HB

149

23-LS0354\I
Craver
5/12/03

CS FOR HOUSE BILL NO. 149(STA)

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-THIRD LEGISLATURE - FIRST SESSION

BY THE HOUSE STATE AFFAIRS COMMITTEE

Offered:
Referred:

Sponsor(s): REPRESENTATIVE WOLF

A BILL

FOR AN ACT ENTITLED

"An Act requiring certain nonprofit corporations under the Alaska Net Income Tax Act to provide notice of lobbying expenditures; providing for a civil penalty for failure to provide the notice; and providing for an effective date."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

* **Section 1.** AS 43.20 is amended by adding a new section to read:

Sec. 43.20.315. Notice of lobbying expenditures by certain nonprofit corporations; civil penalty. (a) A nonprofit corporation exempt from tax liability under this chapter and 26 U.S.C. 501(c)(3) that has annual gross revenues of at least $1,000,000 shall provide adequate notice of a lobbying expenditure over $1,000. For purposes of this subsection, adequate notice must be

(1) a written notice of each lobbying expenditure over $1,000 that

(A) identifies the nonprofit corporation by name, mailing address, and telephone number;

(B) describes the nature of the lobbying expenditure, including,

with reasonable specificity, the lobbying activity proposed; and

(C) states the proposed budget, the location, and time period in which the lobbying activity has occurred or will occur;

(2) published not fewer than two times in eight days in a newspaper of general circulation in the judicial district in which the nonprofit corporation is located, or, if a newspaper is not published in that judicial district, in a newspaper published in the state and distributed in that judicial district; and

(3) published within 15 days before or after the lobbying expenditure occurs.

(b) A nonprofit corporation exempt from tax liability under this chapter that violates (a) of this section is subject to a civil penalty of not more than $100 a day for each day that the corporation fails to cause the timely publication of adequate notice.

(c) Notice is not required under (a) of this section for a payment made to a lobbyist that is reported under AS 24.45.061.

(d) In this section, "lobbying expenditure" has the meaning given in 26 U.S.C. 501(c)(3).

* **Sec. 2.** This Act takes effect January 1, 2004.

Alaska State Legislature

Session:
State Capitol Building, Room 418
Juneau, Alaska 99801-1182
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Representative Kelly Wolf

House District 33

Sponsor Statement.
HB 149

"An Act requiring nonprofit corporations under the Alaska net Income Tax Act to provide prior public notice of lobbying expenditures and an annual report of lobbying expenditures to the Department of Revenue; providing for a civil penalty for failure to provide the notice; and providing for an effective date."

With over 5000 non-profit organizations doing business in the State of Alaska it is the intent of HB 149 is to bring about better public disclosure. While lobbying activities take place on a daily basis, many grants prevent grant funds from being used for lobbying efforts.

HB 149 would require 501c3 non-profits to disclose the sources of their lobbying funds and to post the budget for lobbying efforts, so citizens could make an informed decision regarding contributions. HB 149 would inform citizens that when they make a donation to a non-profit organization they know if their contribution was used for lobbying.

501c3 non-profit organizations in good standing have nothing to fear from this bill.
If you have any questions or suggestions please feel free to contact myself or Neal of staff at ext. 4695.

FISCAL NOTE

STATE OF ALASKA
2003 LEGISLATIVE SESSION

Fiscal Note Number:
Bill Version: HB149
() Publish Date:

Revision Date/Time (Note if correction):
Dept. Affected: Revenue
Title: Lobbying by Nonprofits
BRU: Revenue Operations
Component: Tax Division
Sponsor: Representative Wolf
Requester: House State Affairs Committee
Component No.: 2476

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2004	FY 2005	FY 2006	FY 2007	FY 2008	FY 2009
Personal Services						
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0
CAPITAL EXPENDITURES						
CHANGE IN REVENUES ( )						

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type--Do not abbreviate)						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

Estimate of any current year (FY2003) cost: 0.0
Mark this box (X) if funding for this bill is included in the Governor's FY 2004 budget proposal:

POSITIONS

Full-time						
Part-time						
Temporary						

ANALYSIS: *(Attach a separate page if necessary)*

This legislation would amend AS43.20 to require nonprofit corporations to file reports with the Department of Revenue of their lobbying expenditures.

Although the legislation provides for the department to assess fines against nonprofit corporations that fail to comply with the new requirement, for purposes of this fiscal note the department assumes it will take no enforcement actions in this area. There are more than 1,000 nonprofit corporations that file returns with the state, and the department expects it would accept and file the reports of lobbying expenditures -- and make the information available as allowed by law -- but would not actively police the requirement. If the decision is to actively police the requirement and assess fines, the department would need additional funds for the activity, particularly if corporations appealed the fines and the department incurred the expense of appeal hearings.

Prepared by: Larry Persily, Deputy Commissioner
Phone: 465-5469
Division: Department of Revenue
Date/Time: 4/24/03 10:54 AM
Approved by: Larry Persily, Deputy Commissioner
Date: 4/24/2003
Agency: Department of Revenue

(Revised 9/2002 OMB)

LEGAL SERVICES

DIVISION OF LEGAL AND RESEARCH SERVICES
LEGISLATIVE AFFAIRS AGENCY
STATE OF ALASKA

(907) 465-3867 or 465-2450
FAX (907) 465-2029
Mail Stop 3101

State Capitol
Juneau, Alaska 99801-1182
Deliveries to: 129 6th St., Rm. 329

MEMORANDUM March 20, 2003

SUBJECT: Sectional Summary of HB 149 (Work Order No. 23-LS0354\D)

TO: Representative Kelly Wolf
Attn: Neal

FROM: Barbara R. Craver BRC
Legislative Counsel

You have requested a sectional summary of the above-described bill.

As a preliminary matter, note that a sectional summary of a bill should not be considered an authoritative interpretation of the bill and the bill itself is the best statement of its contents. If you would like an interpretation of the bill as it may apply to a particular set of circumstances, please advise.

Section 1. This is a new section added to the Alaska Net Income Tax Act (AS 24.45) to require nonprofit corporations subject to the corporate income tax in Alaska to provide prior public notice of planned lobbying expenditures over $500. The penalty for failing to provide the proper notice is $100 for each day of a failure to give the required notice. This section also requires that these nonprofit corporations provide an annual report of all lobbying expenditures when they file their tax return with the state.

Section 2. This act will become effective on January 1, 2004.

If I may be of further assistance, please advise.

