the letter are "[p]eople who are concerned about child killing in our community." In her Reply to the government's Response, Dillard also offers an affidavit further identifying various additional actions she has undertaken in her anti-abortion efforts, including engaging in political campaigns. As this affidavit is offered only in Dillard's Reply, it forms no part of the court's opinion.

states that she has attended the third local church (The Journey) as "member, worship leader, [and] youth worker." She has spoken to church groups about abortion generally, without mentioning Dr. Means by name. The evidence shows that Dillard did participate in religious meetings advocating against abortions, as she had previously engaged in a letter-writing campaign conducted by Kansans for Life.

The government asserts that Dillard does not regret writing the letter, and would do it again. In support of this contention, the government notes Dillard's testimony that "I did what the Lord asked me to do. He impressed upon me that I needed to write the letter and I did." This response, however, came in response to an inquiry as to whether she would send the "same" letter again. In the context of the deposition, it appears that Dillard would send the same letter again in 2010, not that she would send similar letters in the future.

The government also cites a Reuters news article from May 16, 2013, that Roeder, who is serving a life sentence, was facing additional administrative charges for his comments in a telephone interview with an abortion opponent in Des Moines, Iowa. Roeder reportedly called the plans of Julie Burkhart to open an abortion clinic in Wichita a "shame and a disgrace." Roeder told the interviewer: "To walk in there and reopen a clinic, a murder mill where a man was stopped, is almost like putting a target on your back – saying, 'Well, let's see if you can shoot me.'" The same article states that Burkhart (the director of the non-profit Trust Women Foundation, which owns Dr. Tiller's former clinic) has had her home picketed, and that "she has been called a killer in some anti-abortion procedures."

But there is absolutely nothing in the article which would tie Roeder's comments to Dillard. There is also nothing to show that these events were ever known to Dr. Means, or that they occurred prior to her decision to abandon her planned clinic. There is nothing indicating that Burkhart has been the target of any actual or threatened violence. To the

extent the article suggests any threat, it is solely on the part of a person already serving a life sentence, incarcerated in a maximum security prison.

Finally, the government cites Dr. Means subsequent deposition in which she was asked if she had "come across" additional evidence of violent action by Dillard, and responded, "Not specifically," but that she has been shown:

> evidence that she seems to have no qualms about threatening harm. There was a letter that I was able to read in some of the evidence to Mr. Grissom about caches of weapons around her house and how she intended to be ready against the – she's saying against the government.

The government has cited absolutely nothing which would corroborate the allegations in the anonymous letter. This anonymous tip letter is plainly inadmissible, and the government cannot indirectly achieve its introduction by getting Dr. Means to speculate about it. More importantly, even after being shown the anonymous letter, Dr. Means still testified that she has seen nothing after the April 2011 preliminary injunction hearing which makes her think an injunction is necessary, and further stated she has no evidence that Dillard intends to contact her in the future.

Conclusions of Law

In Dillard's motion for summary judgment, she first argues that no true threat exists because there is no evidence showing that she had "a determination, design, purpose, goal, or intention to inflict harm on Dr. Means." (Dkt. 182, at 30). Thus, she contends that she lacked any subjective intent to threaten, one of the essential components of a true threat as set forth in *Virginia v. Black*, 538 U.S. 343 (2003). She argues that this is fatal because no true threat exists unless the facts show "the intention of the speaker to inflict bodily harm." (*Id.* at 31). But even in the subjective intent cases cited by the defendant, an intent to inflict *actual* physical harm is not essential to a true threat. Indeed, the Supreme Court explicitly held that such an intent—to directly and personally cause *actual* harm or inflict physical violence—is not a requirement. *Black*, 538 U.S. at 360. Even if the sender has no intent to

carry out the threat, the state may lawfully punish such speech to "'protect ... individuals from the fear of violence' and 'from the disruption that fear engenders.'" *Id.* (quoting *R.A.V. v. City of St. Paul*, 505 U.S. 377, 388 (1992)).What is required is simply the intentional sending of a communication, which the sender knows a reasonable recipient will take as a serious expression of violence. *See United States v. Viefhaus*, 168 F.3d 392, 395-96 (10th Cir. 1999).

Dillard relies on two Ninth Circuit decisions to support her contention that subjective intent is a separate component of true threat analysis. *See United States v. Cassel*, 408 F.3d 622 (9th Cir. 2005); *Fogel v. Collins*, 531 F.3d 824 (9th Cir. 2008). But other courts have recently rejected this approach. *See United States v. Jeffries*, 692 F.3d 473, 479-80 (6th Cir. 2012) (because the Virginia statute contained its own specific intent requirement, "*Black* thus did not turn on subjective versus objective standards for construing threats "); *United States v. Nicklas*, 713 F.3d 435, 440 (8th Cir. 2013) (same, holding that true threat analysis does not inherently require the subjective intent to threaten). *See also United States v. Turner*, ___ F.3d ___, 2013 WL 3111139, n. 4 (2d Cir. June 21, 2013) (noting split of authority).

The Tenth Circuit has not explicitly addressed the objective and subjective intent as separate components of true threat analysis. In *United States v. Magleby*, 420 F.3d 1136, 1139 (10th Cir. 2005), the court rejected a collateral attack on the defendant's conviction of conspiracy to violate civil rights after burning a cross outside a house. Following *Black*, the court observed:

> Unprotected by the Constitution are threats that communicate the speaker's intent to commit an act of unlawful violence against identifiable individuals. The threat must be made with the intent of placing the victim in fear of bodily harm or death. An intent to threaten is enough; the further intent to carry out the threat is unnecessary.

Id. (citations and internal quotation omitted). The defendant cites this language as a requirement that the sender must indeed intend to cause the recipient the "fear of bodily harm or death." The government does not argue the issue, and agrees in its response that

"[t]o demonstrate liability under FACE, the United States must show that Defendant intended to intimidate Dr. Means." (Dkt. 189, at 21).

The government argues that Dillard's arguments about her intent are largely about credibility. It correctly argues that much of Dillard's evidence takes the form of the opinions of a local law enforcement officer and the F.B.I., who found Dillard's letter not a threat, and that such opinions are not dispositive.

As noted in the court's factual findings, much of the government's evidence on the issue of intent is simply inadmissible or based on impermissible speculation — an anonymous tip letter, the (erroneous) suggestion that Dillard has not participated in other anti-abortion activities, hearsay evidence of the prison communications by the murderer Roeder which have not been linked in any way to Dillard. As before, the government offers the testimony of Dr. Means, who concedes that she has no direct knowledge of Dillard's intent, explicitly acknowledging she has no knowledge of any propensity to violence by Dillard.

Accordingly, the additional discovery has apparently produced nothing in the way of usable evidence on the issue of the defendant's intent, and the sole basis for inferring an intent to threaten is from the text of the letter itself. However, the court need not decide whether that language by itself would justify disregarding the substantial evidence showing that Dillard intended to dissuade rather than threaten. Even if there were a triable question as to plaintiff's subjective intent, the government's claim is fatally flawed because it lacks any proof as to two essential components of the objective portion of the true threat analysis.

First, the threat cannot be hypothetical or conditional or predictional; the threat must be imminent, likely, and unconditional. A threat is not a true threat if it is "expressly conditional in nature." *Watts v. United States*, 394 U.S. 705, 708 (1969). A communication with "equivocal language" remains protected speech. *United States v. Barcley*, 452 F.2d 930,

934 (8th Cir. 1971). Where a communication is "equally susceptible of two interpretations, one threatening and the other nonthreatening, the government carries the burden of presenting evidence serving to remove that ambiguity. Absent such proof, the trial must direct a verdict of acquittal." *Id.* at 933.

In its response, the government makes no attempt to show Dillard's letter threatened any imminent violence. Instead, it misconstrues this court's prior Order as a determination that imminence is not required. (Dkt. 189, at 13). It accomplishes this by citing that portion of the court's Order which agreed that a threat of future violence could constitute a true threat. 835 F.Supp.2d at 1125 (observing that in some cases "a statement that a listener will suffer future violence may be a true threat"). But nothing in the cited passage, or anywhere else in the court's Order, suggests that imminence is not a requirement of a true threat.

