18-2454(L)

18-2623, 18-2627, 18-2630 (XAP)

United States Court of Appeals for the Second Circuit

PEOPLE OF THE STATE OF NEW YORK, By Barbara D. Underwood, Acting Attorney General of the State of New York,

Plaintiff-Appellant–Cross-Appellee,

v.

KENNETH GRIEPP, RONALD GEORGE, PATRICIA MUSCO, RANDALL DOE, OSAYINWENSE OKUONGHAE, ANNE KAMINSKY, BRIAN GEORGE, SHARON DOE, DEBORAH M. RYAN, ANGELA BRAXTON, JASMINE LALANDE, PRISCA JOSEPH, SCOTT FITCHETT, JR.,

Defendants-Appellees–Cross-Appellants,

DOROTHY ROTHAR,

Defendant.

On Appeal from the United States District Court for the Eastern District of New York

BRIEF FOR APPELLANT–CROSS-APPELLEE

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PRELIMINARY STATEMENT

The Attorney General brought this civil enforcement action against numerous anti-choice protestors to redress persistent and extensive violations of federal, state, and city laws that protect safe and reliable access to reproductive health care facilities.[1] Since 2012, defendants have obstructed access to the Choices Women's Medical Center in Queens, New York, by blocking portions of the sidewalk; following and standing in front of patients, companions, and volunteer escorts; and crowding outside and reaching into cars as patients attempt to exit their vehicles. Defendants have also harassed patients, companions, and escorts by following them at extremely close distances and trying to engage them in conversation notwithstanding express and implied requests to stop. In addition, defendants have pushed and shoved escorts in an effort to reach patients, and made threatening statements referring to death and acts of

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[1] Defendants are Kenneth Griepp, Ronald George, Patricia Musco, Ranville Thomas (sued as Randall Doe), Osayinwense Okuonghae, Anne Kaminsky, Brian George, Sharon Richards (sued as Sharon Doe), Deborah Ryan, Prisca Joseph, Angela Braxton, and Jasmine LaLande. The Attorney General is not appealing from the denial of a preliminary injunction against defendant Scott Fitchett Jr.

violence. Defendants' conduct has created an intimidating atmosphere around the clinic and has, at times, resulted in physical altercations.

The Attorney General sought a preliminary injunction against defendants' unlawful conduct. Although a fourteen-day preliminary injunction hearing confirmed through extensive documentary, testimonial, video, and photographic evidence that defendants had engaged in intimidating and obstructionist behavior, the United States District Court for the Eastern District of New York (Amon, J.) denied the motion in its entirety. This Court should reverse.

First, the district court wrongly created a failure of proof by unreasonably discrediting all of the documentary evidence contemporaneously created by clinic escorts and patients and nearly all of the live testimony of the Attorney General's witnesses based on a handful of inconsistencies adduced over numerous days of testimony. The district court had no reasonable basis for finding non-credible *every* escort and patient that had ever described an experience at Choices.

Second, the district court committed multiple errors of law in assessing the likelihood of success on the merits. The court erroneously rejected the Attorney General's physical obstruction claims despite case

law from this Court and others finding nearly identical conduct to violate federal and state law. The court likewise wrongly rejected the Attorney General's 'follow-and-harass' claims and force claims notwithstanding extensive video and other evidence showing harassment and unwanted physical contact resulting from defendants' intentional conduct. The court also failed to properly apply this Court's "true threats" standard in assessing defendants' alarming and unjustified statements that escorts "could die at any moment" and "could be hit with a bullet on the sidewalk," among others.

Finally, the district court erred in finding that the Attorney General failed to show a reasonable likelihood of future violations with respect to three defendants that the court found had violated the relevant statutes. Because these defendants maintain that their conduct was lawful, there was no reasonable basis for the court to find that they will comply with the law in the absence of injunctive relief.

JURISDICTIONAL STATEMENT

The district court had jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1367(a). The district court's order denying the Attorney General's motion for a preliminary injunction was entered on July 20, 2018. The

Attorney General filed a timely notice of appeal on August 20, 2018.[2] (JA[3] 2189-2190.) This Court has jurisdiction pursuant to 28 U.S.C § 1292(a)(1).

QUESTIONS PRESENTED

1. Did the district court abuse its discretion in categorically rejecting nearly all of the Attorney General's documentary and testimonial evidence?

2. Did the district court erroneously deny the Attorney General's motion for a preliminary injunction by incorrectly applying the conduct and intent elements of the relevant statutes?

3. Did the district court erroneously deny the Attorney General's motion for a preliminary injunction despite concluding that three defendants had violated the underlying statutes?

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[2] Defendants have cross-appealed from the district court's July 20, 2018 order. (JA 2191-2196.) The Attorney General's motion to dismiss the cross-appeals is pending. (*See* ECF No. 115.)

[3] Citations to "JA __" refer to the Joint Appendix. Citations to "SPA __" refer to the Special Appendix. Citations to "Ex. __" refer to video exhibits, which have been provided to the Court on a separate disk.

STATEMENT OF THE CASE

A. Federal, State, and City Laws Protect Safe Access to Reproductive Health Care Services

Three overlapping statutes protect safe access to reproductive health care clinics in New York: (1) the federal Freedom of Access to Clinic Entrances (FACE) Act, 18 U.S.C. § 248; (2) the parallel New York State Clinic Access Act (NYSCAA), Penal Law §§ 240.70-.71, and Civil Rights Law § 79-m; and (3) the broader New York City Clinic Access Act (NYCCAA), N.Y.C. Admin. Code §§ 10-1001 to -1007.[4] Each of these statutes was passed to prevent violent, intimidating, or obstructionist conduct that discourages patients from accessing, and providers from offering, a full range of reproductive health care services.

1. The Federal FACE Act

Congress passed the FACE Act in 1994 in response to protracted and widespread violence, harassment, and obstruction at clinics offering abortion services. Between 1977 and early 1993, more than 1,000 acts of violence against abortion providers were reported across the United

[4] Prior to October 2018, NYCCAA was contained at N.Y.C. Admin. Code § 8-801 et seq.

States, including at least 36 bombings, 81 arsons, 131 death threats, 84 assaults, two kidnappings, 327 clinic invasions, and one murder. S. Rep. No. 103-117, at 3 (1993). During the same period, more than 6,000 clinic blockades and other disruptions were reported nationwide. *Id.* Congress determined that these activities have "a significant adverse impact . . . on abortion patients and providers," as well as "on the delivery of a wide range of health care services." *Id.* at 14.

The federal FACE Act allows the United States Attorney General, state Attorneys General, and private individuals, 18 U.S.C. § 248(c)(1)-(3), to seek injunctive relief and civil penalties against anyone 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.

Id. § 248(a)(1). To prove a violation of the FACE Act, a plaintiff must therefore show that the defendant (1) by force, threat of force, or physical obstruction (the conduct element), (2) intended to injure, intimidate, or interfere with a person (the general intent element), (3) because that person or any other person is or has been obtaining or providing

reproductive health services (the specific intent element). Each of these requirements is explained in more detail below.

a. The conduct element

The FACE Act requires evidence of one of three types of conduct—the use of force, the threat of force, or physical obstruction. The statute does not expressly define "force," but courts have generally interpreted the term to mean "power, violence, or pressure directed at a person or thing," with no exception for fleeting or de minimis contact. *People ex rel. Spitzer v. Cain*, 418 F. Supp. 2d 457, 473 (S.D.N.Y. 2006) (quotation marks omitted); *see also United States v. Dinwiddie*, 76 F.3d 913, 924 (8th Cir. 1996). "Acts such as hitting, pushing, shoving, kicking, and knocking over an escort have been found to constitute force within the meaning of the statute." *People ex rel. Spitzer v. Kraeger*, 160 F. Supp. 2d 360, 372 (S.D.N.Y. 2001).

The statute likewise does not define "threat of force," but its legislative history provides that "[t]hreats are covered by the Act where it is reasonably foreseeable that the threat would be interpreted as a serious expression of an intention to inflict bodily harm." S. Rep. No. 103-117, at 23. This Court has limited actionable threats of force to "true

threats," or statements that "an ordinary, reasonable recipient who is familiar with the context of the [communication] would interpret . . . as a threat of injury." *United States v. Turner*, 720 F.3d 411, 420 (2d Cir. 2013) (quotation marks omitted) (alterations in original); *People ex rel. Spitzer v. Operation Rescue Nat'l*, 273 F.3d 184, 196-97 (2d Cir. 2001). "True threats" are actionable even if the speaker does not subjectively intend to act on the threat because the government has a legitimate interest in "protect[ing] individuals from the fear of violence and from the disruption that fear engenders." *Virginia v. Black*, 538 U.S. 343, 360 (2003) (quotation marks omitted).

The FACE Act defines "physical obstruction" to mean "rendering impassable ingress to or egress from a facility . . . or rendering passage to or from such a facility . . . unreasonably difficult or hazardous." 18 U.S.C. § 248(e)(4). By its plain terms, the statute does not limit obstruction to blockading clinic entrances or actually preventing access. Rather, the term "unreasonably difficult" is intended to encompass a much broader range of obstacles, including but not limited to narrowing of walking paths and blocking portions of doorways. *United States v. Soderna*, 82 F.3d 1370, 1377 (7th Cir. 1996). This Court and others have

specifically found that physical obstruction may consist of blocking segments of sidewalks or entrances, standing near car doors, and crowding patients in order to delay their access to clinics. *See, e.g.*, *Operation Rescue Nat'l*, 272 F.3d 193-94; *United States v. Mahoney*, 247 F.3d 279, 284 (D.C. Cir. 2001); *Cain*, 418 F. Supp. 2d at 480.