BRC:med
03-331.med

DISABILITY LAW CENTER OF ALASKA

JUNEAU
230 South Franklin #206
Juneau, AK 99801
(907) 586-1627
FAX (907) 586-1066

May 12, 2003

By hand delivery and via e-mail

Rep. Bruce Weyhrauch
Chairman, House State Affairs Committee
Alaska Legislature
State Capitol, Room 102
Juneau, Alaska
E-mail: <ginny.austerman@legis.state.ak.us>

Re: **HB 149: Notice by 501(c)(3)s of lobbying expenditures; Continued opposition**

Dear Representative Weyhrauch:

Thank you for the opportunity to testify regarding HB 149. Due to a client's evidentiary hearing, I likely will be unable to attend the morning hearing scheduled regarding a committee substitute of HB 149 on May 13. Based on the audio archives of the hearing I missed last week, as well as the hearings I have been able to attend, I submit this letter in opposition to the committee substitute.

The current form of the CS appears to be focused on "grass roots" lobbying, since communications to paid lobbyists that register with APOC are not covered by the CS.[1] An organization that registers with APOC and keeps its grass-roots lobbying expenditures to under $1,000 – such as an organization that primarily uses the Internet and e-mail to communicate with its members or supporters – will not be affected by the CS. So the real effect of the bill is focused on organizations that engage in expensive grass roots lobbying activities – primarily display print advertisements and other expensive media advertisements. 501(c)(3)s that engage in this kind of activity usually have a very good lawyer to advise them how to steer a clear path through all of the rules. If they don't seek the advice of such a lawyer, sooner or later they will need one, particularly if the Legislature passes a bill that continues the APOC in some manner as an enforcer of the laws regarding lobbying and political campaigns.

It is unwise for the committee to try to address this subject at this time, in the way the bill is focused. For example, the First Amendment law is unsettled on the

[1] The Disability Law Center registers with APOC when it is intended to actively participate in the state legislative process, even though some of our work is more focused on "educating policymakers." Under the federal law authorizing establishment of "protection and advocacy" (P&A) systems for persons with disabilities, each state is required (as a condition of receiving federal funding for its disabled citizens) to empower the P&A with the ability to "educate policymakers." 42 U.S.C. § 15043(a)(2)(L). However, some times we do feel a need to more clearly advocate for or against a particular bill, and so we have registered with APOC.

contours of Free Speech rights on the Internet. A Ninth Circuit case involving identification of abortionists in "Wanted posters" on a pro-life website last year upheld the federal Freedom of Access to Clinic Entrances Act (FACE) against a First Amendment challenge. There were spirited dissenting opinions in the case, and certiorari in the Supreme Court has been sought.[2] An organization that uses computer equipment to maintain a website might easily spend more than $1,000, and so the State Affairs Committee should wait for Supreme Court pronouncements regarding the exercise of free speech that may come out with that case, before passing on this bill which may be characterized as trying to regulate Internet grass roots lobbying activity.

As to Free Speech in print advertising and other media, any organization that is opposed to regulation of speech – or for that matter any Alaska organization that reviles the activities of the Legislature – can be expected to try to twist the message of the bill to suit its own purposes. If the committee passes this bill, even in the version suggested as a CS, the committee members may be pilloried, conspiracies conjured, on the websites and e-mail listservs of self-appointed "defenders of freedom and the public fisc." This would seem to serve little purpose because: (1) the bill is very unlikely to pass at this point in the session; (2) the bill will not affect the inexpensive grass-roots lobbying of some organizations; and (3) the larger organizations that plan for expenditures well in excess of $1,000 can be expected to also develop a legal war chest. Indeed, one could envision "legal defense funds" popping up under the pretense of raising money to legally attack this bill if it passes through even one committee. There will be very little accountability of what becomes of the "legal defense funds" if the bill does not become law, less so if it does become law.

I applaud Rep. Wolf's search for accountability in the public process, but for these reasons respectfully urge a "no" vote on CSHB 149.

Very truly yours,

Bob Briggs

Robert B. Briggs, staff attorney

Encl.
Cc: (w/ encl.)
Members, House State Affairs Committee
Rep. Kelly Wolf
Dave Fleurant, executive director, DLC-Anchorage

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[2] Planned Parenthood of the Columbia/Willamette, Inc. v. American Coalition of Life Activists, 290 F.3d 1058 (9th Cir. 2002)(amended opinion on denial of motion for rehearing en banc), petition for cert. filed, 71 U.S.L.W. 3292 (Oct. 8, 2002)(No. 02-563)(copy enclosed).

we've focused so much effort on dedicating 200 acres to easing the Juneau golfing situation. Who needs a house over their head when they can putter around?

Mike Jaynes
Juneau

and avoid the charge that the State ... to seize control of the oil fields: adopt the Alaskan model.

In 1976, voters in Alaska amended the state's constitution to set aside 25 percent of the funds received by the state in connection with the development of its oil reserves. The money goes into a permanent fund, run by a board of trustees accountable to the state

politically by makin Shiites, Kurds, et al the economic inequ many oil-rich countr

• Scott E. Pardee is a pr lege in Vermont and wor Bank of New York. © The

Juneau Empire, 4/13/03, p. A5

The Official Alaska Voters Website

"An Informed Voter Is The Best Defense Against Bad Government"

The "Juneau Plan":

Refuse to develop a long term fiscal plan.

Increase revenues through a variety of new TAXES.

Increase the State budget to an unsustainable level.

Spend our PERMANENT FUND earnings.

Continue introduction of new spending bills knowing there is a $1,000,000,000 budget deficit.

New! Alerts: Bills of concern

New! Opinion: Public letters & editorials

Statistics: **Charts, graphs, & survey results**

New! "Spotlight on Juneau" latest edition

Action: **Tools for contacting the Legislature**

New! Watchdog: Statewide voting record

The "Alaska Voters Plan":

Challenge our legislature to submit serious proposals which balance the State budget.

Demand responsible cuts.

Encourage development of a long-range fiscal plan so we can determine Alaska's future.

Expect responsibly funded schools, road maintenance, public health & safety.

Educate Alaskan voters and report the facts about State spending.

Protect our Permanent Fund for future generations.

Promote no new spending bills until the budget is balanced and government size/cost reduced to a sustainable level.

HOT BUTTON ISSUES !!!

(Click on flames for the details)

"MAKE THE DIVIDEND PERMANENT"!!!

HJR 3 Will Put The Dividend Into OUR Constitution

PRIVATE PRISONS
Is Alaska Ripe For The "Corrections Industry" To Pick???

TO KILL OR NOT TO KILL APOC

(The Alaska Public Offices Commission).

That is the Question?

THINKING OUTSIDE THE POLITICAL BOX!!!

Why does the legislature need to continue meeting in Juneau?

If all legislators conducted the public's business from their home town or regional hub, it would greatly reduce travel and per diem expense; make legislators more accessible to their constituents, and less accessible to lobbyists.

