

**UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

ALLENTOWN WOMEN'S CENTER, INC., :

Plaintiff, :

v. :

JOHN DUNKLE :

and :

ANTHONY J. SULPIZIO :

and :

MARK MICHAEL BOGUNOVICH :

and :

JOHN DOE Nos. 1-5, :

Defendants. :

Civil Action No.: _____

**PLAINTIFF'S MEMORANDUM OF LAW
IN SUPPORT OF ITS MOTION FOR PRELIMINARY INJUNCTION**

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Freedom of Access to Clinic Entrances Act of 1994, 18 U.S.C. § 248 *passim*

Pursuant to Local Rule 7.1(c), Plaintiff Allentown Women’s Center, Inc. (“AWC” or “Clinic”) submits the following Memorandum of Law in support of its Motion for Preliminary Injunction against Defendants John Dunkle (“Dunkle”), Anthony Sulpizio (“Sulpizio”), Mark Michael Bogunovich (“Bogunovich”) (collectively, “Defendants”), and all persons in active concert or participation with them.

I. INTRODUCTION

With force and physical obstruction, or trespassing, Defendants Dunkle, Sulpizio and Bogunovich have each engaged in a persistent campaign to injure, intimidate, and/or interfere with the rights of AWC staff, volunteers, and patients to access the AWC health care clinic—violations of the Freedom of Access to Clinic Entrances Act of 1994, 18 U.S.C. § 248 (“FACE Act” or the “Act”) and/or state law. As authorized by the FACE Act and Federal Rule of Civil Procedure 65, AWC seeks a preliminary injunction that enjoins Defendants from further violations of federal law and protects the rights of its staff, volunteers, and patients to obtain and provide reproductive health care services without fear, intimidation, or unlawful interference. Absent timely intervention by this Court, Defendants Sulpizio and Bogunovich are reasonably likely to continue to violate the FACE Act by obstructing the driveways to the AWC health care clinic and committing other acts of force or physical obstruction and Dunkle is reasonably likely to continue trespassing onto AWC property with the intent to harass, intimidate, and dissuade AWC staff, volunteers, and patients from providing reproductive health care services.

The preliminary injunction should issue against Defendants—and all those acting in concert with them—because AWC is likely to succeed on the merits; Defendants’ actions will cause irreparable harm to persons seeking to obtain or provide reproductive health care services at the AWC Clinic; Defendants will not suffer substantial harm should injunctive relief be granted; and injunctive relief is in the public interest of promoting access to reproductive health

services and public safety. Specifically, AWC asks the Court to: (1) prohibit Defendants Sulpizio and Bogunovich from further violations of the FACE Act; (2) prohibit Defendants Sulpizio and Bogunovich from engaging in the use of force or of physical obstruction to injure, intimidate, or interfere with (or attempt to injure, intimidate or interfere with) any person seeking to obtain or provide reproductive health care services at AWC's Clinic in Hanover Township, Northampton County; (3) prohibit Defendants Sulpizio and Bogunovich from standing in, walking across, or traversing around any of the driveway entrances to the AWC Clinic, and from coming within a "buffer zone" of 25 feet extending any of the driveway entrances onto the public right-of-way, for the period of AWC's operating hours and for two hours before and after those hours; and (4) prohibit Defendants Dunkle, Sulpizio, and Bogunovich from trespassing on AWC property. These restrictions will vindicate the right of access protected by the FACE Act and prohibit further trespassing, while also respecting the constitutional rights of Defendants to protest or make known their views about reproductive health care services.

II. FACTUAL BACKGROUND

A. AWC is a Reproductive Health Care Clinic

AWC provides medical care, surgical care, and counseling relating to pregnancy and/or the termination of a pregnancy, including abortion procedures. Declaration of Nurse Executive Doe ¶ 2 (attached as Exhibit 1 and hereinafter referred to as "Nurse Exec. Decl."). AWC is physically located at the corner of South Commerce Way and Courtney Street in Hanover Township, Northampton County, with one driveway connecting the parking lot to South Commerce Way and another driveway connecting the parking lot to Courtney Street. Nurse Exec. Decl., ¶ 5. AWC employs trained professionals, including doctors, nurses, and counselors, to provide reproductive health care services at its Clinic. Nurse Exec. Decl., ¶ 4. AWC also

utilizes volunteer escorts to assist patients seeking reproductive health services at AWC.