To the contrary, the court explicitly noted the controlling authority holding a true threat is one which "'conveys a gravity of purpose and likelihood of execution so as to constitute speech beyond the pale of protected vehement, caustic unpleasantly sharp attacks on government and public officials.'" *Nielander v. Board of County Com'rs*, 582 F.3d 1155, 1168 (10th Cir. 2009) (quoting *United States v. Crews*, 781 F.2d 826, 832 (10th Cir.1986) (alterations and internal quotations omitted)). See 835 F.Supp.2d at 1124. Similarly, the court quoted with approval the observation of the Second Circuit in *New York ex rel. Spitzer v. Operation Rescue*, 273 F.3d 184, 197 (2nd Cir.2001):

> When determining whether a statement qualifies as a threat for First Amendment purposes, a district court must ask whether the threat on its face and in the circumstances in which it is made is so unequivocal, unconditional, immediate and specific as to the person threatened, as to convey a gravity of purpose and imminent prospect of execution.

See 835 F.Supp.2d at 1130. Similarly, the court stressed that the bomb threats which were the subject in *United States v. Viefhaus*, 168 F.3d 392, 396 (10th Cir.1999) were true threats because of "specific information suggesting that [the sender] was a participant in the bomb plot, that the bombs were real, and *their detonation imminent*." *Id.* (emphasis added).

This passage also highlights a second key component an illegal true threat – the communication must reasonably suggest that *the sender* is a participant in the proposed violence. As noted earlier, a true threat may exist even if the sender does not subjectively intend to commit the violence proposed. But the communication must be "reasonably interpreted as communicating the defendant's *own* intent, purpose, or goal" of engaging in violence. *Viefhaus*, 835 F.Supp.2d at 396 (emphasis in original).

There must be context linking the sender to the prospective violence. *See Magleby*, 420 F.3d at 1139 (citing *Black*, 538 U.S. at 359 in holding that true threats are those "that communicate the speaker's intent to commit an act of violence against identifiable individuals"). "A communication rises to the level of an unprotected threat … only if in its context it would have a reasonable tendency to create apprehension that its originator will act according to its tenor." *United States v. Dwyer*, 443 Fed.Appx. 18, 2011 WL 448739, *2 (5th Cir. 2011). Thus, communications which are predictions of violence by others are not true threats. *United States v. Bagdasarian*, 652 F.3d 1113, 1119 (9th Cir. 2011).

The court previously denied Dillard's motion to dismiss in light of the preference for trial by jury, coupled with the government's representation "there may well be other facts that provide further context, but which are unknown and unknowable to the United States at this time, when discovery has yet to be conducted." 835 F.Supp.2d at 1120 (quoting Dkt. 21, at 6 n. 4).

After the completion of extensive discovery, the government has failed to supply such further context. Rather, the evidence before the court, together with controlling precedent, establishes that Dillard's letter falls short of a true threat, and that summary judgment is therefore warranted. Ordinarily the existence of a true threat is a matter for the finder of fact. *Id.* at 1132. However, where the evidence fails to show an objective threat of imminent violence by the sender, the matter is appropriately resolved by the court. *See Corales v. Bennett*, 567 F.3d 554, 563-64 (9th Cir. 2009) (summary judgment may be

appropriate if the evidence ultimately fails to show that the defendant "did not express any intent to commit any act of unlawful violence or to inflict bodily harm"). *See also United States v. Lincoln*, 403 F.3d 703 (9th Cir. 2005) (reversing defendant's conviction for threatening the President, where defendant sent a single letter which simply predicted potential violence by third parties).

Turning to Dillard's letter to Dr. Means, it is clear that the threat is predictive and contingent, and addresses a danger which is not imminent in nature. Dillard wrote Dr. Means: "You will be checking under your car everyday—because maybe today is the day someone places an explosive under it." The letter makes no reference to any imminent danger, such as in *Viefhaus*, where the sender alleged that bombs in 15 major cities would detonate within a week of the communication. To the contrary, Dillard's letter not only lacks any specific time frame, it is doubly conditional. First, the danger is intendant on the establishment of the planned clinic (which could take months or years). Second, and even then, the letter proposes only a possibility, that "maybe" such a bomb will be placed.

Despite its energetic pursuit of discovery, the government has supplied no additional context which would objectively support the determination that actual violence against Dr. Means was likely and imminent. Of course, as it did at the time of the preliminary injunction hearing, the government stresses the letter's reference to the murder of Dr. Tiller by Scott Roeder. But the government has supplied nothing in the way of additional evidence which would show that Dillard supports Roeder's methods as well as his general goal. As the court explicitly cautioned, the letter itself supplied little in the way of an objective threat, as defined by controlling authority such as *Nieland* and *Viefhaus*. Dillard's letter, the court wrote:

> has not been linked to any recent anti-abortion violence, nor is there any suggestion that such bomb warnings have acquired any specific "currency as a death threat for abortion providers," as the "wanted" posters had in [*Planned Parenthood of*] *Columbia/Willamette,* [290 F.3d 1059 (9th Cir. 2002]. There is no evidence directly linking Dillard to any acts of clinic obstruction or violence. There is no evidence of repeated communications directed at Dr.

> Means, only a single passage in a single letter, and this sent openly under her own name.

835 F.Supp.2d at 1131. All of these observations have apparently been confirmed by discovery, and the government supplies neither evidence nor argument to show that the threat of a car bomb may be objectively viewed as imminent, likely, and unconditional. [5]

The same result is equally true as to the second element of the objective element of true threat analysis, the defendant's personal participation in such a car bombing. Again, the court's earlier observations are applicable here:

> Dr. Means was subsequently to learn that Dillard explicitly denied any plans to engage in violence, and that the FBI had interviewed Dillard and concluded she was not a threat. Dr. Means's conclusions that might have later developed a propensity to violence is purely speculative. Means testified that she has received similar warnings as to her safety from family and friends, but distinguished those warnings as being "caring" and free from the language of damnation. She testified that she had no knowledge that Dillard would become violent, but she "couldn't rule it out." Certainly there is no direct evidence or allegation of any bomb plot currently in motion, or that Dillard is a part of such a conspiracy.

835 F.Supp.2d at 1131.

The evidence produced by discovery has confirmed these observations. As noted earlier, Dillard's letter suggests that at some indefinite, future time, "someone" may act violently against Dr. Means. The government can offer nothing more than Dr. Mean's admitted speculation that it is "quite possible" that Dillard may be "a spokesperson that would incite others to violence." Dr. Means acknowledges that she knows nothing of Dillard's propensity to violence, and indeed that she has received the same sort of warnings from her own family.

Dillard sent a single letter to Dr. Means, under her own name, in an envelope bearing her return address. The letter makes no reference to any violent action by Dillard,

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[5] As noted earlier, the government asserts the Order of December 11, 2011 concluded that *any* sort of future threat may be a true threat, even if distant, uncertain, or hypothetical. The claim is erroneous in itself, but is compounded by the fact that the government makes no attempt in the alternative to show that the letter does contain any suggestion of direct or imminent violence.

and is largely devoted to pragmatic and religious arguments against providing abortion services. The only witness presented by the government, Dr. Means, admits that the letter says nothing about what Dillard will do, only what other entities might do.

It is not enough for the government, when presented with defendant's motion for summary judgment, simply to point to witness speculation that violence is "quite possible," or that the witness "couldn't rule it out." There is simply nothing to show, in the words of *Viefhaus*, that Dillard intended to convey her "*own* intent, purpose, or goal"of engaging in violence.

Dillard's letter to Dr. Means is much less vivid than the defendant's letter to the President in *United States v. Lincoln*, 403 F3d 703 (9th Cir. 2005). The defendant wrote:

> you think cause [sic] you go over There and Blow Them up that The killing will Stop in you [sic] Dream They got over 275,800 or more since, Never mind that this is only the Beging [sic] of the Badass war To come Just think Their army is over here already hiding They have more Posion gas Then [sic] you know. ha ha. Too bad you don't think Like Them. You will see a good Job Done agin [sic] may [sic] 2 week's, [sic] maybe 2 months, 3, who know's [sic]. You Will Die too George W Bush real Soon They Promissed [sic] That you would Long Live BIN LADEN.