The technology and necessary equipment is currently available for conducting meetings in this format. Many corporations have adopted this form of communication since 9/11/01 to reduce expense and travel risk for their staff and management.

Of the 837 respondents to a statewide public opinion survey conducted by the Alaska Voters Organization in July, 2003, 82.5% favored a constitutional amendment requiring our legislators meet via video-teleconference from their local Legislative Information Office (LIO) rather than sending them to Juneau.

Why not conduct the people's business via video teleconference from each district's local legislative information office?

Survey Questions of the Week:

1. Do you feel Governor Murkowski's move to eliminate the Alaska Public Offices Commission is justified?
   ○ Yes ○ No ○ Undecided/Don't know

2. Would you support legislators that ease restrictions on lobbyist or allow additional campaign contributions?
   ○ Yes ○ No ○ Undecided/Don't know

3. Do you think the current campaign finance laws and lobbyist restrictions are good public policy?
   ○ Yes ○ No ○ Undecided/Don't know

4. Should everyone that attempts to influence the legislature for monetary gain be called lobbyist?
   ○ Yes ○ No ○ Undecided/Don't know

5. Do you support Representative Wolf's decision to withdraw as co sponsor of "save the PFD" legislation HJR 3?
   ○ Yes ○ No ○ Undecided/Don't know

If you have suggestions for future survey questions, feel free to email them to us.

Submit | Reset

"Whenever the people are well-informed, they can be trusted with their own government."
Thomas Jefferson to Richard Price, 1789.

THE
FOLLOWING
DOCUMENT(S)
ARE
POOR
ORIGINAL
COPIES

"Alaska Voters Organization: Helping Taxpayers Save Money One Bill At A Time"

▷

United States Court of Appeals,
Ninth Circuit.

PLANNED PARENTHOOD OF THE COLUMBIA/WILLAMETTE, INC.; Portland Feminist Women's Health Center; Robert Crist, M.D.; Warren M. Hern, M.D.; Elizabeth Newhall, M.D.; James Newhall, M.D., Plaintiffs-Appellees,
and
Karen Sweigert, M.D., Plaintiff,
v.
AMERICAN COALITION OF LIFE ACTIVISTS; Advocates for Life Ministries; Michael Bray; Andrew Burnett; David A. Crane; Timothy Paul Dreste; Michael B. Dodds; Joseph L. Foreman; Charles Roy McMillan; Stephen P. Mears; Bruce Evan Murch; Catherine Ramey; Dawn Marie Stover; Charles Wysong, Defendants,
and
Monica Migliorino Miller; Donald Treshman, Defendants-Appellants.
Planned Parenthood of the Columbia/Willamette, Inc.; Portland Feminist Women's Health Center; Robert Crist, M.D.; Warren M. Hern, M.D.; Elizabeth Newhall, M.D.; James Newhall, M.D., Plaintiffs-Appellees,
and
Karen Sweigert, M.D., Plaintiff,
v.
American Coalition of Life Activists; Advocates for Life Ministries; Michael Bray; Andrew Burnett; David A. Crane; Timothy Paul Dreste; Joseph L. Foreman; Stephen P. Mears; Monica Migliorino Miller; Catherine Ramey; Dawn Marie Stover; Donald Treshman; Charles Wysong, Defendants,
and
Michael Dodds; Charles Roy McMillan; Bruce Evan Murch, Defendants-Appellants.
Planned Parenthood of the Columbia/Willamette, Inc.; Portland Feminist Women's Health Center; Robert Crist, M.D.; Warren M. Hern, M.D.; Elizabeth Newhall, M.D.; James Newhall, M.D., Plaintiffs-Appellees,
and
Karen Sweigert, M.D., Plaintiff,
v.
American Coalition of Life Activists; Advocates for Life Ministries; Michael Bray; Andrew Burnett; David A. Crane; Michael Dodds; Charles Roy McMillan; Stephen P. Mears; Monica Migliorino Miller; Bruce Evan Murch; Catherine Ramey; Dawn Marie Stover; Donald Treshman, Defendants,
and
Timothy Paul Dreste; Joseph L. Foreman; Charles Wysong, Defendants-Appellants.
Planned Parenthood of the Columbia/Willamette, Inc.; Portland Feminist Women's Health Center; Robert Crist, M.D.; Warren M. Hern, M.D.; Elizabeth Newhall, M.D.; James Newhall, M.D., Plaintiffs-Appellees,
and
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and
Timothy Paul Dreste; Michael Dodds; Joseph L. Foreman; Charles Roy McMillan; Stephen P. Mears; Monica Migliorino Miller; Bruce Evan Murch; Donald Treshman; Charles Wysong, Defendants.
Planned Parenthood of the Columbia/Willamette, Inc.; Portland Feminist Women's Health Center; Robert Crist, M.D.; Warren M. Hern, M.D.; Elizabeth Newhall, M.D.; James Newhall, M.D., Plaintiffs-Appellees,
v.
American Coalition of Life Activists; Advocates for Life Ministries; Michael Bray; Andrew Burnett; David A. Crane; Timothy Paul Dreste; Michael B. Dodds; Joseph L. Foreman; Charles Roy McMillan; Bruce Evan Murch;Catherine Ramey; Dawn Marie Stover; Donald Treshman; Charles Wysong, Defendants.
Paul deParrie, Movant-Appellant.
Planned Parenthood of the Columbia/Willamette, Inc.; Portland Feminist Women's Health Center; Robert Crist, M.D.; Warren M. Hern, M.D.; Elizabeth Newhall, M.D.; James Newhall, M.D.; Karen Sweigert, M.D., individually and on behalf of all persons similarly situated, Plaintiffs-Appellees,
v.
American Coalition of Life Activists; Advocates for Life Ministries; Michael Bray; Andrew Burnett; David Crane; Timothy Paul Dreste; Michael Dodds; Joseph L. Foreman; Charles Roy McMillan; Monica

Migliorino Miller; Bruce Evan Murch; Catherine Ramey; Dawn Marie Stover; Donald Treshman; Charles Wysong, Defendants-Appellants.

Nos. 99-35320, 99-35325, 99-35327, 99-35331, 99-35333 and 99-35405.

Argued and Submitted En Banc Dec. 11, 2001.
Filed May 16, 2002.
As Amended on Denial of Rehearing En Banc July 10, 2002. [FN*]

FN* Judges KOZINSKI and O'SCANNLAIN voted to grant.