A physical obstruction claim under the FACE Act does not require evidence that any particular patient was unable to enter a clinic. This Court has affirmed a criminal conviction under the statute where "nobody sought to enter the clinic during the time" of defendant's obstructive act. *United States v. Dugan*, 450 F. App'x 20, 22 (2d Cir. 2011).

b. The general intent element

The FACE Act's general intent element makes it unlawful to "intentionally injure, intimidate, or interfere with" a person. 18 U.S.C. § 248(a)(1). The legislative history and judicial construction of the statute establish that this phrase adds only an intent requirement to the preceding conduct element, and does not impose an additional conduct requirement. While Congress borrowed the text of the FACE Act's general intent requirement from other federal civil rights laws that use it to describe both the act and the intent elements of an offense, *see*

S. Rep. No. 103-117 at 22, Congress chose to define the conduct element of a FACE Act violation separately and used this phrase only to specify the necessary intent. The FACE Act thus does not require proof of actual injury, intimidation, or interference, but rather provides that "[t]he conduct prohibited by [the statute]—force, threat of force, or physical obstruction—is not unlawful *unless it is intended* to injure, intimidate, or interfere with someone." *Id.* at 23 (emphasis added). This Court has likewise found the intent element to be satisfied where a defendant "sought to interfere with those outside the clinic," even if no actual interference occurred. *Dugan*, 450 F. App'x at 22.

The FACE Act defines "interfere with" as "to restrict a person's freedom of movement," and "intimidate" as "to place a person in reasonable apprehension of bodily harm to him or herself or to another." 18 U.S.C. § 248(e)(2)-(3). Although the statute does not define "intentionally," its legislative history conclusively states that the term means "intending to perform the act and aware of the natural and probable consequences." S. Rep. No. 103-117, at 24 n.39. Accordingly, this element requires only general intent—that is, proof of an intentional

rather than an inadvertent act. *See also Greenhut v. Hand*, 996 F. Supp. 372, 378 (D.N.J. 1998).

c. The specific intent element

The FACE Act's specific intent element requires that the offender acted "because" a person is or has been obtaining or providing reproductive health services, "or in order to intimidate" any person from obtaining or providing such services. 18 U.S.C. § 248(a)(1). As Congress explained, "[t]his motive requirement is not simply a repetition of the scienter [general intent] requirement," but "another element of the offense." S. Rep. No. 103-117, at 24 n.39. The specific intent requirement is satisfied by showing that the defendant "intend[ed] to obstruct and interfere with the obtaining and provision of reproductive health services." *United States v. Weslin*, 156 F.3d 292, 298 (2d Cir. 1998).

2. New York State Clinic Access Act

In 1999, the New York State Legislature passed NYSCAA to supplement the federal FACE Act. *See* Penal Law §§ 240.70-.71. The legislative history reflects substantial concern that "obstruction, intimidation, and violence deter[s] women from seeking, and doctors,

hospitals, and other providers from offering, necessary health care" throughout the State. *See, e.g.*, Mem. from Kathy A. Bennett, Chief of Legislative Bureau of the Office of the N.Y. Att'y Gen., to James M. McGuire, Counsel to the Governor, and Ltr. from Mayor Rudolph W. Giuliani to Governor George E. Pataki, Bill Jacket for ch. 635 (1999), at 4-5, 6-9. The New York Attorney General and local district attorneys are expressly authorized to seek relief under NYSCAA. *See* Civil Rights Law § 79-m.

NYSCAA has largely the same elements and definitional terms as the FACE Act, except that the state statute's specific intent requirement is defined as the intent "to discourage such other person or any other person or persons from obtaining or providing reproductive health services," Penal Law § 240.70(1)(a)-(b), rather than an intent "to intimidate such person," 18 U.S.C. § 248(a)(1). There is no case law or legislative history on the import of NYSCAA's use of "discourage" rather than "intimidate." The district court below treated the FACE Act and NYSCAA as coextensive. (SPA 66.)

3. New York City Clinic Access Act

In 1994, the New York City Council passed NYCCAA, which made it unlawful to, among other things, physically obstruct clinic entrances, follow and harass individuals, or physically damage a clinic, "with the intent to prevent any person from obtaining or rendering, or assisting in obtaining or rendering" reproductive health care services. Local Law No. 3 (1994), *reprinted in* 1994 N.Y.C. Legislative Annual 17-19.

In 2008, the City Council proposed substantial amendments to NYCCAA in response to reports of concerning behavior by protestors outside of New York City clinics. Multiple reproductive health care providers reported that protestors were terrorizing patients, including by chasing and following patients down the street, grabbing and touching patients, shoving literature into patients' hands, standing in front of cars and taxis dropping off patients, and blocking patients' paths towards clinic entrances. *See* N.Y.C. Council, Comm. on Civil Rights, *Committee Report of the Governmental Affairs Divisions* (4/1/09 Report) at 7-8 (Apr. 1, 2009). The City Council determined that these activities inhibit

women's access to medical services and undermine public safety, and passed the amended statute in 2009. *See* Local Law No. 24 (2009).[5]

The amendments made several changes to the statute. First, the City Council eliminated the law's specific intent requirement, while preserving a general intent requirement. *See id.* § 4; N.Y.C. Council, *Hearing of the Joint Committee on Women's Issues and Civil Rights* (11/18/08 Tr.) at 24:6-14, 37:24-38:13 (Nov. 18, 2008) (testimony of Karen Agnifilo, General Counsel, Office of the Criminal Justice Coordinator). Second, the City Council added several new categories of prohibited conduct and clarified the scope of previously proscribed conduct. *See* Local Law No. 24 § 4. Finally, the City Council created a cause of action for clinic operators. *See id.* § 5.

As relevant to this case, NYCCAA prohibits the following conduct, irrespective of whether an offender acts with the specific intent to interfere with reproductive health care services:

> (1) knowingly obstructing or blocking another person from entering or exiting the premises of a reproductive health care facility, by physically

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[5] Local Law 24 and its legislative record are located at https://legistar.council.nyc.gov/LegislationDetail.aspx?ID=448739&GUID=F71810BC-EF31-44EF-9C6C-5860121ED672&Options=ID|Text|&Search=24.

> striking, shoving, restraining, grabbing, or otherwise subjecting a person to unwanted physical contact;
>
> (2) knowingly obstructing or blocking the premises of a reproductive health care facility, so as to impede access to or from the facility;
>
> (3) following and harassing another person within 15 feet of the premises of a reproductive health care facility;
>
> (4) engaging in a course of conduct or repeatedly committing acts within 15 feet of the premises of a reproductive health care facility when such behavior places another person in reasonable fear of physical harm; or
>
> (5) knowingly interfering with the operation of a reproductive health care facility.

See N.Y.C. Admin. Code § 10-1003(a)(1)-(4), (6). The legislative histories of both the 1994 and 2009 versions of NYCCAA refer to and incorporate New York's criminal harassment statutes when discussing the scope of the follow-and-harass prohibition. *See* 4/1/09 Report at 10 (citing Penal Law §§ 240.25, 240.26); 11/18/08 Tr. at 33:24-34:7; N.Y.C. Council, *Report of the Committee on Public Safety* at 1 (Feb. 28, 1994), *reprinted in* 1994 N.Y.C. Legislative Annual 20.

B. Defendants' Unlawful Conduct Outside the Choices Women's Medical Center

1. Choices Women's Medical Center

The Choices Women's Medical Center is an ambulatory outpatient medical facility located in Queens, New York. (JA 192.) Choices offers a full range of reproductive health care services, including obstetrics and gynecological services, prenatal care, and medical and surgical abortions. (JA 1098.) Choices has three entrances and exits: a main public entrance, an administrative entrance for staff, and a patient exit. (JA 192, 2877.) The sidewalk outside the main public entrance is approximately sixteen feet wide. (JA 2877.) The majority of patients travel to Choices by public transportation and arrive on foot, while the remainder travel by car and are dropped off on the sidewalk outside the main entrance to the clinic. (JA 387.)

Choices has been the target of anti-choice protest activity since it began to operate in its current location in 2012. (JA 849-850.) Following a September 2012 incident in which numerous protestors surrounded a patient trying to enter the clinic (Ex. 1; JA 850-851), Choices established a formal volunteer escort program to help patients enter the clinic safely and with minimal stress (JA 849, 862, 2206-2207, 2220). Volunteer

escorts receive training and are required to sign and abide by a code of conduct that prohibits unnecessary engagement with protestors. (JA 356, 360, 2207, 2236.)

Escorts volunteer on Saturday mornings, which is when protest activities primarily occur. (JA 377.) At the end of each shift, escorts meet to recap the day's activities, including any particularly concerning protestor behavior. (JA 363-367.) Following the meeting, escort leaders compile the feedback into a form that includes checklist questions and an opportunity to elaborate on particular incidents. (JA 363-367, 2234-2235.) Choices also asks patients arriving for Saturday appointments to complete questionnaires describing their experiences with protestors. (JA 1044, 2120-2123, 2370-2378.)

2. Defendants' unlawful activities

Several groups and individuals opposed to abortion rights gather to protest outside Choices on Saturday mornings.[6] Many of these protestors

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[6] The district court erroneously found that "escorts often outnumber[] the protestors two to one." (SPA 7.) The court cited to testimony referring to an unusually large number of volunteers in the weekend immediately following the 2016 presidential election. (JA 377.) On a typical weekend, by contrast, there are approximately 15-20 escorts

are peaceful and law-abiding: they pray, sing hymns, hold signs, and demonstrate without impeding patients or interfering with the clinic's operations. (JA 388-389.) Nothing in this lawsuit or in federal, state, or local law seeks to restrict these protest activities.

The defendants in this case are affiliated with two groups that utilize far more aggressive and intimidating measures: Church at the Rock and Grace Baptist Church.[7] The following summary, drawn from evidence introduced at the preliminary injunction hearing, provides an overview of defendants' practices.

a. Defendants use their bodies and large signs to obstruct patients' access to the clinic.

Most patients enter Choices through the main public entrance, whether they arrive on foot or by car. Defendants employ various methods to slow or delay patients' arrival.