403 F.3d at 705. The Ninth Circuit concluded that the defendant's letter was "crude[,] offensive [and] disturbing," but not a true threat:

> In this case, there is no pattern of letters written by Lincoln, followed by murder or any other act [as in *Planned Parenthood*, 290 F.3d at 1085-86]. There was only one letter written by Lincoln. Unlike the single letter in this case, the "wanted" posters were publicly posted on the internet, and thus could be reasonably interpreted as a signal to unknown third parties to target those who appeared on the posters. In contrast, Lincoln's letter was to be sent only to President Bush. In no way could the letter be reasonably viewed as a signal to Al Qaeda or anyone else to carry out an attack upon President Bush.

Id. at 707. The court also rejected the government's argument that the defendant's prior writings in a private workbook could be used to supply a violent context to the letter, because the evidence showed that Lincoln had "disassociated himself from any violent action" by crossing out the writings. Here, the evidence shows that Dillard has never advocated violence, and has publicly rejected violent action. She had nothing to

disassociate herself from.

Similarly, in *United States v. Bagadasarian*, 652 F.3d 1113, 1115 (9th Cir. 2011), the defendant wrote in an internet posting that the President "will have a 50 cal in the head soon." The court reversed Bagdasarian's conviction, stressing that the posting "conveys no explicit or implicit threat on the part of Bagdasarian that *he himself* will kill or injure" the President. *Id.* at 1119 (emphasis added). The court agreed that Bagdasarian's comment was "alarming and dangerous," but cited the Supreme Court's observation in *Watts v. United States*, 394 U.S. 705, 708 (1969) that

> we must interpret the language Congress chose 'against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.' *New York Times Co. v. Sullivan*, 376 U.S. 254, 270, 84 S.Ct. 710, 721, 11 L.Ed.2d 686 (1964). The language of the political arena, like the language used in labor disputes, *see Linn v. United Plant Guard Workers of America*, 383 U.S. 53, 58, 86 S.Ct. 657, 15 L.Ed.2d 582 (1966), is often vituperative, abusive, and inexact.

Id. at 1120.

Dillard's letter, which is far less alarming that the communications in *Bagdasarian* or *Lincoln*, is not a true threat. It suggests neither likely and imminent violence, nor does it suggest that Dillard herself will engage in violence against Dr. Means. After full discovery, the government has supplied no additional evidence of any threatening context which would add to the language of the letter itself. Accordingly, summary judgment in favor of the plaintiff is warranted.

Motion for Partial Summary Judgment

As indicated earlier, Dr. Means has discontinued her plans to open an abortion services clinic in Wichita. The decision occurred after, and in response to, recent changes in Kansas law increasing the regulation of such clinics. She stated that she finalized this decision in the fall of 2011, "because of [Kansas state] law changes." While Dr. Means has

testified that the financial costs of providing security were one part of her decision, and that she would feel more secure if an injunction were entered, she does not state that this would change were decision. Her decision is apparently final and conclusive.

After discontinuing her plans, protest activity against her has dropped off. The last protest at her office ended before the preliminary injunction hearing, the last at her home occurred a few months later. As noted earlier, Dr. Means knows of no propensity to violence on Dillard's part, and that she has no additional reason for thinking that Dillard, or any group acting in concert with her, plans any direct violence against her. More generally, Dr. Means simply "feels as though all of that group [the pro-life community] is still against me."

Dillard has filed a separate motion for summary judgment seeking the dismissal of the government's requested relief in the form of a request for a permanent injunction. Here, the defendant stresses that Dr. Means no longer intends to provide abortions services in Kansas. In its Response to the motion, the government stresses that fact questions exists as to both the intent of Dillard in sending the letter, and the credibility of Dr. Means in her reaction to the letter. Otherwise, the government offers very little to support any finding of a likelihood that Dillard will ever send any further communications to Dr. Means. As Dillard points out, she would not have any reason to do so, since Dr. Means has abandoned her plans for opening any clinic in Wichita.

Given the court's finding that the letter was not a true threat, and hence that no underlying FACE violation occurred, the defendant's additional motion for partial summary judgment will be denied as moot. The court notes, however, that in light of the evidence before it, Dillard's motion would appear to have substantial merit, as the balance of factors necessary for injunctive relief does not weigh in the government's favor where it has shown nothing but speculation as to any future FACE violations by the defendant.

The government stresses that Dr. Means was in part dissuaded from opening any

clinic because of the cost of security. Her actual deposition answer is more equivocal, indicating that "there are a lot of things that go into" a big decision, and security costs were "one of those things."

Dr. Means' testimony fails to provide support for prospective injunctive relief for three reasons. First, she explicitly ascribes security costs as but one of "a lot" of factors which caused her to change her plans.[6] Second, Dr. Means does not identify any separate costs for additional security due to Dillard's 2011 letter, over and above the security which is unfortunately a prudent precaution for all abortions services providers. Third and decisively, Dr. Means' change of plans is apparently final, and an injunction will not alter her plans. Thus, Dillard could have no motive for future communications with Dr. Means.

The government explains Dillard's failure to engage in any other communications with Dr. Means (other than the original letter) as a simple ruse, writing that "it is not surprising that Defendant has refrained from communicating with or coming near Dr. Means, and from violating FACE, during the pendency of this case, for she has been aware that such action could be used in this proceeding." (Dkt. 188, at 14). But future violations of FACE would in themselves be actionable, and likely bring a governmental response against Dillard equally as heavy as the present action. If the glare of publicity and the prospect of additional government legal action are sufficient by themselves to prevent further communications by Dillard, they would remain even in the absence of separate injunctive relief. That is, the government effectively concedes that Dillard is a rational person, at least in the sensing the folly of additional communications with Dr. Means.

Beyond this, the government offers primarily generalized arguments that fact questions exist as to Dillard's actual intent in sending the letter, and the extent and credibility of Dr. Means' explanation of her subjective response to that letter. Even if this

[6] In addition to recent changes in Kansas legislation, Dr. Means has also attributed her change in plans to a lack of hospital privileges and the fact that she is not good at the fund-raising required for the project.

were true, the focus here is whether permanent injunctive relief would serve any purpose to deter future illegal acts by Dillard, given that Dr. Means will not be opening her clinic.

As to this, the government's response relies heavily on a single passage in Dillard's deposition, in which Dillard indicated she would send the same letter again. But, as noted earlier, in the context of the deposition it is clear Dillard was being asked about her regrets or feelings about the 2011 letter, and if she would send "the same letter" if she had to chance to do so again. The deposition testimony was clearly about the 2011 letter; Dillard was not directly asked about future communications towards Dr. Means.

Dr. Means has explicitly acknowledged that, after the court denied the requested preliminary injunction in April, 2011, she has acquired no new evidence which she believes shows the need for an injunction. She does not know that Dillard has ever come near her, other than at the preliminary injunction hearing. She knows that Dillard has publicly stated that she opposes violence, and that she has no intention of committing acts of violence.

As a party seeking injunctive relief, the plaintiff "must show more than past harm or speculative future harm." *Lippoldt v. Cole*, 468 F.3d 1204, 1217 (10th Cir. 2006). *See also Riggs v. City of Albuquerque*, 916 F.2d 582, 586 (10th Cir.1990). The government must show some "current and ongoing plans or activities" by Dillard, or persons with whom she is acting in concert, "are currently engaged in the plans or activities that constitute a threat of violating F.A.C.E." *New York ex rel. Spitzer v. Operation Rescue Nat'l*, 273 F.3d 184, 200 (2d Cir. 2001).

The government has failed to do so. After much discovery, the government has failed to point to specific, non-speculative evidence showing such ongoing plans or threats. Given that Dr. Means will not be offering abortion services in Wichita, there is no need for such permanent injunctive relief. In its response, the government suggests that injunctive relief might after all be appropriate in case Dillard writes to *other* abortion services providers. (Dkt. 188, at 13). But the Amended Complaint premises the entire case,

including the request for injunctive relief, on the 2011 letter to Dr. Means. (Dkt. 19, ¶¶ 21, 24). The Pretrial Order asks for similar relief, adding that "[t]his damage can be alleviated by assurances that Defendant will not attempt to contact or approach *Dr. Means* in the future." (Dkt. 178, at 14) (emphasis added).