Abortion providers brought suit under Freedom of Access to Clinic Entrances Act (FACE) against anti-abortion activist organizations, based on actions of organizations in publicly disclosing names and addresses of providers through posters and Internet web site. The United States District Court for the District of Oregon, Robert E. Jones, J., 41 F.Supp.2d 1130, entered judgment in favor of providers, and granted permanent injunction. Organizations appealed. The Court of Appeals, Kozinski, Circuit Judge, 244 F.3d 1007, reversed. Upon rehearing en banc, the Court of Appeals, Rymer, Circuit Judge, held that: (1) actions of anti-abortion activist organizations in publicly disclosing, through "Guilty" posters and Internet web site, names and addresses of abortion providers, constituted true "threats of force" within meaning of FACE, and thus were not protected speech under First Amendment, and (2) district court would be given the opportunity to evaluate the punitive damages award and to make findings with respect to its propriety.

Affirmed in part; vacated and remanded in part.

Reinhardt, Circuit Judge, filed dissenting opinion in which Kozinski, Kleinfeld, and Berzon, Circuit Judges, joined.

Kozinski, Circuit Judge, filed dissenting opinion in which Reinhardt, O'Scannlain, Kleinfeld and Berzon, Circuit Judges, joined.

West Headnotes

[1] Civil Rights 244
78k244 Most Cited Cases

[1] Federal Courts 776
170Bk776 Most Cited Cases

Proper definition of a "threat" for purposes of Freedom of Access to Clinic Entrances Act (FACE) was a question of law which court reviewed de novo. 18 U.S.C.A. § 248.

[2] Constitutional Law 90.1(1)
92k90.1(1) Most Cited Cases

First Amendment protects speech that advocates violence, so long as the speech is not directed to inciting or producing imminent lawless action and is not likely to incite or produce such action. U.S.C.A. Const.Amend. 1.

[3] Constitutional Law 90.1(1)
92k90.1(1) Most Cited Cases

For First Amendment purposes, a "threat" is an expression of an intention to inflict evil, injury, or damage on another. U.S.C.A. Const.Amend. 1.

[4] Constitutional Law 90.1(1)
92k90.1(1) Most Cited Cases

A true threat, that is one where a reasonable person would foresee that the listener will believe he will be subjected to physical violence upon his person, is unprotected by the First Amendment; it is not necessary that the defendant intend to, or be able to carry out his threat since the only intent requirement for a true threat is that the defendant intentionally or knowingly communicate the threat. U.S.C.A. Const.Amend. 1.

[5] Civil Rights 113.1
78k113.1 Most Cited Cases
(Formerly 78k110.1)

"Threat of force" within meaning of Freedom of Access to Clinic Entrances Act (FACE) means a statement which, in the entire context and under all the circumstances, a reasonable person would foresee would be interpreted by those to whom the statement is communicated as a serious expression of intent to inflict bodily harm upon that person. 18 U.S.C.A. § 248(a)(1), (c)(1)(A).

[6] Civil Rights 113.1
78k113.1 Most Cited Cases

(Formerly 78k110.1)

[6] **Constitutional Law** 90.1(1)
92k90.1(1) Most Cited Cases

A threatening statement that violates Freedom of Access to Clinic Entrances Act (FACE) is unprotected under the First Amendment. U.S.C.A. Const.Amend. 1; 18 U.S.C.A. § 248(a)(1), (c)(1)(A).

[7] **Constitutional Law** 90.1(1)
92k90.1(1) Most Cited Cases

Whole factual context and all of the circumstances are considered in order to determine whether a statement is a true threat for purposes of First Amendment. U.S.C.A. Const.Amend. 1.

[8] **Civil Rights** 113.1
78k113.1 Most Cited Cases
(Formerly 78k110.1)

[8] **Constitutional Law** 90.1(1)
92k90.1(1) Most Cited Cases

[8] **Constitutional Law** 90.1(9)
92k90.1(9) Most Cited Cases

Actions of anti-abortion activist organizations in publicly disclosing, through "Guilty" posters and Internet web site, names and addresses of abortion providers, constituted true "threats of force" within meaning of Freedom of Access to Clinic Entrances Act (FACE), and thus were not protected speech under First Amendment; by knowingly replicating "wanted"-type poster pattern that preceded the elimination of other abortion providers and by putting abortion providers in an abortionists' file that scored fatalities, organizations were not staking out a position of debate but of threatened demise. U.S.C.A. Const.Amend. 1; 18 U.S.C.A. § 248(a)(1), (c)(1)(A).

[9] **Civil Rights** 262.1
78k262.1 Most Cited Cases

[9] **Constitutional Law** 90.1(1)
92k90.1(1) Most Cited Cases

Injunction prohibiting dissemination of threatening posters which violated Freedom of Access to Clinic Entrances Act (FACE) was not an improper prior restraint on speech. U.S.C.A. Const.Amend. 1; 18 U.S.C.A. § 248.

*1061 Christopher A. Ferrara, American Catholic Lawyers Ass'n Inc., Ramsey, NJ, for defendants-appellants Donald Treshman and Monica Migliorino Miller.

Stephen J. Safranek, Richard Thompson, and Edward L. White, III, Thomas More Center for Law & Justice, Ann Arbor, MI, for defendants-appellants American Coalition of Life Activists, Advocates for Life Ministries, Andrew Burnett, David Crane, Catherine Ramey, Michael Bray, and Dawn Stover.

Maria T. Vullo, Paul, Weiss, Rifkind, Wharton & Garrison, New York, NY, for plaintiffs-appellees Planned Parenthood of the Columbia/Willamette, Inc., Portland Feminist Women's Health Center, Robert Crist, M.D., Warren Hern, M.D., Elizabeth P. Newhall, M.D., and James Newhall, M.D.

Robert M. O'Neil, for amicus curiae Thomas Jefferson Center for the Protection of Free Expression, Charlottesville, VA.

Paul deParrie, Portland, OR, amicus curiae pro se.

Michael H. Simon, Perkins Coie LLP, Portland, OR, for amicus curiae ACLU Foundation of Oregon, Inc.

Susan M. Popik, Chapman, Popik & White, San Francisco, CA, for amici curiae Feminist Majority Foundation, Center for Reproductive Law and Policy, National Abortion and Reproductive Rights Action League and NARAL Foundation, National Abortion Federation, National Coalition of Abortion Providers, National Organization for Women Foundation, NOW Legal Defense and Education Fund, National Women's Health Foundation, Northwest Women's Law Center, Physicians for Reproductive Choice and Health, and Women's Law Project.

Eliot D. Prescott and Jane R. Rosenberg, Assistant Attorneys General of Connecticut, for amici curiae Connecticut, Arizona, California, Colorado, Hawaii, Kansas, Montana, Nevada, New York, Oklahoma, Oregon and Washington.