Complaint (“Compl.”) at ¶ 20.

B. Defendants Have A Long History of Unlawful Conduct Against Reproductive Health Care Facilities In General

As early as 1994, Defendant Dunkle was arrested with members of an anti-choice extremist group for physically blocking a Rochester, New York clinic. Compl. at ¶ 21. Dunkle is or has been associated with a group known as the “Army of God,” another extremist anti-choice group that advocates for violence against reproductive health clinics and staff. *Id.* at ¶ 22. Twelve years ago, this Court found Dunkle violated the FACE Act after he posted death threats against a former executive director of AWC and a number of doctors on his blog. *Id.* at ¶ 23; see also *Gonzales v. Dunkle*, Civ. Action No. 07-3577 (E.D. Pa. Nov. 8, 2007). Dunkle, occasionally acting together with Defendant Sulpizio, regularly protests outside the home of Dr. Roe, a medical doctor who provides reproductive health services at the AWC Clinic. Compl. at ¶ 26. As recently as 2014, Dunkle posted a message on his blog where he stated his belief that “we should examine every legitimate means, *including force*, in our attempt to protect children from being tortured to death...” Compl. at ¶ 27 (emphasis added).

As early as January 1992, this Court held Defendant Sulpizio in civil contempt because he “participated in protest activities” at a women’s health clinic, was on the property of that clinic for purposes relating to the protest, and made “aggressive actions” towards two escorts at the clinic—all in violation of a permanent injunction prohibiting him from those activities. Compl. at ¶ 32; Ne. Women’s Ctr., Inc. v. McMonagle, et al., Civ. Action No. 85-4845 (E.D. Pa. Jan. 22, 1992). Moreover, this Court already found that Sulpizio works in concert with anti-abortion groups, organizations, and individuals as part of a campaign to intimidate staff, patients, and volunteers. See id.

C. Defendants Have A Long History of Unlawful Conduct or Intimidation at AWC

Dunkle's unlawful activity is not limited to New York. In January 2016, Dunkle was found guilty of defiant trespass for unlawfully entering AWC property, and his conviction was confirmed on appeal. Commonwealth v. Dunkle, Case Nos. NT-0255-2015 (Mag. Dist. J. 03-01-04) & CP-48-SA-0037-2016 (Ct. Com. Pleas Northampton Cty. May 25, 2016). In a separate case in June 2016, Dunkle pled guilty to defiant trespass for again unlawfully entering AWC property. Commonwealth v. Dunkle, Case No. NT-0232-2016 (Mag. Dist. J. 03-01-04 June 16, 2016). Despite these criminal convictions, Dunkle trespassed on AWC property at least 15 times in a single day, February 23, 2019. Compl. at ¶ 31.

This Court's 1992 contempt finding against Sulpizio has not prevented him from bringing his campaign of intimidation to the Lehigh Valley. Sulpizio has maintained an almost daily presence on or near one of the two driveways leading to the AWC Clinic. Nurse Exec. Decl., ¶ 6; Declaration of Escort Stiles ("Stiles Decl."), ¶¶ 2-3, attached hereto as Exhibit 2.¹

Sulpizio used physical force to threaten and obstruct an AWC volunteer in April 2017. On April 15, 2017, Sulpizio walked from the middle of the curb into the driveway at the AWC Clinic with a clipboard, appearing to be an official employee of AWC. Compl. at ¶ 36; Stiles Decl., ¶ 10. Sulpizio approached a car entering the driveway and then attempted to physically block an AWC volunteer from approaching the same car. Stiles Decl., ¶ 12. Sulpizio physically pushed the volunteer away from the car's window, and, when the volunteer persisted in trying to reach the car, Sulpizio physically smacked the volunteer's forehead. Compl. at ¶¶ 39-40; Stiles Decl., ¶¶ 13-14. For this assault on an AWC volunteer, Sulpizio was convicted of harassment (subjecting another to physical contact) in violation of 18 Pa. C.S. § 2709(a)(1). Commonwealth