Wholly apart from the legitimate and inevitable constitutional challenges which accompany any attempt at the restraint of speech, it is too late for the government to suddenly assert that, notwithstanding all the pleadings and discovery in the last two years, it now seeks injunctive relief, not on behalf of Dr. Means, but on behalf of some other, unidentified health care providers. Even if that were the case, the result would be the same: the plaintiff has failed to provide supporting probative evidence of an ongoing plan on the part of the defendant to make true threats violating FACE. As noted earlier, the evidence of future threats against Dr. Means is purely speculative — the suggestion of future threats against additional persons is speculation piled on top of speculation.

Finally, the government cites to one of Dillard's prison letters, which the court has previously and explicitly held to be a privileged communication. The government justifies this remarkable action by asserting (Dkt. 189, at 23 n. 5) that Dillard referenced the letter in her motion, thereby effectively waiving the privilege. But the fact asserted by the plaintiff (Dkt. 182, ¶ 47) is a recitation of Dillard's deposition responses. Those answers were questions posed by government's counsel. It was thus the *government's counsel who quoted from the privileged letter* before asking a *generic* question about Dillard's religious beliefs. Dillard's response does not focus in any way on the letter, but her beliefs in general:

> I don't believe we should just pray about [abortion]. I think God has told us that we need to be involved in the political process and we need to -- we need to be serving others. When we help a woman that's coming to the clinic and give her some options, when we take her over to get a sonogram at a pregnancy crisis center, when we offer her help with finding abortion -- or finding adoption alternatives, we're helping others. That's doing what Christ asked us to do.

Dillard was asked generally about her religious beliefs, and her general answer was the

evidence cited in the plaintiff's brief. There was no waiver.

IT IS ACCORDINGLY ORDERED this 15th day of August, 2013, that the defendant's Motion for Summary Judgment (Dkt. 182) is hereby granted; defendant's Motion for Partial Summary Judgment (Dkt. 181) is denied as moot. The government's Motion to Unseal (Dkt. 161), predicated on determination of the United States Magistrate Judge (Dkt. 160) is denied in light of the court's subsequent order of April 19, 2013 (Dkt. 175). The government's Motion for Leave (Dkt. 183), seeking to partially unseal certain exhibits, is denied in light of the explicit provisions in the Privacy Act Protective Order (Dkt. 140) entered in the action, as well as the findings of the court herein.

s/ J. Thomas Marten

J. THOMAS MARTEN, JUDGE

ATTACHMENT B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

UNITED STATES OF AMERICA,

Plaintiff,

vs. Case No. 11-1098-JTM

ANGEL DILLARD,

Defendant.

MEMORANDUM AND ORDER

Dr. Mila Means, a family practitioner in Wichita, Kansas, has publicly announced that she is receiving the training required for her to perform abortion services. Means had been a friend of Dr. George Tiller, a prominent provider of abortion services, until his murder on May 31, 2009, by Scott Roeder. On or around January 19, 2011, defendant Angel Dillard wrote a letter to Means urging her to drop her plans. Invoking consequences ranging from a loss of sleep to intense public scrutiny to eternal damnation, Dillard also wrote that Means "will be checking under your car everyday — because maybe today is the day someone places an explosive under it." Means' office manager referred the letter to the police, and the United States subsequently commenced this action, seeking an award of damages on behalf of Means, and a civil monetary penalty against Dillard.[1]

[1] The government also sought to enjoin Dillard from additional communications with Dr. Means, or approaching within 250 feet of herself, her agents, workplace or residence. (Dkt. 4, at 9). The court denied the government's motion for a preliminary injunction following a hearing

Dillard's letter, which was sent in an envelope bearing her name and return address, states in full:

> Dr. Means,
>
> It has come to our attention that you are planning to do abortions at your Harry St. location. I am stunned that you would take your career in this direction. Fewer people than ever before are pro-abortion, quality physicians wouldn't even consider associating themselves with it, and more Americans than ever before are unwilling to turn a blind eye to the killing of a baby when the ratio for adoption is 36 couples to 1 baby.
>
> Maybe you don't realize the consequences of killing the innocent. If Tiller could speak from hell, he would tell you what a soulless existence you are purposefully considering, all in the name of greed. Thousands of people are already looking into your background, not just in Wichita, but from all over the U.S. They will know your habits and routines. They know where you shop, who your friends are, what you drive, where you live. You will be checking under your car everyday — because maybe today is the day someone places an explosive under it. People will be picketing your home, your office. You will come under greater scrutiny than you've ever known, legally and professionally. Much worse than the disciplinary actions and ethical concerns that you've been facing. You will become a pariah — no physician will want to associate with you. You will be seen like all the other hacks that have stooped to doing abortions when they weren't good enough to maintain a real practice. You will lose your legitimate clientele, as no one bringing a baby into this world wants to be in the same facility where you are also killing them. You will have trouble keeping staff who are willing to participate in innocent blood-shedding and won't be able to keep the sanitary conditions necessary to maintain a healthy medical facility. You will end up having the same kind of rat-infested, dirty facility that they have in north-eastern Kansas. Anyone who partners with you will experience the same headaches. Not to mention the fact that you will be haunted by bloody, squirming, dismembered babies in your sleep. You can't do what is morally reprehensible and enjoy peace of mind. The Bible says, "There are six things the Lord hates ... hands that shed innocent blood, a heart that devises evil schemes, feet that are quick to rush into evil..." Proverbs 6:16-18. Abortion kills human life-it matters not if you kill it at 6 weeks or at 26 weeks, it's still the unnatural, violent death of a human baby for the sake of convenience. You are doing what the Humane Society wouldn't allow to happen to a pregnant dog or cat.

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conducted April 20, 2011. (Dkt. 22).

> I urge you to think very carefully about the choices you are making. There are 3 churches within 1 block of your practice, and many others who must take a stand. We will not let this abomination continue without doing everything we can to stop it. We pray you will either make the right choice and use your medical practice to heal instead of kill, or that God will bring judgment on you, the likes of which you cannot imagine. We don't want you killing our children in our community. Good people are tired of this rampant evil, and will stand against you every step of the way. Do the world a favor and ABORT this stupid plan of yours. It's not too late to change your mind.
>
> Angel Dillard

The government brought this action under the Freedom of Access to Clinic Entrances Act (FACE), 18 U.S.C. § 248(a)(1) which provides criminal and civil liability for any person who

> by force or threat of force or by physical obstruction, intentionally injures, intimidates or interferes with or attempts to injure, intimidate or interfere with any person because that person is or has been, or in order to intimidate such person or any other person or any class of persons from, obtaining or providing reproductive health services.

FACE authorizes civil actions both by persons aggrieved by a violation of the Act, and by the Attorney General of the United States. In the case of the latter, the Act provides in subsection (c)(2):

> (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.

FACE explicitly defines "intimidate" as "to place a person in reasonable apprehension of bodily harm to him- or herself or another." § 248(e)(3).

Dillard has moved to dismiss the action, arguing that her letter was constitutionally protected speech, cited the Supreme Court's recent decision in *Snyder v. Phelps*, 131 S.Ct. 1207, 1215 (2011). In *Snyder*, the Court reiterated that "'speech on public issues occupies the highest rung of the hierarchy of First Amendment values'" 131 S.Ct. at 1215 (*quoting Dun & Bradstreet, Inc. v. Greenmoss Builders*, 472 U.S. 749, 760 (1985). Dillard contends that the court's finding, at the conclusion of the hearing on the government's motion for injunctive relief, that the letter was not a true threat, is the law of the case and is dispositive as to her motion to dismiss. (Dkt. 28, at 3, 22).