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and 25-30 protestors. (JA 377-378, 390-391.) On certain Saturdays, protestors substantially outnumber escorts. (*See, e.g.*, JA 2261.)

[7] Defendants Griepp, Ronald George, Musco, Thomas, Okuonghae, Kaminsky, Brian George, Richards, Ryan, and Joseph are affiliated with Church at the Rock. Defendants Braxton and Lalande are affiliated with Grace Baptist Church.

First, defendants narrow the already crowded sidewalk space by holding multiple very large signs measuring approximately three-by-five feet perpendicular to the building. (JA 1736, 2200, 3950.) Kenneth Griepp testified that his goal is to have a "blizzard of signs" outside of Choices (JA 1736) and admitted that the signs create roadblocks "[i]n the direct path to the door" (JA 1739).

Ronald George, Patricia Musco, and Ranville Thomas use signs to slow patients and escorts who are attempting to enter Choices. (JA 445-448, 483-484, 496, 507-510, 902, 1196, 1231-1232, 1575; Exs. 31, 41, 102, 307.) Exhibit 31, for example, shows Ronald George moving in front of escorts with a large sign as they attempt to help a patient enter the clinic. (Ex. 31.) Exhibit 41 likewise shows Thomas standing in the middle of the sidewalk, holding a large sign directly in the path of a patient approaching the clinic's door. (Ex. 41.)

Defendants also use their bodies to impede patients and escorts trying to enter the clinic. Griepp, for example, stands within feet of the clinic entrance, forcing patients and escorts to move around him to enter. (JA 668, 911-912, 2292-2293.) Other defendants, including Osayinwense Okuonghae, run up to and move in front of patients approaching the

clinic, forcing patients to squeeze between stationary protestors (often holding large signs), roving protestors, and escorts trying to assist with access to the door. (JA 518-519; Exs. 23, 138.)

Ronald George, Brian George, Musco, Anne Kaminsky, Sharon Richards, and Angela Braxton engage in similar conduct. (JA 449-451, 524-525, 557-558, 905-906, 1258-1259, 1268-1269, 1592-1593, 1859-1860, 1870, 1968-1970, 2254, 2299, 2324, 2373-2374, 2846; Exs. 7, 55, 307.) Exhibit 307, for example, shows Ronald George moving in front of a patient being escorted to Choices at an angle that forced the patient to stop walking to avoid colliding into a wall. (Ex. 307.) At the end of the video, a police officer verbally admonished George for obstructing the patient's access to the clinic by using his body to physically block her path. Similarly, Brian George admitted in a declaration submitted after trial that he uses a technique called "slow walking" to delay patients' entry into the facility. (JA 2187.)

Ronald George, Musco, Thomas, Okuonghae, Kaminsky, and Braxton also use their bodies to block or impede patients arriving to the facility by car, often by standing in large groups within inches of the car door before the patients get out. (JA 485-490, 496-499, 518-520, 929-933,

1153-1159, 1209-1210, 1238-1239, 1244-1250, 1270, 1288-1289, 1344, 1573-1574, 1576-1577, 1861, 2028-2029, 2251, 2381, 2882; Exs. 39, 49B, 58, 105, 137.) Exhibit 39, for example, shows Ronald George, Thomas, Musco, and Okuonghae converging on a couple exiting their car with a child and a stroller. (Ex. 39.) Exhibit 137 similarly shows Thomas and three other protestors swarming around an escort and patient trying to exit a car. (Ex. 137.) Musco and Okuonghae also approach arriving cars and reach directly into the car windows to speak to patients and their companions. (Exs. 49B, 58, 105.)

b. Defendants follow and harass patients, companions, and escorts

Defendants also target patients and their companions by following them very closely as they approach the clinic and verbally haranguing them even when the patients, companions, or escorts assisting them ask defendants to stop. Griepp instructs defendants to "tag team" with each other to address patients who resist conversation: "one church member might walk ten feet with a patient and then another church member will pick up and have a second opportunity." (JA 1750.) Defendants therefore make "multiple passes" at their targets (JA 1809), and insist on following

and berating patients, companions, and escorts even after being asked to desist (JA 1709, 1729, 1849, 1854-1855, 1905-1907; Ex. 99).

Exhibit 333, for example, shows Thomas closely following a patient despite her repeated requests that he "back up." (Ex. 333.) In Exhibits 351 and 354, Thomas similarly follows and speaks to individuals who are visibly upset and trying to walk away from him. (Exs. 351, 354.) Exhibit 324 likewise shows Deborah Ryan following on the heels of a patient trying to enter the clinic, despite the patient rebuffing Ryan's initial approach. (Ex. 324.) In addition to Thomas and Ryan, Ronald George, Prisca Joseph, Jasmine LaLande, Musco, Richards, and Braxton also follow and continue to engage patients and companions despite express and implied requests to stop. (JA 427-430, 477, 479-480, 528-530, 550-552, 560-564, 582-587, 1162-1163, 1188-1190, 1195, 1198-1199, 1212-1216, 1232, 1253-1254, 1272-1273, 1282-1286, 1293-1295, 1332-1335, 1577, 1807-1809, 1848-1851, 1854-1856, 1905-1907, 2029-2030, 2252-2259, 2264, 2283-2286, 2295, 2297, 2304, 2380, 2382, 2802; Exs. 3, 17, 24, 37, 135, 452.)

Patients and their companions are often upset, intimidated, and frightened by defendants' conduct. On several occasions, patients have

stepped off the sidewalk and into traffic to avoid defendants' persistent approaches. (JA 550-552, 1188-1190, 2259, 2304, 2785.) Patients and companions become especially concerned when defendants address their minor children. On one occasion, for example, Thomas told a small child, "[D]on't let your mother go in there; they kill children in there." (JA 2264.) On a different occasion, Ronald George continued to follow a man arriving at the clinic with a small child, even after the man said "I told you to stop. I've got my kid here, man, leave me alone." (JA 477, 2297.)

Several physical altercations have occurred as the result of defendants' relentless conduct. Exhibit 135, for example, shows a confrontation between Joseph and a patient's female companion that occurred because Joseph knowingly approached the women after they had expressly rebuffed Musco's earlier advances. (Ex. 135; JA 1805-1808.) The companion was so upset by Joseph's conduct that she hit her, and Joseph responded by striking the companion in return. Exhibits 133, 134, and 387 show a patient arriving at the clinic with her young child, becoming upset by defendants' haranguing behavior, leaving the clinic to confront defendants, and hitting Braxton's camera after Braxton began to film her. (Exs. 133, 134, 387; JA 1599-1600, 2024.) On a different

occasion, a male companion whose partner had miscarried a wanted pregnancy became so upset by Braxton's conduct towards his partner that he ran to the parking lot to obtain rocks and kicked a sign held by a different protestor. (JA 560-564, 2502; Ex. 37.)

c. Defendants use force and threats of force to intimidate and interfere with patients and escorts

Defendants have often knocked into, shoved, and stepped on the feet of patients and escorts. In May 2017, for example, Richards stepped on and broke a patient's sandal. (JA 899, 1262-1264, 1590, 2321.) On a different occasion, Richards collided into escorts who were helping a patient walk into the clinic with her child when Richards tried to reach around the escort's arm to force a pamphlet into the patient's hand. (JA 1259-1261, 2250.) Ronald George has similarly shoved escorts (JA 2265-2268) and stepped on their feet (JA 2288-2289) in an attempt to reach patients, causing those escorts to stumble and trip. In addition to Ronald George and Richards, LaLande, Ryan, and Thomas have also hit escorts, stepped on their feet, and knocked into them while attempting to reach patients. (JA 431-434, 438-440, 501-505, 531-532,

580-584, 1271-1273, 1316-1318, 1935-1936, 2255-2256, 2297, 2304, 2307, 2309; Ex. 21.)

Thomas and Ronald George have used verbal threats to intimidate escorts. In January 2016, for example, Thomas told escorts "that they could die at any moment" and "could be hit with a bullet on the sidewalk." (JA 929, 1202-1203, 1578, 2257, 2379.) These statements were made only six weeks after an anti-choice protestor shot and killed three people at a Planned Parenthood clinic in Colorado.[8] In April 2016, immediately following a knife attack that occurred across the street from the clinic during a Saturday morning shift, Thomas told an escort, "[T]hat could be you one day. Someone could pull a knife on you." (JA 1335-1336; *see also* JA 507, 2263.) On other occasions, Thomas told an escort, "You're going to kick the bucket soon." (JA 928-929, 2251.) Ronald George has likewise told escorts that "the people who went to work on 9/11 didn't know what was going to happen that day, you never know when you're going to die." (JA 441-442, 2267.)

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[8] *See* Julie Turkewitz & Jack Healy, *3 Are Dead in Colorado Springs Shootout at Planned Parenthood Center*, N.Y. Times, Nov. 27, 2015; Richard Fausset, *Suspect in Colorado Planned Parenthood Rampage Declares 'I'm Guilty' in Court*, N.Y. Times, Dec. 9, 2015.

Thomas has also stood within inches of patients and told them that the escorts would not be there when the patients left the clinic, implying that patients would be left unprotected upon leaving their appointments. (JA 1195-1196.)

d. Defendants interfere with the clinic's operations by deliberately misleading patients

On at least two different occasions, Musco and Kaminsky approached patients heading toward Choices and falsely told them that the clinic was closed. (JA 1343-1344, 1384-1385.) As a result, those patients left without receiving medical treatment. (JA 1343-1344, 1384-1385.)

C. Procedural History

1. The Attorney General's complaint and motion for a preliminary injunction

In June 2017, the Attorney General brought an enforcement action against the individual protestors pursuant to the FACE Act, NYSCAA, and NYCCAA, seeking declaratory and injunctive relief, as well as civil penalties. (JA 41-72.) The Attorney General also filed a motion for a preliminary injunction against all defendants. (JA 73-74.) Defendants subsequently moved to dismiss, challenging the Attorney General's standing and the constitutionality of the three statutes. (JA 75-80.)