Erwin Chemerinsky, University of Southern California Law School, Los Angeles, CA, for amici curiae Anti-Defamation League, The American Jewish Committee, Hadassah, the Women's Zionist Organization of America, Inc.

William A. Norris, Akin, Gump, Strauss, Hauer & Feld, L.L.P., Los Angeles, CA, for amicus American Medical Association.

Lawrence S. Lustberg, Gibbons, Del Deo, Dolan, Griffinger & Vecchione, Newark, ***1062** NJ, for amici curiae Senator Charles E. Schumer, et al.

Appeals from the United States District Court for the District of Oregon; Robert E. Jones, District Judge, Presiding. D.C. No. CV-95-01671-REJ (District of Oregon).

Before: SCHROEDER, Chief Judge, and REINHARDT, KOZINSKI, O'SCANNLAIN, RYMER, KLEINFELD, HAWKINS, SILVERMAN, WARDLAW, BERZON, and RAWLINSON, Circuit Judges.

Opinion by Judge RYMER; Dissent by Judge REINHARDT; Dissent by Judge KOZINSKI; Dissent by Judge BERZON.

RYMER, Circuit Judge.

For the first time we construe what the Freedom of Access to Clinics Entrances Act (FACE), 18 U.S.C. § 248, means by "threat of force." FACE gives aggrieved persons a right of action against whoever by "threat of force ... intentionally ... intimidates ... any person because that person is or has been ... providing reproductive health services." 18 U.S.C. § 248(a)(1) and (c)(1)(A). This requires that we define "threat of force" in a way that comports with the First Amendment, and it raises the question whether the conduct that occurred here falls within the category of unprotected speech.

Four physicians, Dr. Robert Crist, Dr. Warren M. Hern, Dr. Elizabeth Newhall, and Dr. James Newhall, and two health clinics that provide medical services to women including abortions, Planned Parenthood of the Columbia/Willamette, Inc. (PPCW) and the Portland Feminist Women's Health Center (PFWHC), brought suit under FACE [FN1] claiming that they were targeted with threats by the American Coalition of Life Activists (ACLA), Advocates for Life Ministries (ALM), and numerous individuals. [FN2] Three threats remain at issue: the Deadly Dozen "GUILTY" poster which identifies Hern and the Newhalls among ten others; the Crist "GUILTY" poster with Crist's name, addresses and photograph; and the "Nuremberg Files," which is a compilation about those whom the ACLA anticipated one day might be put on trial for crimes against humanity. The "GUILTY" posters identifying specific physicians were circulated in the wake of a series of "WANTED" and "unWANTED" posters that had identified other doctors who performed abortions before they were murdered.

FN1. We refer collectively to the plaintiffs as "physicians" unless reference to a particular party is required. In addition to FACE, the case went to trial on claims that the same conduct violated the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1962 (except that ACLA was alleged to be the RICO enterprise and was not a defendant on this claim), and on claims that the defendants conspired to violate FACE and RICO. As each claim turns on whether there were true threats without constitutional protection, the appeal and our opinion focus only on FACE.

FN2. Michael Bray, Andrew Burnett, David A. Crane, Timothy Paul Dreste, Joseph L. Foreman, Stephen P. Mears, Monica Migliorino Miller, Catherine Ramey, Dawn Marie Stover, Donald Treshman, and Charles Wysong. We refer to them collectively as "ACLA."

Although the posters do not contain a threat on their face, the district court held that context could be considered. It defined a threat under FACE in accordance with our "true threat" jurisprudence, as a statement made when "a reasonable person would foresee that the statement would be interpreted by those to whom the maker communicates the statement as a serious expression of intent to harm." Applying this definition, the court denied ACLA's motion for summary judgment in a published opinion. ***1063***Planned Parenthood of the Columbia/Willamette, Inc. v. ACLA (PPCW II)*, 23 F.Supp.2d 1182 (D.Or.1998). [FN3] The jury returned a verdict in physicians' favor, and the court enjoined ACLA from publishing the posters or providing other materials with the specific intent to threaten Crist, Hern, Elizabeth Newhall, James Newhall, PPCW, or the Health Center. *Planned Parenthood of the Columbia/Willamette, Inc. v. ACLA (PPCW III)*, 41 F.Supp.2d 1130 (D.Or.1999). ACLA timely appealed.

FN3. The court had previously denied ACLA's motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6). *Planned Parenthood of the Columbia/Willamette, Inc. v. ACLA (PPCW I)*, 945 F.Supp. 1355 (D.Or.1996).

A panel of this court reversed. In its view, the standard adopted by the district court allowed the jury to find ACLA liable for putting the doctors in harm's way by singling them out for the attention of unrelated but violent third parties, conduct which is protected by the First Amendment, rather than for authorizing or directly threatening harm itself, which is not. *Planned Parenthood of the Columbia/Willamette, Inc. v. ACLA (PPCW IV)*, 244 F.3d 1007 (9th Cir.), *reh'g en banc granted*, 268 F.3d 908 (9th Cir.2001). The panel decided that it should evaluate the record independently to determine whether ACLA's statements could reasonably be construed as saying that ACLA, or its agents, would physically harm doctors who did not stop performing abortions. Having done so, the panel found that the jury's verdict could not stand.

We reheard the case en banc because these issues are obviously important. We now conclude that it was proper for the district court to adopt our long-standing law on "true threats" to define a "threat" forpurposes of FACE. FACE itself requires that the threat of force be made with the intent to intimidate. Thus, the jury must have found that ACLA made statements to intimidate the physicians, reasonably foreseeing that physicians would interpret the statements as a serious expression of ACLA's intent to harm them because they provided reproductive health services. Construing the facts in the light most favorable to physicians, the verdict is supported by substantial evidence. ACLA was aware that a "wanted"-type poster would likely be interpreted as a serious threat of death or bodily harm by a doctor in the reproductive health services community who was identified on one, given the previous pattern of "WANTED" posters identifying a specific physician followed by that physician's murder. The same is true of the posting about these physicians on that part of the "Nuremberg Files" where lines were drawn through the names of doctors who provided abortion services and who had been killed or wounded. We are independently satisfied that to this limited extent, ACLA's conduct amounted to a true threat and is not protected speech.

As we see no reversible error on liability or in the equitable relief that was granted, we affirm. However, we remand for consideration of whether the punitive damages award comports with due process.