The First Amendment's prohibition of laws limiting the freedom of speech does not include "true threat[s]." *Virginia v. Black*, 538 U.S. 343, 359 (2003). Prosecution under FACE, therefore, has been interpreted to require the existence of a true threat, that is, a "threat where a reasonable person would foresee that the listener will believe he will be subjected to physical violence, with the intent to intimidate physicians." *Planned Parenthood of Columbia/Williamette v. American Colation of Life Activists*, 499 F.3d 949, 958 (9th Cir. 2005). *See also Planned Parenthood of the Columbia/Willamette v. American Coalition of Life Activists*, 290 F.3d 1058 (9th Cir.2002) (upholding FACE against First Amendment challenge).

In the context of a state criminal prosecution for cross-burning, the Supreme Court has emphasized the intent of the accused:

> "True threats" encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular

> individual or group of individuals. The speaker need not actually intend to carry out the threat.... Intimidation in the constitutionally proscribable sense of the word is a type of true threat, where a speaker directs a threat to a person or group of persons with the intent of placing the victim in fear of bodily harm or death.

Virginia v. Black, 538 U.S. at 359-60 (2003) (citations omitted).

The determination of whether a given communication is a true threat is "a fact-intensive inquiry, in which the language, the context in which the statements were made, as well as the recipients' responses are all relevant." *Nielander v. Bd. of County Commissioners*, 582 F.3d 1155, 1167-68 (10th Cir. 2009) (discussing true threats in context of 42 U.S.C. § 1983 action for malicious prosecution). In determining whether communications constitute an unprotected true threat, they "should be considered in light of their entire factual context, including the surrounding events and reaction of the listeners." *United States v. Orozco-Santillan*, 903 F.2d 1262 1265; (9th Cir. 1990), *overruled in part on other gds*., *United States v. Hanna*, 293 F.3d 1080 (9th Cir. 2002). The Eight Circuit has specifically applied this standard to prosecutions under FACE, holding that "[t]he court must analyze an alleged threat in the light of [its] entire factual context and decide whether the recipient of the alleged threat could reasonably conclude that it expresses a determination or intent to injury presently or in the future." *United States v. Dinwiddie*, 76 F.3d 913, 925 (8th Cir. 1996) (internal quotations and citations omitted). It is not necessary that a speaker actually intend to commit violence. *Virginia v. Black*, 538 U.S. at 360. The touchstone is whether "an ordinary, reasonable person who is familiar with the context of the communication would interpret it as a threat of injury." *United States v. Spring*, 305 F.3d 276, 280 (4th Cir. 2002) (alterations and internal quotations omitted).

"A true threat 'conveys a gravity of purpose and likelihood of execution so as to constitute speech beyond the pale of protected vehement, caustic unpleasantly sharp attacks on government

and public officials.'" *Nielander*, 582 F.3d at 1168 (quoting *United States v. Crews*, 781 F.2d 826, 832 (10th Cir. 1986) (alterations and internal quotations omitted). In *Didwiddie*, the court recognized that numerous factors are relevant to this inquiry, including

> the reaction of the recipient of the threat and of other listeners, whether the threat was conditional, whether the threat was communicated directly to its victim, whether the maker of the threat had made similar statements to the victim in the past, and whether the victim had reason to believe that the maker of the threat had a propensity to engage in violence. This list is not exhaustive, and the presence or absence of any one of its elements need not be dispositive.

76 F.3d at 925.

Statements which are "made in jest, [or] communicated to a large audience, or political in nature, or conditioned on an event that would never happen" are statements more likely to be found to be protected speech rather than a true threat. *United States v. McDonald*, 2011 WL 3805759 (4th Cir. Aug. 30, 2011). Whether a statement is made anonymously may, depending on the circumstances of the case, increase or decrease the likelihood that an reasonable listener would infer the existence of a true threat. *See United States v. Bagdasarian*, 652 F.3d 1113, 1120-21 n. 20 (9th Cir. 2011). "The fact that a threat is subtle does not make it less of a threat." *United States v. Gilbert*, 884 F.3d 454, 455-56 (9th Cir. 1989).

The context of a statement may also establish, in some cases, that a prediction of violence by third parties may be reasonably taken as a true threat. In *United States v. Viefhaus*, 168 F.3d 392, 396 (10th Cir. 1999), the defendant was charged transmitting a bomb threat by telephone, in violation of 18 U.S.C. § 844(e), based upon his use of an answering machine message urging a white supremacist revolution. The message then stated

> a letter from a high ranking revolutionary commander has been written and received demanding that action be taken against the government by all white warriors by

> December 15th and if this action is not taken, bombs will be activated in 15 pre-selected major U.S. cities. That means December 15, 1996, one week from today. In [other] words, this war is going to start with or without you.

168 F.3d at 394. The defendant contended that the message was not a true threat, in part, because it merely reported a potential threat by a third party, rather than reflecting a direct statement of his own actions. The Tenth Circuit rejected this as a blanket defense. Given the objective nature of the true-threat inquiry, the court held,

> it is logical that a defendant who repeats a third party's threat may be subjected to criminal liability.... If a defendant's repetition of a third party's threat is reasonably interpreted as a simple disclosure of the existence of the threat for informational purposes, no illegality has occurred. If, on the other hand, a defendant's repetition of a third party's threat is reasonably interpreted as communicating the defendant's *own* intent, purpose, or goal to "kill, injure, or intimidate any individual or unlawfully to damage or destroy any building, vehicle, or other real or personal property by means of fire or an explosive," the defendant has violated 18 U.S.C. § 844(e). In the latter scenario, the defendant has effectively adopted the third party's threat as his own. There is no requirement that the defendant convey an intent to carry out the threatened conduct himself. *See United States v. Dinwiddie*, 76 F.3d 913, 925 n. 9 (8th Cir.1996) (*citing United States v. Bellrichard*, 994 F.2d 1318, 1319–24 (8th Cir.1993)).

168 F.3d at 396 (emphasis in original).

The Second Circuit has expressed a similar view in a prosecution under FACE. in *New York ex rel. Spitzer v. Operation Rescue National*, 273 F.3d 184, 196 (2nd Cir. 2001). In conducting its inquiry as to the existence of a true threat,

> a court must be sure that the recipient is fearful of the execution of the threat *by the speaker* (or the speaker's co-conspirators). Thus, generally, a person who informs someone that he or she is in danger from a third party has not made a threat, even if the statement produces fear. This may be true even where a protestor tells the objects of protest that they are in danger and further indicates political support for the violent third parties.

Id. at 196 (emphasis in original).

Thus, a statement that a listener will suffer future violence may be a true threat, but only if the listener reasonably understands that the violence will be perpetrated by the defendant or third parties acting in concert with him, and the context of the statement is important. This principle is also reflected in recent cases discussing the existence of a true threat in the context of prosecutions for making threats against the President.

In *United States v. Bagdasarian*, 652 F.3d 1113, 1119 (9th Cir. 2011), the Ninth Circuit held that insufficient evidence supported the presidential threat conviction of the defendant, who had posted internet messages containing racist statements relating to Barak Obama, along with two additional comments — "shoot the nig country fkd for another 4 years+" and "Obama fk the niggar, he will have a 50 cal in the head soon." The court concluded that these statements, repellent as the were, were not objectively understood as threats by the defendant.

> Neither statement constitutes a threat in the ordinary meaning of the word: "an expression of an intention to inflict ... injury ... on another." Webster's Third New International Dictionary 2382 (1976). The "Obama fk the niggar" statement is a prediction that Obama "will have a 50 cal in the head soon." It conveys no explicit or implicit threat on the part of Bagdasarian that he himself will kill or injure Obama. Nor does the second statement impart a threat. "[S]hoot the nig" is instead an imperative intended to encourage others to take violent action, if not simply an expression of rage or frustration. The threat statute, however, does not criminalize predictions or exhortations to others to injure or kill the President. It is difficult to see how a rational trier of fact could reasonably have found that either statement, on its face or taken in context, expresses a threat against Obama by Bagdasarian.
>
> There is no disputing that neither of Bagdasarian's statements was conditional and that both were alarming and dangerous. The first statement, which referred to Obama as a "niggar" who "will have a 50 cal in the head soon," coupled a racial slur with an assassination forecast during a highly controversial campaign that would ultimately make Obama the country's first black president. No less troubling is the defendant's second statement imploring others to "shoot the nig," lest the "country [be] fkd for another 4 years+" because "never in history" has a black person "done ANYTHING right." There are many unstable individuals in this nation to whom assault weapons and other firearms are readily available, some of whom might believe that they were doing the nation a service were they to follow Bagdasarian's

> commandment. There is nevertheless insufficient evidence that either statement constituted a threat or would be construed by a reasonable person as a genuine threat by Bagdasarian against Obama.
>
> When our law punishes words, we must examine the surrounding circumstances to discern the significance of those words' utterance, but must not distort or embellish their plain meaning so that the law may reach them. Here, the meaning of the words is absolutely plain. They do not constitute a threat and do not fall within the offense punished by the statute.