¹ Escort "Stiles" is a pseudonym.

v. Sulpizio, Case No. NT-00140-2017 (Mag. Dist. J. 03-01-04 July 7, 2017). His conviction was upheld on appeal. Commonwealth v. Sulpizio, Case No. CP-48-SA-00194-2017 (Ct. Com. Pleas Northampton Cnty. Oct. 18, 2017).

Sulpizio engages in conduct designed to block ingress and egress from the AWC Clinic or to make such movement unreasonably difficult or hazardous. Sulpizio purposefully walks slowly and methodically in front of vehicles attempting to enter the driveway in an attempt to force vehicles to stop while he yells and screams at the driver. Compl. at ¶¶ 47 & 48. Sometimes, Sulpizio will set up orange cones on the driveway to intentionally narrow the path where cars can drive so he can more easily obstruct people seeking to enter the Clinic’s parking lot. Id. at ¶ 50.

Bogunovich sometimes appears with Sulpizio for activities at the AWC Clinic. On August 30, 2018, Bogunovich joined Sulpizio in blocking the driveway and otherwise getting the cars of patients and visitors to stop at the driveways to the AWC Clinic. Nurse Exec. Decl., ¶¶ 20-21. Like Sulpizio, Bogunovich will also walk slowly in front of cars arriving at the Clinic and seek to threaten staff, volunteers, or patients to force them not to seek or provide reproductive health services. Nurse Exec. Decl., ¶ 22.

III. LEGAL STANDARDS

The FACE Act authorizes this Court to issue temporary, preliminary, and/or permanent injunctive relief. 18 U.S.C. § 248(c)(1)(B). To obtain a preliminary injunction, the court considers four factors, in a two-step process. Reilly v. City of Harrisburg, 858 F.3d 173, 179 (3d Cir. 2017), as amended (June 26, 2017). First:

[A] movant for preliminary equitable relief must meet the threshold for the first two “most critical” factors: it must demonstrate that it can win on the merits (which requires a showing significantly better than negligible but not necessarily more likely than not) and that it is more likely than not to suffer irreparable harm in the absence of preliminary relief.

Id. at 179. If these first two “gateway factors are met,” the court “then considers the remaining two factors:” the possibility of harm to other interested persons from the grant or denial of the injunction and the public interest. Id. at 176, 179. Ultimately, the court must “determine[] in its sound discretion if all four factors, taken together, balance in favor of granting the requested preliminary relief.” Id. at 179. As set forth below, AWC has established each of the four factors a court must consider before issuing preliminary injunctive relief and this Court should exercise its authority to enjoin Defendants Sulpizio and Bogunovich from continuing their unlawful course of conduct that violates the FACE Act and interferes with the rights of AWC staff, volunteers, and patients.

IV. ARGUMENT

A. AWC Has Reasonable Probability of Success on Merits of Its Claims

AWC is likely to succeed on the merits of its FACE Act claim and state law claims against Defendants; accordingly, this factor supports issuance of the proposed injunction.

As an initial matter, to satisfy this first prong for injunctive relief, “the movant need only prove a ‘prima facie case,’ not a ‘certainty’ [that the party] will win.” Issa v. Sch. Dist. of Lancaster, 847 F.3d 121, 131 (3d Cir. 2017) (citations omitted). The Third Circuit “do[es] not require that the right to a final decision after trial be ‘wholly without doubt;’ the movant need only show a ‘reasonable probability’ of success.” Id. (citations omitted). The claims AWC asserts against Defendants have clear, easily satisfied elements and AWC has demonstrated—at the very least—a “reasonable probability” of success against each Defendant.