I

The facts are fully set out in the district court's order granting injunctive relief, *PPWC III*, 41 F.Supp.2d at 1131-1155, and we shall not belabor them. In sum:

On March 10, 1993, Michael Griffin shot and killed Dr. David Gunn as he entered an abortion clinic in Pensacola, Florida. Before this, a "WANTED" and an "unWANTED" poster with Gunn's name, photograph, address and other personal information were published. The "WANTED" poster describes Gunn as an abortionist and invites participation by prayer and ***1064** fasting, by writing and calling him and sharing a willingness to help him leave his profession, and by asking him to stop doing abortions; the "unWANTED" poster states that he kills children at designated locations and "[t]o defenseless unborn babies Gunn in [sic] heavily armed and very dangerous." After Gunn's murder, Bray and Paul Hill (a non-party who was later convicted of murdering a different doctor) prepared a statement supporting Griffin's acquittal on a justifiable homicide theory, which ALM, Burnett, Crane, Dodds, Foreman, McMillan, Ramey and Stover joined.

On August 21, 1993, Dr. George Patterson, who operated the clinic where Gunn worked, was shot to death. A "**WANTED**" poster had been circulated prior to his murder, indicating where he performed abortions and that he had Gunn perform abortions for his Pensacola clinic.

In July 1994, Dr. John Bayard Britton was murdered by Paul Hill after being named on an "unWANTED" poster that Hill helped to prepare. One gives Britton's physical description together with his home and office addresses and phone numbers, and charges "crimes against humanity"; another also displays his picture and states that "he is considered armed and extremely dangerous to women and children. Pray that he is soon apprehended by the love of Jesus!!!" In addition to these items, a third version of the Britton "unWANTED" poster lists personal achievements and Britton's "crimes against humanity," also warning that "John Bayard Britton is considered armed and extremely dangerous, especialy [sic] to women and children." ALM, Bray,

Burnett, Crane, McMillan, Ramey and Stover signed a petition supporting Hill.

Many pro-life activists in Operation Rescue condemned these acts of violence. As a result, ALM, Bray, Burnett, Crane, Foreman, McMillan, Ramey and Stover, who espoused a "pro-force" point of view, split off to form ACLA. Burnett observed, "if someone was to condemn any violence against abortion, they probably wouldn't have felt comfortable working with us." Organizational meetings were held in the spring of 1994, and ACLA's first event was held in August 1994. ACLA is based in Portland, Oregon, as is ALM. ALM publishes *Life Advocate,* a magazine that is distributed nationally and advocates the use of force to oppose the delivery of abortion services. Except for Bray, who authored *A Time to Kill* and served time in federal prison for conspiring to bomb ten clinics, the individual defendants were directors of ACLA and actively involved in its affairs. ALM commissioned and published Bray's book, noting that it "shows the connection between the [justifiable homicide] position and clinic destruction and the shootings of abortionists." Wysong and ACLA also drafted and circulated a "Contract on the Abortion Industry," having deliberately chosen that language to allude to mafia hit contracts.

ACLA presented the Deadly Dozen poster during a January 25, 1995 press conference at the March for Life event in Washington, D.C. Bray, Burnett, Crane, Dodds, Foreman, McMillan, Murch, Ramey, Stover, Treshman and Wysong were there; Dreste later ratified the poster's release. This poster is captioned "**GUILTY**" at the top (which meant the same thing to Crane, who drafted it, as "wanted"), beneath which in slightly smaller print the poster indicates "OF CRIMES AGAINST HUMANITY." The poster continues: "Abortion was provided as a choice for East European and Jewish women by the (Nazi) National Socialist Regime, and was prosecuted during the Nuremberg Trials (1945-46) under Allied Control Order No. 10 as a 'war crime.' " Under the heading "THE DEADLY DOZEN," the poster identifies thirteen doctors of whom James Newhall, Elizabeth Newhall, ***1065** and Warren Hern are three. The poster provides Hern's residence and the home address of James Newhall and Elizabeth Newhall; it also lists the name and home address of Dr. George Kabacy, a doctor who provided abortions at PPCW. It offers a "$5,000 REWARD" "for information leading to arrest, conviction and revocation of license to practice medicine." At the bottom the poster bears the legend "**ABORTIONIST**" in large, bold typeface. The day after the Deadly Dozen poster was released, the FBI offered protection to doctors identified on it and advised them to wear bulletproof vests and take other security precautions, which they did. Knowing this, ALM reprinted the poster in the March 1995 edition of its magazine *Life Advocate* under a cover with the "grim reaper" holding a scythe; Murch printed it in his newsletter *Salt & Light;* and ACLA republished the Deadly Dozen poster at events in August 1995 and January 1996.

ACLA released the Crist poster along with five others in August 1995 at the old federal courthouse in St. Louis where the *Dred Scott* decision had been handed down. Burnett, Crane, Dreste, McMillan, Ramey, Stover and Wysong attended the event. Three of the posters identify doctors; the others identify reproductive health care clinics, one of which was a Planned Parenthood affiliate where Crist worked. The Crist poster has "**GUILTY**" in large bold letters at the top followed by "OF CRIMES AGAINST HUMANITY" in smaller font. It also gives his home and work addresses; states "Please write, leaflet or picket his neighborhood to expose his blood guilt"; offers a "$500 REWARD" "to any ACLA organization that successfully persuades Crist to turn from his child killing through activities within ACLA guidelines"; and has "**ABORTIONIST**" in large bold type at the bottom.

At its January 1996 conference, ACLA displayed the Deadly Dozen poster, held a "White Rose Banquet" to honor prisoners convicted of anti-abortion violence, and introduced ALM's Paul deParrie to unveil the "Nuremberg Files." ACLA sent a hard copy of some of the Files to Neal Horsley (a non-party) to post on the internet, and ACLA's name appeared on the Nuremberg Files website opened in January 1997. Approximately 200 people are listed under the label "ABORTIONISTS: the shooters," and 200 more are listed under Files for judges, politicians, law enforcement, spouses, and abortion rights supporters. Crist, Hern and the Newhalls are listed in the "abortionists" section, which bears the legend: "Black font (working); Greyed-out Name (wounded); Strikethrough (fatality)." The names of Gunn, Patterson and Britton are struck through.

By January 1995 ACLA knew the effect that "WANTED," "unWANTED," or "GUILTY" posters had on doctors named in them. For example, in a September 1993 issue of *Life Advocate* which reported that an "unwanted" poster was being prepared for Britton, ALM remarked of the Gunn murder that it "sent shock waves of fear through the

ranks of abortion providers across the country. As a result, many more doctors quit out of fear for their lives, and the ones who are left are scared stiff." Of another doctor who decided to quit performing abortions after circulation of a "Not Wanted" poster, Bray wrote that "it is clear to all who possess faculties capable of inductive analysis: he was bothered and afraid." Wysong also stated: "Listening to what abortionists said, abortionists who have quit the practice who are no longer killing babies but are now pro-life. They said the two things they feared the most were being sued for malpractice and having their picture put on a poster." And Burnett testified with respect to the ***1066** danger that "wanted" or "guilty" posters pose to the lives of those who provide abortions: "I mean, if I was an abortionist, I would be afraid."