Id. at 1119-20 (footnotes omitted).

The same court drew a similar conclusion with respect to a predition of future violence against President George Bush in *United States v. Lincoln*, 403 F.3d 703 (9th Cir. 2005). The defendant in that action sent a letter to President Bush in opposition to Operation Desert Storm:

> you think cause [sic] you go over There and Blow Them up that The killing will Stop in you [sic] Dream They got over 275,800 or more since, Never mind that this is only the Beging [sic] of the Badass war To come Just think Their army is over here already hiding They have more Posion gas Then [sic] you know. ha ha. Too bad you don't think Like Them. You will see a good Job Done agin [sic] may [sic] 2 week's, [sic] maybe 2 months, 3, who know's [sic]. You Will Die too George W Bush real Soon They Promissed [sic] That you would Long Live BIN LADEN

403 F.3d at 705.

In reaching its conclusion, the *Lincoln* court distinguished *Planned Parenthood v. American Coalition of Life Activists*, 290 F.3d 1058 (9th Cir. 2002), where it had upheld a conviction under FACE based upon defendants' posting online information about abortion doctors on "wanted posters" which included the images of both living and murdered physicians. In contrast to the "clear pattern of appearance on a poster followed by murder" of abortion doctors, the defendant in *Lincoln* had sent "single letter" which was not publicly posted, but sent only to a single recipient; there was thus "no way the letter could be reasonably viewed as a signal to Al Qaeda or anyone else to carry out an attack on President Bush." 403 F.3d at 707. The court overturned the defendant's conviction,

holding that the letter was the defendant's "crude and offensive method of stating political opposition to the President, [and though] disturbing, [it was] his constitutional right to endorse the violent actions of Bin Laden and Al Qaeda, which is protected speech." *Id.* Any violence referenced in the letter, the court stressed, was that of Al Qaeda rather than the defendant. Again citing its earlier decision in *Planned Parenthood*, 290 F.3d at 1072, the court stressed the observation in that case that if the abortion proponents "'had merely endorsed or encouraged the violent actions of others, its speech would be protected.'" 403 F.3d at 707.

In its Response to the Motion to Dismiss, the government first stresses that a dismissal may not be awarded so long as its complaint presents facts which present a FACE Act claim that is at least plausible on its face, citing *Bell Atl. v. Twombly*, 550 U.S. 544 (2007), and *Ashcroft v. Iqbal*, ___ U.S. ___, 129 S.Ct. 1937 (2009). The government also argues that the court should not take account of facts presented by Dillard in her motion, "such as her allegedly non-violent history and alleged lack of contact with, and knowledge of, Dr. Means." (Dkt. 21, at 3 n.2). The court should not consider evidence outside the pleadings, it argues, because it has not conducted discovery in the action. (*Id*. at 6 n. 4). The government invokes the general standard that the court should consider the context of an alleged true threat, but fails to specify what additional evidence it anticipates it may obtain through discovery, suggesting that "there may well be other facts that providing further context, but which are unknown and unknowable to the United States at this time." (*Id*.).

As noted above, the standard is what a reasonable person in Dr. Means's position would have thought of Dillard's letter. The court takes no account of facts presented or alleged separately by Dillard, but notes that, as to the issue of her own, personal reaction to the Dillard letter, Dr. Means has presented evidence by affidavit and by direct testimony, and there is no indication that the

government disavows any of the evidence supplied by her. This evidence, in conjunction with the text and other circumstances in the Dillard letter, provides a sufficient basis for ruling on the defendant's motion.

Mila Means is currently undergoing training to provide abortion services. She intends to provide those services in Wichita. She testified that she currently provides reproductive health care services for women, but not abortions. Patients now have to travel some 300 miles for those services. She testified that she cannot perform abortions in her current location due to injunction arising from a lawsuit alleging a property nuisance, so she is working on putting together a nonprofit to put up a building. Means was a good friend of George Tiller.

She testified that she will begin to provide abortion services only after the training. She has assisted some abortions during her training. She is not currently scheduled to provide any abortion services in Wichita, and has no facilities to provide abortions. Despite Dillard's letter, she still intends to provide abortion services in Wichita.

Means testified that her staff had begun to perform some increased security measures even before receiving Dillard's letter. After the letter, she and her staff began to having a mechanic check her car, traveling home by different routes and staying overnight in different locations. They also installed some door alarms at her office, and has begun looking for a more secure building in which to practice. (Dkt. 4-1, ¶ 9, 11).

Means did not directly receive Dillard's letter. The letter was opened by her office manager, Andrea Hamel. Hamel immediately notified the Wichita police, and told Means about the letter only at some later date. Means is not sure exactly when this occurred, but believes it was relatively close to the date of the letter. At some point, a copy of the letter was also given to the FBI.

Means does not read letters received by her clinic which are deemed non-threatening. She testified that they had a box which contained one or two other letters they had been concerned about.

At some point after she was shown Dillard's letter, Means conducted some internet research, and discovered an article by the Associated Press about Dillard, indicating that she had corresponded with Roeder, and stating that she admired him for his convictions. (Dkt. 24, at 55). Means testified that the article also stated that Dillard stated for herself she did not plan any violence. (*Id*. at 38). During cross-examination, Means testified that "I'm sure she didn't" have any plans for violence at the time of the article, but that "people's tendency to move toward violence happens over time." (*Id*.) She also testified that, after her initial research, she found an article indicating that the FBI had met with Dillard and concluded that she was not a threat. (*Id*. at 50).

Means testified that the letter's references to scrutiny by "[t]housands of persons," and that local groups "must take a stand" meant that "[i]t's quite possible she is spokesperson that would incite others to violence." (Dkt. 24, at 37). She testified, "I didn't know that she specifically would be the violent one, but I couldn't rule it out." (*Id.*) Means agrees that the "a relatively small number" part of the pro-life community has engaged in violence. (*Id*. at 39).

Means does not know that Dillard has ever met her or been to her office or home, has no knowledge that Dillard has any criminal record. The only communication from Dillard that Means considers threatening is the January 29, 2011 letter. (Id. at 43).

Means agrees that other people have warned her about the risk of violence, but testified that those "are friendly people that talk about possible issues." (*Id*. at 46). But the "people who warn [her] don't talk about hell [or] soulless existence. (*Id*.) She testified that the warnings about security

issues from her family and friends are different, because "it's from people who are caring for you." (*Id*. at 99).

The government also attempts to expand the case beyond the single reference to potential car bomb by noting that the letter also states that Dillard would "do everything" to stop Means, and referenced the murdered Dr. Tiller. But the context of the letter fails to support any inference that these comments represent true threats. The "we will do everything" language is clearly prefaced by language about three local churches, and contains no suggestion that the churches would engage in any violent conduct against Means. Similarly, the letter does not refer to the historical violence against Dr. Tiller, but presents a religious argument: "If Tiller could speak from hell, he would tell you what a soulless existence you are purposefully considering, all in the name of greed." These statements are insufficient in themselves to create any belief by a reasonable recipient that the writer was threatening violence.

As to the substance of that motion, the government relies primarily on four cases finding the existence of a true threat in the context of abortion protests, *United States v. Dinwiddie*, 76 F.3d 913 (8th Cir. 1996), *United States v. McMillan*, 53 F.Supp.2d 895 (S.D. Miss. 1999), *United States v. Hart*, 212 F.3d 1067 (8th Cir. 2000), and *Planned Parenthood of the Columbia/Willamette v. American Coalition of Life Activists*, 290 F.3d 1058 (9th Cir.2002).