Although the parties initially agreed to forgo motion practice on the preliminary injunction and instead to conduct expedited discovery and a bench trial (JA 21), defendants foreclosed that procedural route when they announced less than one month before trial that they intended to file counterclaims if their motions to dismiss were denied (JA 111-112; SPA 4). Accordingly, the United States District Court for the Eastern District of New York (Amon, J.) held a fourteen-day preliminary injunction hearing in February and March 2018.

The Attorney General called seven witnesses—four current and former clinic escorts (Pearl Brady, Mary Lou Greenberg, Margot Garnick, and Theresa White), the clinic's director of counseling (Esther Prigue), a front desk employee (Angelica Din), and a former security guard (Troyd Asmus). Defendants called ten witnesses—seven defendants (Griepp, Ronald George, Joseph, Musco, Thomas, Braxton, and Fitchett), a pastor affiliated with Grace Baptist Church (Peter Nicotra), the founder of Choices (Merle Hoffman), and an investigator for the Attorney General's office (Luis Carter). The parties also offered extensive documentary, video, and photographic evidence.

2. The district court's denial of the motion for a preliminary injunction

In July 2018, the district court denied the Attorney General's motion for a preliminary injunction in its entirety. (SPA 1-103.) The court issued several threshold rulings for purposes of resolving the motion.[9] Specifically, the court agreed that the Attorney General had standing to enforce violations of all three statutes (SPA 56-62), rejected defendants' First Amendment challenges as foreclosed by circuit precedent (SPA 63-66), and declined to resolve defendants' vagueness challenge to NYCCAA's follow-and-harass provision (SPA 95-97). Instead, the court concluded that the Attorney General failed to show a likelihood of success on the merits of most of its claims or a likelihood of repetition of wrongs with respect to those violations the Attorney General had established.

In reaching these conclusions, the district court categorically disregarded as unreliable or non-credible almost all of the live testimony from five of the seven witnesses called by the Attorney General, based on a few isolated incidents where the court found that some of these

[9] The district court did not appear to issue these rulings in connection with defendants' motions to dismiss, which remain pending.

witnesses had been inconsistent or self-contradictory. (SPA 5-6, 11-18.) The court made no specific findings about defendants' credibility, and instead accepted at face value their denials of misconduct and innocent explanations of intent. (*See, e.g.*, SPA 21-23, 25-26, 28-32, 44-45, 48-49, 90-91.) The court also categorically rejected all of the escort recaps and patient questionnaires submitted by the Attorney General as unreliable hearsay entitled to no weight. (SPA 11-13.)

The district court thus limited its review to video and photographic evidence and defendants' testimony. Based on that evidence, the district court found that, with a few exceptions, the Attorney General had failed to show violations of the underlying statutes. The court concluded that video evidence supporting the Attorney General's force claims showed only "incidental" contact between defendants, escorts, and patients, and that such contact did not establish that defendants had acted with "intent to injure, intimidate, or interfere."[10] (SPA 71-72.) The court similarly

[10] Defendants did not argue, and the district court did not find, that the Attorney General failed to prove the specific intent element of the FACE Act and NYSCAA, which requires proof that defendants acted "because" a person was receiving or providing reproductive health care services, or in order to intimidate or discourage a person from receiving

concluded that video evidence supporting the follow-and-harass claims failed to show defendants' intent to harass, annoy, or alarm patients, even though defendants admitted that they had a deliberate policy of following and continuing to engage patients in conversation even after being asked to stop. (SPA 99-100.)

Although Thomas and Ronald George admitted telling escorts that they could "die at any moment" (among other threatening statements), the district court construed such statements as harmless descriptions of religious beliefs rather than true threats of force. (SPA 75-78.) The court also concluded (with one exception) that defendants had not physically obstructed access to Choices because patients were ultimately able to enter the facility despite defendants' crowding around patients' cars, narrowing of the sidewalk with large signs, shadowing of patients on the brief walk into the clinic, and more. (SPA 91-95.)

The district court did identify several violations committed by three defendants. First, the court concluded, based on defendants' admissions, that Brian George's "slow walk" in front of patients on three occasions

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or providing such services. *See* 18 U.S.C. § 248(a)(1); Penal Law § 240.70(1)(a)-(b).

constituted intentional physical obstruction. (SPA 43.) Second, the court decided that Musco and Kaminsky had each, on separate occasions, interfered with the clinic's operations by falsely telling an approaching patient that the clinic was closed. (SPA 29, 42-43.) Nevertheless, the court accepted defendants' representations that they would not engage in similar misconduct in the future and held that a preliminary injunction was therefore unwarranted. (SPA 90-91, 102-03.)

STANDARDS OF REVIEW

This Court reviews a district court's legal rulings de novo and the denial of a motion for a preliminary injunction for abuse of discretion. *Friends of the E. Hampton Airport, Inc. v. Town of East Hampton*, 841 F.3d 133, 143 (2d Cir. 2016). Evidentiary rulings made in connection with the denial of a preliminary injunction are also reviewed for abuse of discretion. *Schering Corp. v. Pfizer Inc.*, 189 F.3d 218, 224 (2d Cir. 1999). A district court abuses its discretion when its ruling is based "on an incorrect legal standard or on a clearly erroneous assessment of the facts." *New York Progress & Prot. PAC v. Walsh*, 733 F.3d 483, 486 (2d Cir. 2013) (quotation marks omitted).

A party requesting a preliminary injunction must generally show "(1) irreparable harm; and (2) either (a) a likelihood of success on the merits, or (b) sufficiently serious questions going to the merits of its claims to make them fair ground for litigation, plus a balance of the hardships tipping decidedly in favor of the moving party," and (3) "that a preliminary injunction is in the public interest."[11] *Oneida Nation of New York v. Cuomo*, 645 F.3d 154, 164 (2d Cir. 2011). However, when a statute authorizes the government to seek preliminary injunctive relief but does not specifically require proof of irreparable harm, such harm is presumed and need not be proven. *See City of New York v. Golden Feather Smoke Shop, Inc.*, 597 F.3d 115, 121 (2d Cir. 2010).

SUMMARY OF ARGUMENT

The district court's denial of the Attorney General's motion for a preliminary injunction should be reversed for several reasons.

First, the district court's determination that the Attorney General failed to present sufficient credible evidence to support its claims was

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[11] Defendants did not dispute below that the Attorney General satisfied the "public interest" prong of the preliminary injunction standard.

based on the court's unreasonable rejection of nearly all of the Attorney General's evidence.

Second, the district court erred in holding that the Attorney General failed to demonstrate a likelihood of success on the merits of the claims. The court applied an incorrect legal standard for determining what conduct constitutes physical obstruction under the FACE Act, NYSCAA, and NYCCAA by holding that obstruction requires evidence that patients were barred from accessing a clinic. To the contrary, the statutes prohibit any conduct that makes access to a clinic unreasonably difficult or otherwise impedes such access. The court also wrongly concluded that the Attorney General failed to establish defendants' intent with respect to NYCCAA's follow-and-harass provision and the force claims under all three statutes. The statutory texts and governing case law make clear that defendants' undisputed conduct violated the statutes' prohibitions. The district court further misapplied this Court's "true threats" standard by failing to meaningfully analyze the context in which defendants' threatening statements were made.

Finally, the district court erred in finding that the Attorney General failed to show a reasonable likelihood of future violations with respect to

three defendants for whom past violations had been established. The record evidence showed that defendants believe their conduct to be lawful and are likely to repeat it in the absence of injunctive relief.

ARGUMENT

POINT I

THE DISTRICT COURT ERRONEOUSLY DISREGARDED NEARLY ALL OF THE ATTORNEY GENERAL'S DOCUMENTARY AND TESTIMONIAL EVIDENCE

An erroneous evidentiary ruling is grounds for reversal when it affects a party's substantial rights, including where a district court rejects "a party's primary evidence in support of a material fact, and failure to prove that fact defeats the party's claim." *Schering*, 189 F.3d at 224 (reversing denial of motion for preliminary injunction). Here, the district court incorrectly rejected the overwhelming majority of the Attorney General's documentary and testimonial evidence, including every escort recap and patient questionnaire offered in support of the motion for a preliminary injunction, and nearly all of the testimony from five of the seven witnesses introduced by the Attorney General. (SPA 5-6, 11-18.) The court's ruling led it to disregard substantial evidence that supported the Attorney General's claims. (SPA 71, 92, 99.) Because the

district court's denial of the motion for a preliminary injunction was based in substantial part on failure of proof, and because that failure of proof was the result of multiple unsupportable rulings, the decision below must be reversed.

A. The District Court Clearly Erred in Categorically Declining to Consider Clinic Escort Recaps and Patient Questionnaires.

With respect to the Attorney General's documentary evidence, the district court erroneously determined that the clinic escort recaps and patient questionnaires were hearsay evidence entitled to no weight. (SPA 11-13.) It is well-established that hearsay evidence is admissible on a motion for a preliminary injunction, as the district court acknowledged. (SPA 12 (citing *Mullins v. City of New York*, 626 F.3d 47, 48 (2d Cir. 2010)). The court nonetheless held, without citing to any authority, that hearsay evidence is entitled to no weight when the parties have conducted discovery and non-hearsay evidence is available. This Court has never made such a distinction.