1. AWC can show at least a reasonable probability that Sulpizio and Bogunovich violated the FACE Act.

AWC has a reasonable probability of success in showing that Defendants Sulpizio and Bogunovich have each engaged in prohibited actions in violation of the FACE Act. A FACE

claim has three elements. The FACE Act prohibits those who, (1) by force, threat of force, or physical obstruction (2) intentionally injure, intimidate, or interfere with (or attempt to injure, intimidate, or interfere with), (3) any person because that person is or has been providing or obtaining reproductive health services or in order to intimidate that person or any other person or class of persons from obtaining or providing reproductive health services. 18 U.S.C. § 248(a)(1). The evidence before the Court shows that AWC has a reasonable probability of success on every element of its FACE claim against Defendants Sulpizio and Bogunovich.

a) Sulpizio has repeatedly engaged in the use of force.

Force is not a defined term in the statute so, “it is fundamental that [it] will be interpreted as taking [its] ordinary, contemporary, and common meaning.” New York ex rel. Spitzer v. Cain, 418 F. Supp. 2d 457, 473 (S.D.N.Y. 2006) (citations and quotations omitted) (interpreting FACE Act). In Cain, the court held that “force is broadly defined as ‘power, violence, or pressure directed against a person or thing.’” Id. (citation omitted). “It is not limited to violent or assaultive force, and there is no exception for fleeting and *de minimis* contact...” Id. (multiple citations and alternations omitted). In Cain, the court described as “the clearest example of a use of force in violation of FACE” where a defendant “came up to an escort volunteering at the Center, pressed his body into the escort, and pushed the escort when the escort told him to move away.” The Cain court rejected the defendant’s argument that such behavior was privileged because the escorts got in between the defendant and the patient. “Frustration at the presence of escorts and their efforts to shield patients from unwanted interaction with the defendants does not justify the use of force against an escort and does not provide a cognizable defense for [the defendant’s] actions.” Cain, 418 F. Supp. 2d at 474.

Here, AWC can easily satisfy its burden to show a reasonable probability that Sulpizio’s actions were “force” within the meaning of the FACE Act because of its overwhelming evidence

on this point. On April 15, 2017, Sulpizio physically pushed an AWC volunteer escort away from the car window of a person attempting to enter the AWC Clinic. Stiles Decl., ¶ 10. When Sulpizio’s conduct failed to dissuade the AWC volunteer from escorting the occupant into the Clinic, Sulpizio then physically smacked the volunteer in the head. Stiles Decl., ¶¶ 13-14. This conduct—even if denied by Sulpizio—satisfies the definition of “force” under the FACE Act and shows that AWC has a reasonable probability of success on this element of its claim. Force is “not limited to violent or assaultive force,” even though here Sulpizio was convicted for subjecting another person to “physical contact.” Commonwealth v. Sulpizio, Case No. NT-00140-2017 (Mag. Dist. J. 03-01-04 July 7, 2017). His conviction was upheld on appeal. Commonwealth v. Sulpizio, Case No. CP-48-SA-00194-2017 (Ct. Com. Pleas Northampton Cnty. Oct. 18, 2017).

b) *Sulpizio and Bogunovich physically obstruct the AWC Clinic.*

The Act defines “physical obstruction” as “rendering impassable ingress to or egress from a facility that provides reproductive health services...or rendering passage to or from such a facility...unreasonably difficult or hazardous.” 18 U.S.C. § 248(e)(4). Physical obstruction is not limited to “bodily obstruction, but rather is broadly phrased to prohibit any act rendering passage to the facility unreasonably difficult.” Cain, 418 F. Supp. 2d at 480 (quoting United States v. Mahoney, 247 F.3d 279, 284 (D.C. Cir. 2001)). Some acts of physical obstruction that are “sufficient to create liability under FACE” include “obstructing or slowing access to driveways or parking lots” and “blocking patients inside automobiles by standing close to car doors.” Cain, 418 F. Supp. 2d at 480 (multiple citations omitted). The court in Cain found physical obstruction where the defendants “block and corner patients in an effort to impede their progress to the clinic so that the defendants have more time in which to ‘counsel’ them to leave the Center.” Id. at 481; see also New York ex rel. Spitzer v. Kraeger, 160 F. Supp. 2d 360, 376 (N.D.N.Y. 2001) (FACE

violations under physical obstruction prong where defendants slowly paced the entire length of the sidewalk with large signs and did not yield any space for pedestrians because it interfered with ingress and egress of patients and staff).