By January 1995 the physicians knew about the Gunn, Patterson and Britton murders and the posters that preceded each. Hern was terrified when his name appeared on the Deadly Dozen poster; as he put it: "The fact that wanted posters about these doctors had been circulated, prior to their assassination, and that the--that the posters, then, were followed by the doctor's assassination, emphasized for me the danger posed by this document, the Deadly Dozen List, which meant to me that--that, as night follows day, that my name was on this wanted poster ... and that I would be assassinated, as had the other doctors been assassinated." Hern interpreted the poster as meaning "Do what we tell you to do, or we will kill you. And they do." Crist was "truly frightened," and stopped practicing medicine for a while out of fear for his life. Dr. Elizabeth Newhall interpreted the Deadly Dozen poster as saying that if she didn't stop doing abortions, her life was at risk. Dr. James Newhall was "severely frightened" in light of the "clear pattern" of a wanted poster and a murder when there was "another wanted poster with my name on it."

The jury found for plaintiffs on all claims except for Bray and Treshman on the RICO claims. [FN4] The district court then considered equitable relief. It found that each defendant used intimidation as a means of interfering with the provision of reproductive health services; that each independently and as a co-conspirator published and distributed the Deadly Dozen poster, the Crist poster, and the Nuremberg Files; and that each acted with malice and specific intent in communicating true threats to kill, assault or do bodily harm to each of the plaintiffs to intimidate them from engaging in legal medical practices and procedures. The court found that the balance of hardships weighed "overwhelmingly" in plaintiffs' favor. It also found that thedefendants' actions were not protected speech under the First Amendment. Accordingly, it issued a permanent injunction restraining defendants from: threatening, with the specific intent to do so, any of the plaintiffs in violation of FACE; from publishing or distributing the Deadly Dozen poster and the Crist poster with specific intent to threaten the plaintiffs; from providing additional material concerning plaintiffs, with a specific intent to threaten, to the Nuremberg Files or similar web site; and from publishing or distributing the personally identifying information about the plaintiffs in the Files with a specific intent to threaten. The court also required defendants to turn over materials that are not in compliance with the injunction except for one copy of anything included in the record, which counsel was permitted to retain.

> FN4. On the FACE claims, the jury awarded $39,656 to Crist, $14,429 to Hern, $15,797.98 to Elizabeth Newhall, $375 to James Newhall, $405,834.86 to PPCW, and $50,243 to PFWHC from each defendant as compensatory damages and $14.5 million to Crist, $13 million to Hern, $14 million to Elizabeth Newhall, $14 million to James Newhall, $29.5 million to PPCW, and $23.5 million to PFWHC in punitive damages. On the RICO claims (after trebling), Crist was awarded $892,260; Hern, $324,657; Elizabeth Newhall, $355,454; James Newhall, $8,442; PPCW $9,131,280; and PFWHC, $1,130,466.

II

[1] Before turning to the merits, we must consider the standard of review because ACLA contends that in a free speech case it is de novo. Relying on *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 104 S.Ct. 1949, 80 L.Ed.2d 502 (1984), ACLA submits that we must first determine for ourselves ***1067** whether its speech is classic protected speech or is a "true threat" by reviewing the entire record.

Physicians assert that the standard of review for which ACLA contends comes from libel cases, but that threat cases are different; the more searching review of the record incumbent upon courts in libel

cases, they urge, is inapposite to threat cases. They also point out that we have decided all of our threats cases without engaging in de novo review of the factual record. *See, e.g., United States v. Gilbert,* 884 F.2d 454, 457 (9th Cir.1989) (*Gilbert II*) ("Viewed as a whole, and using the contextual analysis we have used for other statutes, a rational trier of fact could find a threat."); *United States v. Gordon,* 974 F.2d 1110, 1117 (9th Cir.1992) ("Although some of the factual circumstances surrounding the incident suggest a contrary result, the jury acted reasonably [in finding that] the threats were serious."); *United States v. Orozco-Santillan,* 903 F.2d 1262, 1266 (9th Cir.1990) ("[A] rational jury could conclude that Orozco Santillan's statement ... was a threat."); *see also United States v. Hoff,* 22 F.3d 222, 224 (9th Cir.1994) (reviewing for clear error conviction for intimidating forest ranger).

We do not entirely agree with either side. It is true that our threats cases have been decided without conducting a de novo review of the factual record, but the issue was not squarely presented in any of those cases. For this reason, we cannot take it as definitively resolved.

In *Bose* (a defamation action arising out of a publication about loudspeaker systems), the Court confronted an apparent conflict between Federal Rule of Civil Procedure 52(a), providing that findings of fact shall not be set aside unless clearly erroneous, and its rule in cases raising First Amendment issues that "an appellate court has an obligation to 'make an independent examination of the whole record' in order to make sure that 'the judgment does not constitute a forbidden intrusion on the field of free expression.' " *Bose,* 466 U.S. at 498-99, 104 S.Ct. 1949 (quoting *New York Times Co. v. Sullivan,* 376 U.S. 254, 284-86, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964)). The Court noted that it had previously exercised independent judgment on questions such as whether particular remarks are "fighting words," *Street v. New York,* 394 U.S. 576, 592, 89 S.Ct. 1354, 22 L.Ed.2d 572 (1969), and whether, as a matter of constitutional law, a motion picture is obscene. *Jenkins v. Georgia,* 418 U.S. 153, 159-61, 94 S.Ct. 2750, 41 L.Ed.2d 642 (1974). In this connection, the Court observed that in *Jenkins* it had rejected the notion that a jury finding (there of obscenity) "is insulated from review so long as the jury was properly instructed and there is some evidence to support its findings"; rather, substantive constitutional limitations govern. *Bose,* 466 U.S. at 506-07, 104 S.Ct. 1949. Therefore, it concluded, appellate judges must themselves determine whether the record establishes the constitutional facts required for showing actual malice with convincing clarity in a case governed by *New York Times.* This obligation does not, however, extend to any evidence that is not germane to the actual malice (or core constitutional fact) determination. *Id.* at 514 n. 31, 104 S.Ct. 1949.