To the contrary, this Court held in *Mullins* that hearsay evidence was properly considered on a motion for a preliminary injunction decided, as here, after a multi-day evidentiary hearing, which in *Mullins* followed

summary judgment, a merits trial, and a remand during an earlier stage of the proceeding. *See* 626 F.3d at 50-51. The non-hearsay record in *Mullins* was no less developed than the record here, but this Court nonetheless found consideration of hearsay evidence to be appropriate. The district court erred in concluding otherwise.[12]

The district court also erroneously rejected all of the contemporaneously created escort recaps for "exaggerat[ing] the impropriety of protestor conduct and generally fail[ing] to provide the context of the interactions they describe." (SPA 12-13.) The court's sole support for this categorical rejection was a single example of an inconsistency between a statement in one escort recap and later live testimony at the preliminary

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[12] Because hearsay evidence is admissible on a motion for a preliminary injunction, the Attorney General's evidence need not have satisfied a hearsay exception to have been considered. But the escort recaps or patient questionnaires could also have been admitted under well-established hearsay exceptions. For example, the present sense impression and excited utterance exceptions, *see* Fed. R. Evid. 803(1)-(2), are "derived from the belief that contemporaneous statements about observed events leave less time to forget or fabricate and, therefore, tend to be reliable." *United States v. Gonzalez*, 764 F.3d 159, 169 (2d Cir. 2014). The escort recaps contain detailed recollections of contemporaneous events (*see e.g.*, JA 2320-2322), while the patient questionnaires memorialize encounters with protestors shortly after the encounters occurred (*see e.g.* JA 2375).

injunction hearing. (*See* JA 908-910, 2316-2319.) Even if the district court had grounds to reject that particular escort recap, it had no justifiable basis to reject *every* escort recap introduced by the Attorney General on the same basis. Each recap described different incidents from different shifts, based on the recollections of distinct groups of volunteer escorts. The court's ruling failed to identify any reasonable basis for assuming that *every* escort had exaggerated or made misrepresentations in the recaps. Such blanket rulings are strongly disfavored because of the substantial risk that they are arbitrary and overbroad. *See Cerabio LLC v. Wright Med. Tech., Inc.*, 410 F.3d 981, 994 (7th Cir. 2005). The district court thus abused its discretion in categorically rejecting an entire category of documents based on its concerns about a single one of those documents.

The district court likewise erred in rejecting every patient questionnaire offered by the Attorney General. (SPA 13). The court justified its ruling by stating that it was difficult to ascertain the "representative value" of the documents in light of Choices' inconsistent record-keeping practices. (SPA 13.) The Attorney General did not introduce patient questionnaires as "representative" evidence, but rather as further evidence of the types of misconduct described in testimonial and

documentary evidence. (*See, e.g.* JA 2371 (patient noting that protestors tried to prevent her from entering Choices notwithstanding her request that they stop speaking to her).) The court abused its discretion in finding that the patient questionnaires introduced at the hearing were unreliable for the narrow purpose for which they were offered.

B. The District Court Clearly Erred in Finding Several Witnesses' Testimony Entirely Non-Credible.

The district court also erred in dismissing as non-credible nearly all of the live testimony of five of the Attorney General's seven witnesses. Although a district court generally has substantial leeway to make credibility determinations, its findings are not insulated from appellate review if the court committed clear error in rejecting witness testimony. *See Anderson v. City of Bessemer City*, 470 U.S. 564, 575 (1985) ("The court of appeals may well find clear error even in a finding purportedly based on a credibility determination"). In particular, as relevant here, a district court may not draw unreasonable inferences from a particular credibility finding. *See Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 512 (1984) (noting that "discredited testimony" is normally not "a sufficient basis for drawing a contrary conclusion").

Here, the district court committed clear error in the sweeping inferences that it drew from its purported credibility findings. First, the district court concluded that the four testifying clinic escorts and Choices' former security guard were "biased and unreliable" because they are members of the "pro-abortion movement," have expressed "negative" feelings about defendants, performed research on defendants and other anti-choice protestors, and "find[] defendants' speech offensive." (SPA 13-18.) The court acted improperly by categorically finding these witnesses non-credible based on their personal views about abortion—particularly when the court declined to apply any such rule to defendants' testimony, despite their indisputably strongly held personal views on the same subject.[13] Volunteer escorts, like anti-choice protestors, often have strongly held beliefs about reproductive rights. If the existence of those beliefs standing alone were sufficient to discredit these escorts' direct, eyewitness testimony about protesters' conduct around reproductive health clinics, then it would be difficult if not impossible to prove

[13] Defendants' testimony established, among other things, that they use terms such as "death escorts" to refer to the escorts (JA 1856), tell patients and escorts that they are "supporting murder" (JA 1895), and tell patients that doctors at Choices "kill children" (JA 1962).

violations of the federal, state, and local laws that protect access to such facilities.

Second, the district court erroneously determined that, as a general matter, the escorts and security guard were not credible because they "exaggerated" defendants' misconduct. (SPA 13-17.) But much of the disregarded testimony was corroborated by other witnesses (including the defendants themselves, and Esther Priegue and Angelica Din, whose credibility was not challenged by the court), documentary evidence (in the form of escort recaps), and videos. For example, Pearl Brady's testimony (JA 560-564) regarding a confrontation between Angela Braxton and a patient's companion was fully corroborated by Prisca Joseph's contemporaneous notes (JA 2502) and video evidence (Ex. 37). At minimum, the district court should not have disregarded witness testimony that was corroborated by other reliable sources.

Third, the record does not support the grounds on which the district court found particular witnesses non-credible. With respect to Pearl Brady and Margot Garnick, the district court broadly rejected their testimony based on "inconsistencies" between their testimony and certain videos of incidents presented at trial. (SPA 14, 16.) But these supposed

"inconsistencies" are simply differences between the district court's characterization of the events in the videos and the witnesses' characterizations of the same evidence. (*See* SPA 25 (discussing Ex. 31), 32-33 (discussing Ex. 41), 49-50 (discussing Ex. 21).) The court identified no specific factual misrepresentations about the events that occurred in the cited videos that would undermine these two witnesses' credibility.

For example, Garnick testified that Exhibit 41 showed Thomas making "it difficult for the patient to get to the entrance" by standing in the middle of the sidewalk with a large sign and moving with the sign towards the door as a patient approached. (JA 1196-1198.) The district court disagreed, finding that the patient "walk[ed] into the clinic without impediment." (SPA 33.) A district court's disagreement with a witness's characterization of events is not sufficient to support an adverse credibility determination on a discrete issue, much less on all of the issues that were the subject of Brady and Garnick's testimony.

For three other witnesses—Mary Lou Greenberg, Theresa White, and Troyd Asmus—the district court identified a small number of apparent discrepancies between the witnesses' testimony about particular incidents and other evidence. (SPA 15-17.) But the court

subsequently rejected *all* of these witnesses' extensive testimony about other incidents where there was no indication that they were being inconsistent or dishonest. (SPA 21-22, 24, 27, 32, 36, 39-43, 45-46, 50.) It was unreasonable for the district court to conclude, based on a handful of discrete discrepancies for each of these three witnesses, that it should disregard their testimony about dozens of other interactions over several years of service.

Finally, the district court compounded the errors in its fact-finding by concluding that *defendants'* credibility is irrelevant. (SPA 5.) The court expressly relied on defendants' statements to decide several critical issues, such as their intent. (SPA 21-23, 25-26, 28-30, 48-49, 72, 90-91.) It was unreasonable for the court to accept defendants' testimony wholesale without any serious inquiry into their credibility, while at the same time categorically disregarding the testimony offered by the Attorney General's witnesses based on isolated or discrete inconsistencies.

POINT II

THE DISTRICT COURT ERRONEOUSLY FOUND THAT THE ATTORNEY GENERAL HAD NOT MADE A SUFFICIENT SHOWING OF LIKELIHOOD OF SUCCESS ON THE MERITS

A. The Attorney General Demonstrated a Likelihood of Success on the Merits of the Physical Obstruction Claims.

The district court rejected the Attorney General's physical obstruction claims based on a legally erroneous standard for what conduct constitutes obstruction. In substance, the court held that physical obstruction requires either blockading a clinic entrance or refusing to yield space to another person. (SPA 89.) But the relevant statutes do not limit physical obstruction to only these specific actions. The FACE Act and NYSCAA prohibit all actions that "render[] passage to and from" a facility "unreasonably difficult or hazardous." 18 U.S.C. § 248(e)(4); Penal Law § 240.70(3)(d). NYCCAA's more lenient obstruction requirement forbids conduct that "impede[s] access to or from the facility." N.Y.C. Admin. Code. § 10-1003(a)(2). This Court and others have consistently found physical obstruction based on a wide variety of practices that slow, delay, or otherwise hinder a patient's access to a reproductive health care facility.

Here, the record evidence shows that defendants used large signs to block escorts from assisting patients, crowded outside car doors, walked towards or in front of patients at an angle that forced them to walk into walls to avoid being physically contacted by defendants, and more. These actions went well beyond making access to Choices "unpleasant or emotionally difficult" (SPA 89 (quotation marks omitted)); rather, defendants' physical conduct created concrete impediments to the ability of patients, companions, and escorts to enter Choices. The fact that some individuals were ultimately able to find their way into the clinic does not defeat the physical obstruction claims, as the district court reasoned. (SPA 91-95.) What Congress, the New York State Legislature, and the New York City Council sought to protect was not merely *any* access to clinics, but rather *safe and reliable* access. See *supra* at 5-15. The district court's overly narrow view of physical obstruction undermines the fundamental purposes of the federal, state, and city statutes at issue here.

1. The underlying statutes do not require proof that patients were barred from accessing the clinic.

The district court's insistence (SPA 91-95) that the Attorney General was obligated to prove that a patient was actually precluded from accessing the clinic as a result of defendants' conduct has no basis in the governing law. "[O]bstruction need not be permanent or entirely successful. That patients may have eventually reached [Choices] in spite of defendants' actions is therefore beside the point." *Cain*, 418 F. Supp. 2d at 480 n.18.

With respect to the FACE Act and NYSCAA, this Court has noted that the "unreasonably difficult" standard can be satisfied by evidence that a defendant "stepp[ed] in front of escorts; us[ed] his sign to prevent escorts from walking past him; position[ed] himself next to patients' automobiles so that they have difficulty opening their car doors; and follow[ed] patients to and from the [clinic] entrance after they have indicated that they do not wish to talk to him." *United States v. Scott*, 187 F.3d 282, 284 (2d Cir. 1999) (quotation marks omitted). In *Operation Rescue National*, this Court likewise identified the following "strong" evidence of physical obstruction: "[p]rotestors often walked across driveways so as to meet oncoming cars, and then deliberately attempted

to slow or even stop the cars' progress. . . . [S]ome of the defendants have also interfered with pedestrians as they approach the building . . . [by] standing in front of them as the pedestrians tried to enter the building." 273 F.3d at 194.