Evidence of driveway obstruction was sufficient “physical obstruction” under the FACE Act to support a preliminary injunction in United States v. Lindgren, 883 F. Supp. 1321 (D.N.D. 1995). In Lindgren, a witness testified that two defendants “regularly appear in front of the clinic [and] usually position themselves at the driveway” and that one defendant “sometimes stands to the side of the driveway, but sometimes stands in the driveway forcing cars entering the driveway to stop.” Id. at 1329. When the car stopped, the witness testified, the other defendant “approaches...and singles the occupant to roll down the window. [The defendant] then sticks her head and arm into the car, and hands literature to the occupant.” Id. Another witness testified that the defendants “slow cars down by standing very close to them” and “place their bodies or arms in front of the windshield, and their feet where they would be run over by the car tires.” Id. at 1329-30. The court found that this testimony, if true, would constitute physical obstruction and that, notwithstanding the denials from the defendants, the testimony demonstrated “a substantial possibility that [plaintiff] will prove a FACE violation by [defendants] by their conduct in the clinic driveway.” Id. at 1331.

Here, AWC can easily satisfy its burden to show a reasonable probability that Sulpizio and Bogunovich’s actions constitute physical obstruction within the meaning of the FACE Act. Both Sulpizio and Bogunovich “will walk slowly in front of cars arriving at the AWC clinic.” Nurse Exec. Decl., ¶ 22. Sulpizio will “walk from the edge of the driveway...into the middle of the driveway, approaching cars from the side. This strategy means that drivers must change their direction or stop to avoid hitting him.” Stiles Decl., ¶ 4. Sulpizio also attempts to disguise

himself as a legitimate AWC volunteer, with an “official-looking appearance” and a “clipboard” and “dress[ed] in the same color as the volunteers,” Stiles Decl., ¶¶ 5-6, all of which is part of his effort to physically obstruct the entrance to the Clinic by unwitting patients or visitors.

c) *Remaining prongs of the FACE Act claim are easily satisfied.*

AWC easily has shown reasonable probability of success for the remaining elements of a FACE claim. The Act further defines “interfere with” as “to restrict a person’s freedom of movement” and “intimidate” to “place a person in reasonable apprehension of bodily harm to him or herself or to another.” *Id.* at § 248(e)(2) & (e)(3). Sulpizio’s physical attack against Escort Stiles was an intentional action that injured Stiles, restricted his movement, and placed him in reasonable apprehension of bodily injury. Sulpizio’s conspicuous photography and ominous warnings of injury directed to AWC staff and volunteers place them in reasonable fear of bodily harm—that is, intimidating them within the meaning of the FACE Act. Sulpizio’s and Bogunovich’s continued campaign of physical obstruction at the driveways to the AWC Clinic restrict freedom of movement and make ingress and egress unreasonably difficult or hazardous. The fact that Sulpizio and Bogunovich have focused their attention on AWC is not happenstance; their vile comments demonstrate that they want to target AWC staff, volunteers, and patients *because they are AWC staff, volunteers, and patients*—that is, because they seek or provide reproductive health services at AWC, or intend to do so. *See* Nurse Exec. Decl. ¶¶ 8-12, Stiles Decl. ¶¶ 10-14; 18, Declaration of Dr. Roe, ¶¶ 10-17; (attached hereto as Exhibit 3), Declaration of Employee No. 1, ¶¶ 6-11 (“Employee No. 1 Decl.”) (attached hereto as Exhibit 4) and Declaration of Escort Smith, ¶¶ 10-18 (attached hereto as Exhibit 5). AWC has a reasonable probability of success on its FACE claim against Sulpizio and Bogunovich.