In *Columbia/Willamette*, the Ninth Circuit upheld the judgment that defendants violated the FACE Act by their publication of "wanted" posters featuring doctors who performed abortions, given evidence showing that three doctors had been previously murdered following the publication of similar posters. Given this context, the court held, "the poster format itself had acquired currency

as a death threat for abortion providers" at the time the defendants publicized their posters. 290 F.3d at 1058.

In *Dinwiddie*, the defendant pro-life activist protested outside an abortion clinic over a six to eight month period. During this period she used a bullhorn to shout over 50 comments to clinic doctor Robert Crist, including, "Robert, remember Dr. Gunn [a doctor providing abortion services who was killed in 1993] ... This could happen to you ... He is not in the world anymore. Whoever sheds man's blood, by man his blood shall be shed." 76 F.3d at 917. But in addition to such general comments of future violence, she also made specific threats of physical force and directly associated herself with that violence, telling a clinic director that "you have not seen violence yet until you see what *we* do to you." *Id*. (emphasis added). She had, in addition, physically obstructed patients from entering the clinic, and had signed a petition stating that "lethal force was justifiable [in a prior killing of a doctor providing abortion services] provided it was carried out for defending the lives of unborn children." *Id*. at 917 n. 2, The court concluded that "[a]lthough Mrs. Dinwiddie did not specifically say to Dr. Crist, 'I am going to injure you,' the manner in which Mrs. Dinwiddie made her statements, the context in which they were made, and Dr. Crist's reaction to them [wearing a bullet-proof vest]" supported the finding that the comments were true threats. *Id*. at 925-26.

In *United States v. McMillan*, 53 F.Supp.2d 895, the court found an abortion clinic protestor in contempt for violating a consent decree arising from a FACE Act case. The protestor, over the course of several weeks, had repeatedly asked, "Where's a pipebomber when you need him?" 53 F.Supp.2d at 896. He had made these comments every time one of the clinic's doctors arrived for work. The doctor testified that the protestor originally made other comments, but changed his message to include references to pipebombers "when the Unibomber [sic] was in the newspapers."

Id. at 898. In finding the protestor in contempt, the court stressed that the comments were both repetitive and resonant with other cases involving similar acts of violence. The respondent, the court stated, had not been lured into

> blurting out statements which might be instantly regretted. Instead, the testimony presented to this court shows that McMillan, acting alone or in the presence of other more passive demonstrators, chooses to shout his pipebomber comments at the very time Dr. Stoppel arrives at the clinic. This comment was shouted not once or twice, but many times over a period of time spanning six to eight weeks according the best estimate of Dr. Stoppel. No one contends that this was a "one-time" utterance. According to Dr. Stoppel, McMillan began shouting about the need for a pipebomber at approximately the same time as the news media was carrying stories about the "Unibomber" and the Olympic pipe-bomb incident, and that he continued to do so until this civil contempt action was filed.

Id. at 905.

Finally, in *United States v. Hart*, 212 F.3d 1067 (8th Cir. 2000), the court upheld the defendant's FACE Act conviction, based on his parking of two Ryder trucks outside of two abortion clinics in Little Rock. Workers at each clinic discovered, on September 25, 1997, a truck "unattended and [with] no indication as to its purpose for being there, parked in the clinic driveway rather than the parking lot. 212 F.3d at 1070.

> First, Hart targeted abortion clinics, which are often sites of protests and violence. In particular, Hart regularly protested outside the two clinics at which he parked the Ryder trucks. He also placed the trucks in the driveways, near the entrances, rather than in the parking lot. The trucks actually blocked the entrance to each clinic building. In fact, an employee at one clinic testified that the truck had been parked "as close to [the clinic] as it could possibly be." Furthermore, the placement of the trucks at the clinics coincided with a visit to Little Rock from President Clinton, whose presence in the area further heightened concerns about potential violence. It was reasonable for the jury to conclude that Hart, by placing a Ryder truck directly in the entranceway of each clinic, sought to take advantage of the heightened level of security concerns in the Little Rock area to create a threat of violence on that particular day. Moreover, Hart offered no legitimate reason for leaving the trucks early that morning, and he provided no notice or explanation for his actions. These circumstances, coupled with the similarity to the well-known events of the Oklahoma City bombing, were reasonably interpreted by clinic staff and police officers as a

> threat to injure. Furthermore, the reaction of clinic staff indicates that they did in fact perceive the Ryder trucks as a threat of force. Several clinic employees testified that they believed that the trucks contained bombs, and they immediately contacted the police, who evacuated the clinics and nearby homes and businesses and called in bomb squads.

212 F.3d at 1072.

The relevance of the cases cited by the government is limited. In *Dinwiddie* and *McMillan*, the courts stressed the sheer volume of the invective directed at the abortion providers. In *Dinwiddie*, *Hart*, and *Columbia/Willamette*, the courts stressed the communications used of a distinctive type of violence which resonated with current events (pipebombs and Ryder trucks) or a particularized form of communication (wanted posters) which was so distinctive as to "acquire[] currency as a death threat for abortion providers." In the present case, by contrast, the government has alleged a single communication from Dillard, which advances potential violence ("maybe today") as but one of the of the many consequences of providing abortion services, which, Dillard suggests, include damnation, public scrutiny, professional and public opprobrium, and the loss of staff, clientele, and sleep. In *Dinwiddie*, the defendant publicly associated herself with the killing of abortion providers, stating that such actions were legally justified. Means testified that the article she read about Dillard indicated that she admired Roeder, but that Dillard expressly disavowed any interest in violence herself.

Similarly, the evidence cited in *Viefhaus* which served to link the defendant to the prospective violence by third parties is not present here. In that case, as noted earlier, the defendant ostensibly related a message from a "high ranking revolutionary commander," that "bombs will be activated in 15 pre-selected major U.S. cities," and that these bombs would be activated "by December 15, 1996," one week after his recorded message. Thus, in *Viefhaus*, the existence of a true

threat was corroborated by specific information suggesting that he was a participant in the bomb plot, that the bombs were real, and their detontation imminent.

The case cited in particular by the defendant, *New York ex rel. Spitzer v. Operation Rescue*, 273 F.3d 184, 197 (2nd Cir. 2001), is also factually distinct. In that case, the Second Circuit upheld a FACE Act injunction against a defendant, but did so based upon evidence that the defendant had physical access to a clinic. With respect to additional findings that the defendant had violated FACE by making true threats, the court stated that it was

> troubled by the District Court's willingness to characterize a broad range of protestor statements as "threats" without giving them the full analysis required by the First Amendment. When determining whether a statement qualifies as a threat for First Amendment purposes, a district court must ask whether the threat on its face and in the circumstances in which it is made is so unequivocal, unconditional, immediate and specific as to the person threatened, as to convey a gravity of purpose and imminent prospect of execution.

273 F.3d at 196 (quotation omitted). This led to the court's previously-noted observation that, as a general rule, a warning of third party violence is not a true threat - even if the warning provokes fear - in the absence of evidence indicating that "the recipient is fearful of the execution of the threat *by the speaker* (or the speaker's co-conspirators)." *Id*. (emphasis in original).

But while the Spitzer court disapproved the district court's blanket assessment of the communications as threatening, and expressed itself "skeptical as to whether any of [the defendant]'s statements constitute true threats," this was, of course, a conclusion rendered in the context of that particular case. In a footnote, the court cited one instance of such a doubtful threat, in which the defendant told a group of clinic workers, "You won't be laughing when the bomb goes off." 273 F.3d at 196 n. 5. But critical to this skepticism was the court's observation that it did not strike alarm in the workers: "The clinic worker who testified to this statement, waited two weeks

before reporting the comment to the police. Were it not for the fact that the recipient of this alleged threat reacted without apparent alarm, we would be more likely to conclude that this statement constituted a true threat." *Id.* In the present case, by contrast, there is evidence from which a jury might conclude that that Dillard's letter provoked a prompt reaction and sincere concern.