Although NYCCAA does not define the term "impede," the dictionary definition of that term is to "delay or prevent (someone or something) by obstructing them." *New Oxford American English Dictionary* 871 (3d ed. 2010). The statute's plain language thus covers any knowing action that obstructs or blocks the premises of a facility and has the effect of delaying a patient's access to that facility, even if the action does not rise to the level of making access "unreasonably difficult," as required for a FACE Act or NYSCAA violation.[14] *See Quest Equities Corp. v. Benson*, 193 A.D.2d 508, 511 (1st Dep't 1993) ("Any standard definition of the word 'impede' includes to delay or slow down."); *cf. Arthur Andersen LLP v. United States*, 544 U.S. 696, 706-07 (2005).

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[14] Plaintiff did not raise this argument before the district court. However, this Court has broad discretion to consider legal "issues not raised in the district court," including "the meaning of a statutory term." *Virgilio v. City of New York*, 407 F.3d 105, 116 (2d Cir. 2005) (quotation marks omitted).

2. The evidence established that defendants obstructed and impeded access to the clinic.

The Attorney General's evidence established that defendants obstructed and impeded access to Choices in several ways: (a) using large signs and their bodies to narrow the sidewalk, crowd patients, block escorts, and hinder patients' path to the facility; and (b) using their bodies to delay patients' exits from cars. See *supra* at 18-21. The purpose and effect of this conduct was to delay and deter patients from entering Choices.

With respect to the first category of conduct, the district court found that the Attorney General's video and photographic evidence either failed to show obstruction or showed only accidental obstruction.[15] (SPA 92-93.)

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[15] The following description of the evidence of physical obstruction relies on the limited record that the district court found credible. The district court's ruling on physical obstruction was incorrect even as constrained to that evidence. However, as explained above (see *supra* Point I), the court's erroneous evidentiary determinations also led it to disregard extensive documentary and testimonial evidence that further supported the obstruction claims. Among many other things, escort testimony and recaps showed that Griepp forced patients and escorts to move around him by standing within feet of the clinic entrance (JA 668, 911-912, 2292-2293), and described additional instances when Okuonghae crowded patients' car doors (*see, e.g.*, JA 1244-1250.) See also *supra* at 18-21.

According to the court, Exhibits 7, 41, 102, and 119 did not show obstruction because they did not show patients who were actually inhibited from entering the facility. (SPA 92-93.) But the district court's characterization is not consistent with the conduct that the video evidence shows. *See Scott v. Harris*, 550 U.S. 372, 378–80 (2007) (rejecting lower courts' characterization of video of police chase). For example, Exhibit 7 shows Angela Braxton moving towards and standing directly in front of multiple patients and companions who were trying to enter the clinic. (Ex. 7.) By standing directly in front of patients, Braxton slowed their progress and impeded their attempts to enter Choices, notwithstanding the fact that patients were ultimately able to enter the clinic. *See Operation Rescue Nat'l*, 273 F.3d at 194 (finding obstruction based on defendants' practice of "standing directly in front of [patients] and trying to communicate with" them).

Likewise, Exhibits 41 and 102 show Ranville Thomas standing directly in the middle of a sixteen-foot-wide sidewalk with an unusually large sign, forcing patients and escorts to crowd into a narrow portion of the sidewalk in order to access the main entrance. (Exs. 41, 102.) As the D.C. Circuit has held, actions that compel patients to enter the clinic in

a "crowded and chaotic" fashion constitute physical obstruction. *Mahoney*, 247 F.3d at 284 (quotation marks omitted). Exhibit 119 similarly shows Patricia Musco and another protestor blocking off approximately two thirds of a sidewalk with large signs, an act that would necessarily force a patient to squeeze through the signs to pass by. (Ex. 119.) Although the photograph "do[es] not show any patients approaching the clinic" (SPA 93), the law does not require any patient to have actually been obstructed. *See Dugan*, 450 F. App'x at 22.

The district court also erroneously found Exhibits 23 and 307 immaterial because they show escorts, rather than defendants, "stepping in front of patients' paths to the clinic." (SPA 93.) These videos make clear that the escorts were forced to step in front of patients because defendants—namely, Osayinwe Okuonghae (Ex. 23) and Ronald George (Ex. 307)—used their bodies to force the escorts and patients to crowd into a narrow portion of the sidewalk. Indeed, in Exhibit 307, Ronald George's conduct was so egregious that a police officer was required to tell him that she had observed him blocking the patient's path and instructed him not to do so in the future. (Ex. 307.) The district court's

description of the video omits the police officer's contemporaneous observation and direction. (SPA 24-25, 93.)

Although the district court correctly found obstruction in Exhibits 31, 55, and 138—including, for example, Ronald George moving his sign to stay in front of patients and escorts as they tried to navigate around him (Ex. 31)—it erred in holding that the obstruction was accidental or inadvertent (SPA 93-95).[16] As a different district court explained on similar facts in *Cain*, defendants' obstructive intent "is plain from the nature of [their] conduct. They 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." 418 F. Supp. 2d at 481. Here too, the videos cited by the district court show defendants intentionally moving towards and in front of patients and escorts in order to delay or deter them from entering Choices. No more is needed to show physical obstruction under the relevant statutes.

Equally flawed is the district court's analysis of defendants' conduct outside cars that drop off patients. Specifically, the court found that

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[16] The defendants in these videos are Sharon Richards (Ex. 55), Ronald George (Ex. 31), and Okuonghae (Ex. 138).

defendants' practices of "crowd[ing] car doors, lean[ing] into open car windows, [and] thrust[ing] pamphlets into them" did not constitute physical obstruction. (SPA 91-92.) As the district court acknowledged, however, this Court and others have found illegal obstruction where "defendants stood so close to the car door that the occupant could not open it or used their bodies to slow moving cars and give the protestor additional time to reach the approaching patient." (SPA 92.) As described *supra* at 20-21, defendants engaged in precisely such conduct.

In addition, the district court failed to consider whether defendants' practice of crowding car doors also makes it unreasonably difficult for a patient to access the clinic because it creates an intimidating atmosphere that discourages women and their companions from exiting the car. For example, Exhibit 39 shows Ronald George, Thomas, Musco, and Okuonghae converging on a couple exiting their car with a child and a stroller. (Ex. 39.) An escort testified that, on a different occasion when a similar event occurred, the woman and her companion "felt overwhelmed by the number of people and protesters who are trying to talk to them while they were trying to get the young child out of the car" and considered leaving the clinic rather than going to their appointment that

day. (JA 1158-1159.) Defendants' conduct around patients' cars thus created physical impediments that went well beyond making access to Choices "unpleasant and even emotionally difficult." *Operation Rescue Nat'l*, 273 F.3d at 195-96.

B. The Attorney General Demonstrated a Likelihood of Success on the Merits of the Follow-and-Harass Claims.

NYCCAA's prohibition on "knowingly follow[ing] and harass[ing]" individuals within fifteen feet of a reproductive health care facility imports the conduct and intent requirements from New York's criminal harassment statutes. See *supra* at 15. Under those statutes, first degree harassment occurs when an individual "intentionally and repeatedly harasses another person by following such person in or about a public place or places or by engaging in a course of conduct or by repeatedly committing acts which places such person in reasonable fear of physical injury." Penal Law § 240.25. Second degree harassment occurs when, "with intent to harass, annoy, or alarm another person," an individual "strikes, shoves, kicks, or otherwise subjects such other person to physical contact, or attempts or threatens to do the same," "follows a person in or about a public place or places," or "engages in a course of

conduct or repeatedly commits acts which alarm or seriously annoy such other person and which serve no legitimate purpose." *Id.* § 240.26.

As the Attorney General argued below, NYCCAA adopts all of the intent and conduct elements of New York's criminal harassment statutes. (*See* Pl. Post-Hearing Proposed Findings of Fact and Conclusions of Law ¶¶ 28-31, E.D.N.Y. ECF No. 189). The Attorney General showed a likelihood of success on the merits of its follow-and-harass claims given undisputed evidence that defendants have a deliberate policy and practice of (1) following patients, companions, and escorts at extremely close distances, and (2) continuing to engage patients, companions, and escorts after express and implied requests to stop. (See *supra* at 21-24; SPA 97-98.) The district court erroneously rejected the Attorney General's follow-and-harass claims based on an unduly narrow interpretation of NYCCAA and an unsupportable view of the record evidence. (SPA 95-102.)

It is well established under New York law that intent may "be inferred from the defendant's conduct and the surrounding circumstances." *People v. Bracey*, 41 N.Y.2d 296, 301 (1977) (quotation marks omitted). "Unwanted communications" made after the recipient "requests that

such attempts at communications cease" warrant the inference of the requisite intent to harass, annoy, or alarm. *People v. Coveney*, 50 Misc. 3d 1, 7 (2d Dep't App. Term. 2015). According to the district court, the Attorney General failed to prove the necessary intent here because "[t]he interactions on the sidewalk outside Choices were generally quite short, and there is no credible evidence that any protestor disregarded repeated requests to be left alone over an extended period or changed his or her tone or message in response to requests to be left alone in a way that suggested the intent to harass, annoy, or alarm." (SPA 101.)

As an initial matter, the court erred in suggesting that the defendants' "legitimate purpose" in making an initial approach towards patients (*i.e.*, sidewalk counseling) immunized all future contacts from NYCCAA liability, absent a change in defendants' tone or message following a request to be left alone. (SPA 99.) Under New York law, an individual's "legitimate purpose" for making an initial approach is irrelevant where the defendant continues to make unwanted contact after an individual has expressly or impliedly asked the communications to cease. *See People v. Shack*, 86 N.Y.2d 529, 536-37 (1995). Communications made after a request to stop cross the line from a

"legitimate communicative purpose" to "harassing conduct," even if they are identical in substance to an initial legitimate contact. *Id.* at 536-37.