2. *AWC can show at least a reasonable probability that Dunkle violated the law against trespass.*

AWC is likely to succeed on the merits of its state law claim against Dunkle. To succeed on a trespass claim, a plaintiff must show the (1) intentional entrance upon (2) land in possession of another (3) without a privilege to do so. E.g. Kennedy v. Consol Energy, Inc., 116 A.3d 626, 636 (Pa. Super. 2015) (quoting Kopka v. Bell Tel. Co., 91 A.2d 232, 235 (Pa. 1952) and Restatement Torts, § 164). The evidence before the Court shows that AWC has a reasonably probability of success on each element of its state law trespass claim against Defendant Dunkle.

Multiple witnesses observed Dunkle repeatedly trespass onto AWC property in February 2019—15 times in one day. Stiles Decl., ¶ 25; Nurse Exec. Decl., ¶ 26. The extent of this intrusion demonstrates that it is intentional, and there is no suggestion that Dunkle was privileged to enter onto the property. Accordingly, AWC’s evidence is sufficient to satisfy its burden of showing the reasonable probability of success on its trespass claim.

Dunkle’s history of and convictions for trespass onto the same AWC property further support AWC’s likelihood of success. Dunkle was convicted of trespass for unlawfully entering AWC property in 2016. Nurse Exec. Decl., ¶ 24; Commonwealth v. Dunkle, Case Nos. NT-0255-2015 (Mag. Dist. J. 03-01-04) & CP-48-SA-0037-2016 (Ct. Com. Pleas Northampton Cty. May 25, 2016). In a separate case, Dunkle pled guilty to defiant trespass for again unlawfully entering AWC property. Commonwealth v. Dunkle, Case No. NT-0232-2016 (Mag. Dist. J. 03-01-04 June 16, 2016). Combined with the observations of AWC witnesses, Dunkle’s criminal convictions and guilty plea to trespass demonstrate unequivocally that Dunkle knew where AWC property began, knew he was not permitted to enter onto AWC property, and repeatedly engaged in a course of conduct designed to trespass onto AWC. AWC has exceeded the “reasonable probability” standard necessary to satisfy the first prong for injunctive relief against Dunkle.

B. AWC Likely to Suffer Irreparable Harm Without Injunction Against Defendants

1. *AWC has and will continue to suffer irreparable harm without an injunction against Sulpizio and Bogunovich*

Because AWC has a strong likelihood of success on the merits of its FACE Act claim against Sulpizio and Bogunovich, and because the FACE Act authorizes preliminary injunctive relief, the second prong of irreparable harm is satisfied. United States v. Roach, 947 F. Supp. 872, 877 (E.D. Pa. 1996).

A statutory provision authorizing preliminary injunctive relief may be an adequate substitute for a finding of irreparable injury to the plaintiff, the second element of a preliminary injunction analysis. Indeed, when an injunction is sought pursuant to a statutory provision, this court has found irreparable harm when “probable cause exists to believe that the statute in question is being violated and that there is some reasonable likelihood of future violations.”

Id. at 877 (multiple citations omitted).

Here, AWC has demonstrated probable cause to believe that the FACE Act is being repeatedly violated by Sulpizio’s and Bogunovich’s actions and those violations are likely to continue. Sulpizio has engaged in the use of force and physical obstruction against AWC staff, volunteers, or patients to intentionally injure, interfere with, or intimidate them from providing—and to intimidate patients from obtaining—reproductive health services. E.g., Stiles Decl., ¶¶ 13-14; Nurse Exec. Doe Decl., ¶ 11; Employee No. 1 Decl., ¶ 11. These repeated actions support the conclusion that probable cause exists to believe the FACE Act is being violated and, given that both Sulpizio and Bogunovich have been engaged at AWC for years, there is a reasonable likelihood of continued violations—unless this Court issues the proposed injunction.