The grounds for finding the existence of a true threat in the present action are shakier than those presented in the cases cited by the government. In a single passage within the letter, Dillard observes that Means will need to daily check her car for explosives "because maybe today is the day someone places an explosive under it." Unlike the cases cited by the government, this reference to a specific type of threat has not been linked to any recent anti-abortion violence, nor is there any suggestion that such bomb warnings have acquired any specific "currency as a death threat for abortion providers," as the "wanted" posters had in *Columbia/Willamette*. There is no evidence directly linking Dillard to any acts of clinic obstruction or violence. There is no evidence of repeated communications directed at Dr. Means, only a single passage in a single letter, and this sent openly under her own name. Dr. Means was subsequently to learn that Dillard explicitly denied any plans to engage in violence, and that the FBI had interviewed Dillard and concluded she was not a threat. Dr. Means's conclusions that might have later developed a propensity to violence is purely speculative. Means testified that she has received similar warnings as to her safety from family and friends, but distinguished those warnings as being "caring" and free from the language of damnation. She testified that she had no knowledge that Dillard would become violent, but she "couldn't rule it out." Certainly there is no direct evidence or allegation of any bomb plot currently in motion, or that Dillard is a part of such a conspiracy.

Against this, the present case includes evidence showing that Dillard wrote her letter less than two years after the murder of Dr. Tiller, that she sent the letter specifically to Dr. Means, that she included a reference to a car bomb, and that after being shown the letter (it is unclear exactly how soon afterwards), Dr. Means conducted an internet search of Dillard and discovered that Dillard had corresponded with Dr. Tiller's assassin in prison and expressed admiration for his convictions.

The court cannot grant Dillard's motion given the controlling standard of review.

> We consistently have held that whether a defendant's statement is a true threat or mere political speech is a question for the jury. *See* [*United States v.*] *Leaverton*, 835 F.2d [254,] 257 [10th Cir. (1987)]; [*United States v.*] *Crews*, 781 F.2d [826,] 832 [(10th Cir. 1986)]. If there is no question that a defendant's speech is protected by the First Amendment, the court may dismiss the charge as a matter of law. *See United States v. Malik*, 16 F.3d 45, 51 (2d Cir.1994).

Viefhaus, 168 F.3d at 397. Other circuits are in agreement. *See United States v. Voneida*, 337 Fed. Appx. 246, 249 (3d Cir.2009) (the existence of a true threat is a question best left to a jury); *Planned Parenthood of Columbia/Willamette*, 290 F.3d at 1069 ("'it is a jury question whether actions and communications are clearly outside the ambit of first amendment protection,'"(quoting *United States v. Gilbert*, 813 F.2d 1523, 1530 (9th Cir. 1987)*; United States v. Roberts*, 915 F.2d 889, 891 (4th Cir.1990) (whether or not a threat is true is a jury question) *United States v. Whiffen*, 121 F.3d 18, 22 (1st Cir. 1997) ("[t]he proper interpretation of Whiffen's remarks, however, is a question of fact and, therefore, appropriately left for the jury" and that "[w]e cannot conclude that the interpretation preferred by Whiffen is, as a matter of law, the correct one"); *United States v. Howell*, 719 F.2d 1258, 1260 (5th Cir.1983)*; United States v. Carrier*, 672 F.2d 300 (2d Cir.1982).

This very heavy burden, that the court may find Dillard's speech was protected and not a true threat only if there is "no question" as to the issue, has not been met. The burden effectively requires

Dillard to demonstrate that no reasonable recipient of her letter could view it as a threat. Given the clear emphasis by the cases on reasonableness and context, this issue must be resolved by the jury.

The court's prior findings with respect to the government's motion for injunctive relief, which were rendered under a different standard of review, are not controlling here. In its request for injunctive relief, the government had the burden of proving that it would likely prevail on the merits of the case. *Westar Energy v. Lake*, 552 F.3d 1215, 1224 (10th Cir.2009). In contrast, Dillard now has the burden to show "beyond doubt that the [government] could prove no set of facts entitling it to relief." *Ash Creek Mining v. Lujan*, 969 F.2d 868, 870 (10th Cir. 1992).

Because the purpose of a preliminary injunction is simply to preserve the positions of the parties, the Supreme Court has emphasized that the resolution a motion for preliminary injunction is inherently provisional. *University of Texas v. Camenisch*, 451 U.S. 390, 395 (1981) ("the findings of fact and conclusions of law made by a court granting a preliminary injunction are not binding at trial on the merits"). Because of the different burdens of proof, the doctrine of the law of the case has no application here. *See United States v. Cen-Car Agency/C.C.A.C.*, 724 F.Supp. 313, 316 (D.N.J. 1989) (rejecting argument that law of the case arose from the court's prior resolution of motion for preliminary injunction). "Courts repeatedly have emphasized that a decision as to the likelihood of success is tentative in nature and not binding at a subsequent trial on the merits. Were the opposite true, an unacceptable conflation of the merits decision and the preliminary inquiry would result." *Homans v. City of Albuquerque*, 366 F.3d 900, 904-905 (10th Cir. 2004) (citations omitted).

IT IS ACCORDINGLY ORDERED this 21st day of December, 2011, that the defendant's Motion to Dismiss (Dkt. 14) is hereby denied.

s/ J. Thomas Marten
J. THOMAS MARTEN, JUDGE

ATTACHMENT C

Received 1/19/11 @ 10:30am

15JAN11

Dr. Means,

It has come to our attention that you are planning to do abortions at your Harry St. location. I am stunned that you would take your career in this direction. Fewer people than ever before are pro-abortion, quality physicians wouldn't even consider associating themselves with it, and more Americans than ever before are unwilling to turn a blind eye to the killing of a baby when the ratio for adoption is 36 couples to 1 baby .

Maybe you don't realize the consequences of killing the innocent. If Tiller could speak from hell, he would tell you what a soulless existence you are purposefully considering, all in the name of greed. Thousands of people are already looking into your background, not just in Wichita, but from all over the U.S. They will know your habits and routines. They know where you shop, who your friends are, what you drive, where you live. You will be checking under your car everyday-because maybe today is the day someone places an explosive under it. People will be picketing your home, your office. You will come under greater scrutiny than you've ever known, legally and professionally. Much worse than the disciplinary actions and ethical concerns that you've been facing. You will become a pariah-no physician will want to associate with you. You will be seen like all the other hacks that have stooped to doing abortions when they weren't good enough to maintain a real practice. You will lose your legitimate clientele, as no one bringing a baby into this world wants to be in the same facility where you are also killing them. You will have trouble keeping staff who are willing to participate in innocent blood-shedding and won't be able to keep the sanitary conditions necessary to maintain a healthy medical facility. You will end up having the same kind of rat-infested, dirty facility that they have in north-eastern Kansas. Anyone who partners with you will experience the same headaches. Not to mention the fact that you will be haunted by bloody, squirming, dismembered babies in your sleep. You can't do what is morally reprehensible and enjoy peace of mind. The Bible says, "There are six things the Lord hates. . . hands that shed innocent blood, a heart that devises evil schemes, feet that are quick to rush into evil. . ." Proverbs 6:16-18. Abortion kills human life-it matters not if you kill it at 6 weeks or at 26 weeks, it's still the unnatural, violent death of a human baby for the sake of convenience. You are doing what the Humane Society wouldn't allow to happen to a pregnant dog or cat.

I urge you to think very carefully about the choices you are making. There are 3 churches within 1 block of your practice, and many others who must take a stand. We will not let this abomination continue without doing everything we can to stop it. We pray you will either make the right choice and use your medical practice to heal instead of kill, or that God would bring judgment on you, the likes of which you cannot imagine. We don't want you killing our children in our community. Good people are tired of this rampant evil, and will stand against you every step of the way. Do the world a favor and ABORT this stupid plan of yours. It's not too late to change your mind.

Angel Dillard

Mrs. Angel Dillard
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WICHITA KS 670

18 JAN 2011 PM 2 L

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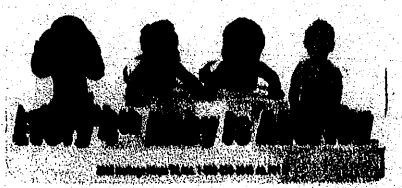

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