In *Shack*, for example, the New York Court of Appeals found that phone calls placed by a mentally ill defendant to the home of a psychologist constituted harassment where the psychologist had asked defendant to stop contacting her. As the court explained, defendant's argument that "he had a legitimate purpose because he placed his calls seeking help for his illness . . . addresses *only* those telephone calls placed *before* [the victim] told him to stop calling her." *Id.* at 536 (emphases added). As the district court in *Kraeger* correctly noted, "'counseling' turn[s] into attempts of intimidation" when an anti-choice protestor "continue[s] to walk side by side with the person or directly behind them and trie[s] to push literature into the person's hand" after being asked to stop. 160 F. Supp. 2d at 369.

The district court here also erroneously found that the brevity of the interactions between defendants, patients, companions, and escorts on the sidewalk in front of Choices precluded a finding of the requisite intent. For example, the court referenced Exhibit 99, a video that shows Ranville Thomas continuously following and berating an escort while

dangling a small rubber fetus doll, notwithstanding the escort's efforts to walk away. (Ex. 99.) According to the court, Exhibit 99 "does not show Thomas talking to the escort for so long, in such a tone, or in such a manner" as to infer unlawful intent.[17] (SPA 101.) But under New York law, "a pattern of conduct composed of a series of acts over a period of time, *however short*, evidencing a continuity of purpose" shows an intent to harass. *In re Amber JJ v. Michael KK*, 82 A.D3d 1558, 1560 (3d Dep't 2011) (quotation marks omitted) (emphasis added); *see also People v. Nasca*, 2013 N.Y. Slip Op. 51539(U) (2d Dep't 2013).

The district court's reliance on the brevity of the underlying interactions also ignores NYCCAA's text and purposes. NYCCAA prohibits harassment that occurs within fifteen feet of the premises of a reproductive health care facility—a necessarily small area—because the City Council concluded (see *supra* at 13-15) that such interactions meaningfully inhibit women's access to critical medical services and undermine public safety. *See also Hill v. Colorado*, 530 U.S. 703, 715

[17] The district court erroneously drew similar conclusions based on purportedly brief interactions between Thomas and unwilling patients at Exhibits 333 and 354. (SPA 100.)

(2000). The district court's insistence that harassment requires extended interactions in a small physical space unjustifiably undermines the City Council's effort to address the type of harmful conduct that occurs outside of clinics like Choices.

Finally, the district court's conclusion that certain video evidence failed to support an inference of intent due to the lack of audio is belied by review of that evidence. For example, Exhibit 135 shows a physical altercation between Prisca Joseph and a female companion that started because Joseph approached the companion and a patient after they had rebuffed Patricia Musco's earlier communications. (Ex. 135; see also *supra* at 23.) The district court found, due to the lack of audio, that there was "insufficient evidence about what Joseph said to the woman and in what tone of voice to allow an inference that Joseph approached the woman with the intent to harass, annoy, or alarm her." (SPA 100-101.) But Joseph testified that she approached the pair despite knowing that they had just rebuffed Musco's communications (JA 1805-1808.) Moreover, Joseph's intent to harass, annoy, or alarm can be inferred from the fact that a physical altercation resulted, and from Joseph's active

participation in that altercation—facts omitted from the district court's discussion of Exhibit 135. (SPA 39-40, 100.)

The district court likewise erred in holding that Exhibits 3, 17, 338 and 351 fail to support a finding of intent because of a lack of audio. (SPA 100.) To the contrary, defendants' intent is readily inferred from their conduct.[18] In each of the four videos, defendants are shown following patients at extremely close distances notwithstanding those patients indicating (at a minimum through gestures and body language) that they do not wish to speak with defendants.[19]

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[18] The defendants appearing in these videos are Ranville Thomas (Ex. 351), Jasmine LaLande (Ex. 17), and Sharon Richards (Exs. 3 and 338).

[19] The district court's ruling on the follow-and-harass claims was incorrect as a matter of law, even if the record were constrained to the limited evidence that the court considered. Because of the court's erroneous evidentiary determinations (see *supra* Point I), it also disregarded extensive documentary and testimonial evidence supporting the follow-and-harass claims, including, for example, evidence that Angela Braxton "ran a couple into the street, against the green light" because they were trying to avoid her insistent efforts to speak to them (JA 551, 2259), evidence that Ronald George followed a man entering the clinic with a young child despite the patient's express wishes not to speak to George (JA 477, 2297), and evidence that Richards "continued to chase" patients down the sidewalk despite the patients' express requests to stop (JA 1252-1254, 2252.) See also *supra* at 21-24. The court likewise ignored the testimony of Angelica Din, an employee at Choice's front desk, (JA 2107-2109), despite a lack of adverse findings about Din's credibility.

C. The Attorney General Demonstrated a Likelihood of Success on the Merits of the Force Claims.

The district court dismissed nearly all of the Attorney General's force claims based on its incorrect determination that escort recaps and witness testimony are "insufficiently reliable to support the accusations." (SPA 71.) The district court thus failed to engage with documentary and testimonial evidence describing numerous occasions on which defendants bumped, shoved, hit, and made other unwanted physical contact with patients and escorts. See *supra* at 24-25. The documentary and testimonial evidence also supported the Attorney General's argument that defendants' conduct was intentional, rather than incidental. (*See, e.g.*, JA 2228, 2307.) Because the district court's erroneous rulings led it to find failures of proof that do not fairly reflect the record evidence, the denial of a preliminary injunction must be reversed. See *supra* Point I.

The order should also be reversed because the district court's analysis of Exhibit 21—the only evidence the court considered with respect to the force claims—was irrational, and the legal conclusions the court drew from that video were erroneous. (*See* SPA 71-72.) Exhibit 21 shows a collision between LaLande and an escort who was attempting to help a patient enter through the clinic doors. The video shows that the

collision occurred because LaLande ran up to the escort and patient and wrested her arm over the escort's shoulder to thrust a pamphlet into the patient's hands, hitting the escort in the process. (Ex. 21.) According to the district court, "this video shows a quintessential incidental contact," because "LaLande was trying to hand the patient a pamphlet while the escorts tried to block her access to the patient." (SPA 71.) There is no lawful basis for the court's conclusion (SPA 71) that defendants lacked an "intent to injure, intimidate, or interfere" when they intentionally reached through and around escorts and patients in a way that inevitably caused unwanted physical contact.[20]

The FACE Act's requirement to "intentionally injure, intimidate, or interfere" using force requires proof only that the defendant "intend[ed] to perform the act and [was] aware of the natural and probable consequences." S. Rep. No. 103-117, at 24 n.39; see also *supra* at 9-11. The same standard applies to NYSCAA. *See* Penal Law § 240.70(1)(a). The legislative history for NYCCAA likewise confirms that its intent

[20] The court agreed that hitting, pushing, shoving, and the other types of physical contact identified by the Attorney General constitute prohibited acts of force. (SPA 67-68.)

element is satisfied with proof of an intentional rather than inadvertent act. *See* 11/18/08 Tr. at 24:6-14, 37:24-38:13.

Here, the district court agreed that defendants intentionally jostle with escorts in an attempt to force pamphlets into patients' hands or otherwise communicate with patients. (SPA 71.) A "natural and probable consequence" of intentional jostling in a crowded place is unwanted physical contact, including the type of contact evidenced at Exhibit 21. *Cf. Stagl v. Delta Airlines Inc.*, 52 F.3d 463, 473-74 (2d Cir. 1995) (holding that an injury caused by pushing and shoving in unruly crowd is reasonably foreseeable). In response to being asked by escorts to stop touching them, defendants did not respond with contrition but rather with statements indicating that defendants were well aware that unwanted physical contact occurs as a result of their conduct. For example, an escort testified that after LaLande hit the escort's arm when trying to hand a pamphlet to a patient, she said, "I will do whatever I need to do to get the word to women in need." (JA 581, 2307.) The same witness described an incident where Ronald George stepped on an escort's feet, refused to apologize, and said "[i]f you get in someone's way when they're walking, you're going to get hit." (JA 432-434, 2288.)

Defendants' statements, together with their underlying intentional conduct, are sufficient to establish violations of FACE, NYSCAA, and NYCCAA. As the district court correctly noted during trial (JA 2131), "the fact that an escort has managed to get into a position and blocked out the protestor does not entitle the protestor to elbow or shove or engage in any physical contact with the escort."[21] *See also Cain*, 418 F. Supp. 2d at 474.

D. The Attorney General Demonstrated a Likelihood of Success on the Merits of the Threat of Force Claims.

As described *supra* at 25-26, Ronald George and Ranville Thomas have made numerous threatening statements to escorts. In the weeks after a 2015 shooting at a Planned Parenthood clinic in Colorado Springs where an anti-choice protestor killed three people, Thomas told escorts that they "could die at any moment," that they "never know when death may come," and that they "could die from being shot by a bullet while on

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[21] In a footnote (SPA 72 n.20), the district court credited Ronald George's explanation of an incident where he admitted striking an escort and determined that George's acknowledged use of force was not motivated by the escort's provision of reproductive health care services as required by the FACE Act (see *supra* at 11) but by George's anger that the escort touched him first. The court's unquestioning reliance on George's account failed to address George's obvious motive to minimize the incident and misrepresent his intent.

the sidewalk." (JA 928-929, 1202-1203.) One of the recipients of these statements testified that she and her colleagues found the statements "very threatening and scary" because of the Colorado shooting.[22] (JA 1202-1203, 1578-1579, 2379.) In April 2016, immediately following a knife fight that occurred across the street from Choices, Thomas said to one escort "[t]hat could be you one day. Someone could pull a knife on you." (JA 1335-1336.) Thomas's statement was plainly intended to invoke the fear caused by that fight. (*See also* JA 507, 2263.) Courts have previously found similar statements to constitute true threats. *See, e.g.*, *United States v. Scott*, 958 F. Supp. 761, 769-70 (D. Conn. 1997) (finding that "[a] bullet could come your way today" and "just because you are young does not mean your life won't be taken early" constituted threats).