Even in the absence of any presumption, the facts show that Sulpizio’s and Bogunovich’s conduct is likely to cause irreparable harm. As the Cain court noted, [t]he defendants are accused of obstructing access to medical facilities, and ‘women denied access [to medical facilities]

cannot be compensated by money damages; injunctive relief alone can assure them the clinic's availability.'" New York ex rel. Spitzer v. Cain, 418 F. Supp. 2d 457, 473 (S.D.N.Y. 2006) (citing and quoting N.Y.S. Nat'l Org. for Women v. Terry, 886 F.2d 1339, 1362 (2d Cir. 1989) (affirming injunction under public nuisance cause of action)). Sulpizio and Bogunovich engage in a course of conduct designed to physically obstruct AWC staff, volunteers, and patients from reaching the AWC Clinic or to make reaching the Clinic unreasonably difficult or hazardous. Sulpizio and Bogunovich endeavor to deny access to the Clinic and, as such, the harm they inflict or intend to inflict cannot be remedied by money damages.

Sulpizio's and Bogunovich's actions present additional harm in the way that they unduly tax local law enforcement. AWC has been forced to call the Colonial Regional Police Department many, many times to protect the ability of its staff, volunteers and patients to enter the AWC Clinic and obtain or provide services. E.g., Nurse Exec. Decl., ¶¶ 13; 21 and 26 (calls to police department because of Sulpizio); see Commonwealth v. Sulpizio, Case No. NT-00140-2017 (Mag. Dist. J. 03-01-04 July 7, 2017) & Commonwealth v. Sulpizio, Case No. CP-48-SA-00194-2017 (Ct. Com. Pleas Northampton Cnty. Oct. 18, 2017) (charges against Sulpizio). These harms can be mitigated or eliminated with issuance of the proposed injunction order.

Plainly stated, as long as Sulpizio's and Bogunovich's conduct continues unfettered, AWC staff, volunteers and patients remain at risk of irreparable harm. The proposed injunction order is thus necessary to bring reasonable limits to the ability of Sulpizio and Bogunovich to violate the FACE Act and further their campaign of harassment and intimidation against AWC.

2. *AWC has and will continue to suffer irreparable harm without an injunction against Dunkle*

An injunction against trespass or continued trespass is consistent with Pennsylvania law. In Greyhound Lines, Inc. v. Peter Pan Bus Lines, Inc., 845 F. Supp. 295 (E.D. Pa. 1994), this

Court held that repeated trespass onto the plaintiff's land "threaten[ed] irreparable injury as legally defined. It is well grounded in Pennsylvania law that continuing trespass is properly enjoined because recovery in damages, while possible, is impractical because the cost of pursuing recovery will usually exceed the recovery itself." *Id.* at 302 (multiple citations omitted).

Here, Dunkle has repeatedly trespassed on AWC property—for which he was convicted or pled guilty in court. As recently as February 2019, Dunkle resumed his trespassing and unlawfully and intentionally entered onto AWC property fifteen (15) times in one day. This is precisely the sort of continuing trespass that demonstrates irreparable harm: money damages would be impractical because the cost of pursuing recovery would exceed recovery itself, and AWC is entitled to the full use and enjoyment of the land on which Dunkle unlawfully enters. Moreover, Dunkle's well-known history of extremism and his recent resumption of trespassing generate reasonable fears on the part of AWC staff and volunteers that Dunkle is escalating his efforts to intimidate and harass the staff, volunteers, and patients at AWC.

C. The Balance of Harms Weighs In Favor of Issuing Injunction Against Defendants

Any harm to Defendants that might result if the Court issued an injunction would be minimal, but the benefits to AWC would be substantial. Accordingly, the balance of harms weighs in favor of issuing the injunction.

The conduct that AWC seeks to enjoin—namely, the use of force, physical obstruction, and trespassing of AWC that seems to interfere with and intimidate its staff, volunteers and patients—is not legally protected. Defendants have no right or privilege to engage in that conduct. By contrast, AWC patients have a right to seek reproductive health care services at its Clinic—even if Defendants disagree with the services provided there. And AWC staff and volunteers have the right to access the Clinic and to the full use and enjoyment of property. In United States v. Roach, the Court found this third prong weighed in favor of issuing an

injunction so long as the injunction was designed to prohibit specific conduct that was not protected by the First Amendment and did not “prohibit all expressive activity.” 947 F. Supp. at 877. Here, the proposed injunction will act to prevent Defendants’ further unlawful conduct by excluding them from the areas closest to the driveway entrances to the AWC Clinic, but it still permits Defendants to engage in expressive activity.

A buffer zone is an appropriate remedy for a FACE Act violation where the requested relief “burdens no more speech than necessary to serve a significant governmental interest,” Madsen v. Women’s Health Center, 512 U.S. 753, 765 (1994), and “is narrowly tailored to the evidence presented.” United States v. McMillian, 946 F. Supp. 1254, 1269 (S.D. Miss. 1995). In Madsen, the Supreme Court approved a 36-foot buffer zone area around a clinic’s property line because “[o]n balance, we hold that the 36-foot buffer zone around the clinic entrances and driveway burdens no more speech than necessary to accomplish the governmental interest at stake.” 512 U.S. at 770. In McMillan, the court approved a 25-foot buffer zone from the clinic’s property line and found that 25-foot zone “will roughly put the defendant across the street from the clinic” and still permit him to exercise his rights of free speech. 946 F. Supp. at 1269-70.

Here, AWC seeks a buffer zone that is more limited than those approved by the Supreme Court. AWC seeks a buffer zone of 25 feet from a driveway entrance, which is eleven feet *less* than the Madsen court upheld, which Defendants could easily comply with while still remaining across the street from the Clinic. Should this Court issue the proposed injunction order, Defendants would be able to fully engage in their expressive conduct against AWC; the buffer zone would only prevent them from being able to easily obstruct cars and individuals from entering the AWC parking lot or otherwise attempt to make ingress or egress unreasonably difficult or hazardous, which they have no right to do anyway. Moreover, the proposed buffer

zone would be imposed only during hours of operation and two hours before or after operation. The proposed order is narrowly tailored only to restrict the speech necessary to serve strong governmental interests. And prohibiting Defendants from entering onto AWC property—which they also have no right to do—would not restrict their expression in any public place.

The proposed injunction would not substantially harm Defendants and would protect the significant interests of AWC in protecting the ability of staff, volunteers and patients to access its Clinic. The proposed injunction would not affect, let alone substantially harm, any third parties or non-parties to this dispute. On the contrary, prospective patients of AWC would be assured of their ability to access unobstructed entrances to the AWC Clinic. The proposed injunction is narrowly tailored to a precise group of individuals and to remedy the precise conduct in which they have repeatedly—and unlawfully—engaged.

D. Injunctive Relief Is In Public Interest

Reproductive health services are a matter of public interest and concern, and the public interest will best be served by granting the preliminary injunction in this matter. A significant public and governmental interest lies in allowing unfettered access to health care facilities. In evaluating this fourth factor, this Court previously held that the public interest is served by enforcement of the FACE Act:

By enacting FACE, Congress specifically sought to promote public health and safety by prohibiting obstructive conduct that historically has injured, intimidated, and interfered with persons seeking to provide or obtain reproductive health services. Congress determined that FACE serves the public interest by ensuring that individuals who seek to provide or obtain reproductive health services can do so free from unlawful interference.

Plaintiff has met its burden of persuasion on each of the four prongs of the preliminary injunction standard.

United States v. Roach, 947 F. Supp. 872, 877 (E.D. Pa. 1996).

This Court has previously held that public interest warranted an injunction to prevent trespassing. “The public interest will not be harmed from enjoining illegal conduct. Furthermore, public safety will be enhanced by ensuring that only the legal and liable possessors of the property will be traversing it.” Greyhound Lines, Inc. v. Peter Pan Bus Lines, Inc., 845 F. Supp. 295, 302 (E.D. Pa. 1994). The public interest is served when a trespasser is enjoined.

V. **CONCLUSION**

For the reasons set forth herein, the Court should grant AWC’s motion for preliminary injunctive relief against Defendants John Dunkle, Anthony J. Sulpizio and Mark Michael Bogunovich, and all persons acting in concert with them, and should issue the proposed Order accompanying AWC’s Motion.

Respectfully submitted,

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