The district court credited the escorts' testimony and recollection (SPA 6), concluded that defendants had made these statements (SPA 22,

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[22] On a different occasion, George said to an escort that "the people who went to work on 9/11 didn't know what was going to happen that day, you never know when you're going to die." (JA 441-442, 2267.) The escort explained that the statement was "alarming" because "telling people that they never know when they are going to die when you're protesting outside of a clinic" is inextricably intertwined with "the history of violence against abortion clinics and abortion providers and volunteers over the past several decades." (JA 441.)

30-31), and agreed that the statements were alarming (SPA 76). The court nevertheless determined that the statements were not true threats in light of defendants' religious beliefs, the escorts' familiarity with those religious beliefs, and the nature of defendants' protesting activities. (SPA 76-78.) As explained further below, the district court's conclusion was erroneous because it failed to consider the full context of the challenged statements (particularly their temporal proximity and direct reference to specific acts of violence), the history of violence at abortion clinics, and the escorts' testimony regarding their reactions.

This Court applies an objective standard for determining whether a statement constitutes a true threat—"namely, whether an ordinary, reasonable recipient who is familiar with the context of the [communication] would interpret it as a threat of injury." *Turner*, 720 F.3d at 420 (quotation marks omitted); *see also Planned Parenthood of the Columbia/Willamette, Inc. v. American Coalition of Life Activists*, 290 F.3d 1058, 1077 (9th Cir. 2002) (en banc). "Context is critical in a true threats case." *Id.* at 1078. Other circuits evaluating FACE Act claims have noted that the "past history of violence against abortion providers" is highly probative to determining whether a statement threatening

violence at an abortion clinic rises to the level of a true threat. *United States v. Dillard*, 795 F.3d 1191, 1201 (10th Cir. 2015); *United States v. Hart*, 212 F.3d 1067, 1071 (8th Cir. 2000); *Planned Parenthood*, 290 F.3d at 1078-79.

Here, the district court said nothing about the history of violence at abortion clinics generally, or the specific Colorado shooting and knife fight that defendants' statements were referencing, even though such considerations would necessarily affect the way in which a reasonable recipient would interpret the statements at issue. Instead, the court focused on the fact that defendants "regularly preached about the fragility of life and the need to repent" and construed defendants' statements as reflections of that religious philosophy rather than references to concrete acts of violence. (SPA 76.) Moreover, the district court minimized the severity of defendants' statements by noting that, as a general matter, "the escorts were familiar both with the context of their speech and with the protestors themselves, and were not genuinely fearful of them or intimidated by their words." (SPA 76.)

The district court's unduly optimistic characterizations of defendants' statements are simply not supported by the record. As one of

the escorts testified, Thomas's pointed reference to "bullets" in January 2016 was especially concerning because the Planned Parenthood shooting occurred only weeks before the statement was made.[23] (JA 1202-03.) Similarly, an escort explained that Thomas's statements after the knife fight were intimidating because the escorts had just experienced a frightening incident of potential violence. (*See* JA 507, 2263.) The district court's failure to acknowledge this critical background in evaluating the statements at issue rendered its analysis legally insufficient.

The court also erred in analyzing the threatening statements made by Thomas to patients. As an escort testified, Thomas has, on numerous occasions, stood within inches of patients and told them that the escorts would not be there when the patients left the clinic—suggesting that patients should feel vulnerable to assaults or other types of violence after the conclusion of their appointments. (JA 1195-1196.) Although the court agreed that "this statement in a hostile setting could raise concerns," it

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[23] The district court misconstrued the escort's testimony regarding why she did not report this threat to authorities. (SPA 78.) As the escort explained, she did not believe that the police would act on the specific threat that Thomas made based on her experience with law enforcement. (JA 1203.)

found the language "too attenuated to support a holding that a reasonable patient would have interpreted it as a threat of force." (SPA 81-82.) But a defendant may not shield himself from "liability simply by using the passive voice or couching a threat in terms of 'someone' committing an act of violence, so long as a reasonable recipient could conclude, based on the language of the communication and the context in which it is delivered, that this was in fact a veiled threat of violence by the defendant." *Dillard*, 795 F.3d at 1201. Again, the district court's refusal to consider how the history of violence at abortion clinics would influence a reasonable patient's perception of Thomas's statements requires reversal.

The district court was also wrong to conclude that Thomas's statement was not a threat because he "did not scream the statement, did not make a gesture indicating a violent intent," and "did not have a history of using force and threatening force, much less such a history that would be known to the recipient of the threat." (SPA 82.) Thomas's tone, while potentially relevant, is not dispositive. "[A]n implied menace" can be as actionable as "a literal threat." *Turner*, 720 F.3d at 422. In addition, while *the escorts* may have been familiar with Thomas, and thus could

conceivably have discounted these particular threatening statements in light of the broader context of their interactions with him, there is no indication that *patients* shared such familiarity or experience. The district court therefore unreasonably minimized the likelihood that Thomas's alarming statements would frighten such patients.

POINT III

THE DISTRICT COURT'S DETERMINATION THAT DEFENDANTS WERE UNLIKELY TO REPEAT MISCONDUCT IS UNSUPPORTED BY THE RECORD

Governmental plaintiffs seeking to enjoin statutory violations need not prove irreparable harm, but must merely demonstrate "the likelihood of continuing violation or recommencement of the offensive behavior, if it has ceased during the pendency of the litigation."[24] *United States v. Diapulse Corp. of Am.* 457 F.2d 25, 28-29 (2d Cir. 1972). "A likelihood of future violations may be inferred from past unlawful conduct." *Commodity Futures Trading Comm'n. v. British Am. Commodity Options Corp.*, 560 F.2d 135, 142 (2d Cir. 1977). Here, even as it improperly

[24] The record in this case also establishes irreparable harm that warrants injunctive relief. *See New York State Nat'l Org. for Women v. Terry*, 886 F.2d 1339, 1362 (2d Cir. 1989).

dismissed the Attorney General's claims as to several defendants, the district court correctly concluded that the record established multiple statutory violations by Brian George, Musco, and Kaminsky. The court nevertheless declined to issue a preliminary injunction based on unsupported determinations that these defendants are not likely to commit future violations. The district court abused its discretion in denying a preliminary injunction on this ground.

First, the district court correctly concluded that Brian George violated the FACE Act, NYSCAA, and NYCCAA by physically obstructing patients seeking to enter Choices on at least three occasions. (SPA 43, 90.) Specifically, George purposely engaged in a "slow walk" in front of patients to "delay the patients' access to Choices and thereby provide more time for protestors to speak with the patients and hand them literature." (SPA 90.) The court's finding of intentional physical obstruction was based on George's admission to the conduct in a declaration submitted after the trial (JA 2187), as well as on Musco's contemporaneous notes and live testimony describing George's practice. (JA 1859-1861, 1869-1870, 2845-2846, 2862-2863.)

Notwithstanding the court's conclusion that George committed multiple intentional violations, it credited George's conclusory promise—made in the same post-trial declaration—that he "'will not engage in that behavior again,'" and denied the Attorney General's motion for injunctive relief. (SPA 90-91 (quoting JA 2187).) The court abused its discretion in relying on George's late-filed declaration without offering the Attorney General an opportunity to cross-examine George about his self-serving promise to cease his misconduct, and without engaging in any serious inquiry into George's credibility.[25] *See Chicago Ridge Theatre Ltd. P'ship v. M&R Amusement Corp.*, 855 F.2d 465, 468-69 (7th Cir. 1988). The court's immediate acceptance of George's statement is further undermined by George's insistence in this appeal that his practice of slow walking is in fact lawful—a strong indication that he will perceive no reason to avoid such behavior in the future. *See* Mem. of Law in Opp'n to Mot. to Dismiss Cross-Appeals for Griepp Defs. at 2, 5, 8-9 (ECF No. 130).

[25] Although the district court correctly noted that the Attorney General did not object to George's belated submission (SPA 91 n.29), plaintiff had no reason to believe that the court would rely on a declaration submitted after trial and oral argument without giving the parties notice.

The reasonable likelihood of future violations is established where, as here, the defendant "maintains that its activities were legitimate." *British Am. Commodity Options*, 560 F.2d at 142.

Second, the district court concluded that Musco and Kaminsky both falsely told approaching patients that Choices was closed, resulting in those patients leaving the premises without obtaining services. (SPA 29, 43.) Although the court assumed for purposes of the motion that such statements "rise to the level of interfer[ing] with the operation of a reproductive health care facility" in violation of NYCCAA, it nevertheless determined that Musco and Kaminsky are unlikely to repeat this misconduct "having been warned about the impropriety of such statements." (SPA 102-103 (quotation marks omitted).) Like George, Musco and Kaminsky have maintained that their conduct is lawful (JA 2184-26), and neither defendant has offered evidence suggesting that they in fact understand that their prior statements were unlawful. Although the court correctly noted that the Attorney General established a single violation by each defendant (SPA 102), multiple violations are not necessary to justify injunctive relief. *See United States v. W.T. Grant Co.*, 345 U.S. 629, 633 (1953).

CONCLUSION

This Court should reverse the district court's denial of the Attorney General's motion for a preliminary injunction.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a) of the Federal Rules of Appellate Procedure, Will Sager, an employee in the Office of the Attorney General of the State of New York, hereby certifies that according to the word count feature of the word processing program used to prepare this brief, the brief contains 14,000 words and complies with the typeface requirements and length limits of Rule 32(a)(5)-(7).

/s/ Will Sager