The Court revisited the issue in *Harte-Hanks Communications, Inc. v. Connaughton,* 491 U.S. 657, 109 S.Ct. 2678, 105 L.Ed.2d 562 (1989). *Harte-Hanks* was a libel action against a newspaper, also governed by *New York Times.* The court of appeals had affirmed a judgment against the paper without attempting to make an independent evaluation of the credibility of conflicting oral testimony concerning the facts underlying the jury's finding of actual malice. Certiorari was granted to consider whether the appellate ***1068** court's analysis was consistent with *Bose.* Harte-Hanks conceded that when conducting the independent review required by *New York Times* and *Bose,* a reviewing court should properly hesitate to disregard a jury's opportunity to observe live testimony and assess witness credibility, but contended that the Supreme Court had nevertheless rejected the trial court's credibility determination in *Bose.* Justice Stevens, writing for the Court in both *Bose* and *Harte-Hanks,* noted that this was not correct; he explained that in *Bose* the Court had accepted the trial court's determination that the author of the report at issue did not provide credible testimony, but had been unwilling to infer actual malice from the finding. *Id.* at 689 n. 35, 109 S.Ct. 2678. The *Harte-Hanks* Court went on to review the entire record, holding that given the instructions, the jury's answers to special interrogatories, and the facts that were not in dispute, the jury must have found certain testimony incredible and that from these findings, considered with the undisputed evidence, it followed that the paper acted with actual malice and that the evidence was sufficient to support such a finding.

The same rule was reiterated in *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston,* 515 U.S. 557, 115 S.Ct. 2338, 132 L.Ed.2d 487 (1995), a First Amendment case involving a parade permit. As the Court explained: "This obligation rests upon us simply because the reaches of the First Amendment are ultimately defined by the facts it is held to embrace, and we must thus decide for ourselves whether a given course of conduct falls on the near or far side of the line of constitutional protection." *Id.* at 567, 115 S.Ct. 2338.

We have discussed the issue a number of times, in

connection with threats in *United States v. Merrill*, 746 F.2d 458 (9th Cir.1984), *United States v. Gilbert (Gilbert I)*, 813 F.2d 1523 (9th Cir.1987), *Melugin v. Hames*, 38 F.3d 1478 (9th Cir.1994), and *Lovell v. Poway Unified School Dist.*, 90 F.3d 367 (9th Cir.1996), and in defamation actions in *Newton v. National Broadcasting Co.*, 930 F.2d 662 (9th Cir.1990), *Eastwood v. National Enquirer, Inc.*, 123 F.3d 1249 (9th Cir.1997), and *Hoffman v. Capital Cities/ABC, Inc.*, 255 F.3d 1180 (9th Cir.2001).

Merrill was prosecuted for mailing injurious articles through the mail (letters with live .22 caliber rim fire bullets, some with the words "Kill Reagan," some with pornographic playing cards) and for threatening the life of the President in violation of 18 U.S.C. § 871. ACLA relies on that part of *Merrill* where we considered the obscenity conviction under the *Bose* standard of review. We interpreted *Bose* and *Smith v. United States*, 431 U.S. 291, 97 S.Ct. 1756, 52 L.Ed.2d 324 (1977), as allowing deferential (sufficiency of the evidence) review of findings about contemporary community standards and the offensiveness of the material, but as requiring more extensive review of the district court's findings that Miller's letters lacked serious political value. *Smith*, 431 U.S. at 305, 97 S.Ct. 1756 (whether a work lacks serious literary, artistic, political, or scientific value for purposes of an obscenity prosecution is a "determination ... particularly amenable to appellate review"). However, we did not apply heightened review to the threats conviction. Instead, we stated:

> Whether any given form of written or oral expression constitutes a true threat for the statute's [§ 871] purposes is a question for the trier of fact under all of the circumstances. *Roy v. United States*, 416 F.2d [874,] 877-78 [(9th Cir.1969)]. A few cases may be so clear that they can be resolved as a matter of law, *e.g.*, *Watts v. United States*, 394 U.S. 705, 89 S.Ct. 1399, 22 L.Ed.2d 664[ ] (1969) (conditional statement made at ***1069** political rally which provoked listeners' laughter was merely "political hyperbole," and question should not have gone to jury), but most cases arising under this statute present widely varying fact patterns that should be left to the trier of fact. *United States v. Carrier*, 672 F.2d [1300,] 1306 [(2d Cir.1982)].

Merrill, 746 F.2d at 462-63. Under this standard we held that the district judge was not clearly erroneous in finding that the letters constituted an objectively serious threat to harm the President.

We followed *Merrill* in *Gilbert I*, 813 F.2d at 1529-30. Gilbert was charged with violating the Fair Housing Act, 42 U.S.C. § 3631(b) and (c), by mailing menacing flyers to intimidate the director of an adoption organization responsible for the placement and adoption of black and Asian children from aiding minority children's occupancy of dwellings in Kootenai County. Noting that whether expression is a true threat is for the trier of fact, we recognized that "[w]hether any given form of written expression can supply the requisite intent requirement is a question for the trier of fact." *Gilbert I*, 813 F.2d at 1529. Thus, "it is a jury question whether actions and communications are clearly outside the ambit of first amendment protection." *Id.* at 1530. And following the Seventh Circuit's lead in *United States v. Khorrami*, 895 F.2d 1186, 1192 (7th Cir.1990), we held in *Melugin* that "the issue whether the prosecution has shown a 'true threat' is a question of fact for the jury, not a question of law for the court." *Melugin*, 38 F.3d at 1485.

Lovell was a § 1983 action in which a student was suspended for allegedly threatening to shoot a teacher. We acknowledged that "[d]ifferent standards are sometimes used when reviewing district court cases in which the court adjudged the constitutionality of a restriction on speech," and that a de novo review of the facts is conducted when a restriction is upheld. *Lovell*, 90 F.3d at 370.

Newton was a defamation action brought by Wayne Newton (a public figure) against NBC. It was tried to a jury, which found actual malice. The appeal caused us specifically to consider how "to strike the proper balance between our constitutional (Seventh Amendment) deference to the factfinder and our constitutional duty to safeguard First Amendment values" in light of *Bose* and *Harte-Hanks*. *Newton*, 930 F.2d at 666. We observed that the "independent examination of the record" contemplated by *Bose* is " 'not equivalent to a "de novo" review of the ultimate judgment itself,' " where the reviewing court makes an "original appraisal of all the evidence to decide whether or not judgment should be entered for the plaintiff." *Id.* at 670 n. 10 (quoting *Bose*, 466 U.S. at 514 n. 31, 104 S.Ct. 1949). However, we also noted that as a general rule, we have conducted de novo review of the record when a restriction on speech has been upheld. *Id.* (citing *Daily Herald Co. v. Munro*, 838 F.2d 380, 383 (9th Cir.1988)). We then read *Bose* and *Harte-Hanks* as creating a "credibility exception" to the *New York Times* rule of independent review, such that we give "special deference" to credibility determinations but conduct "a more searching review of other evidence" germane to the actual malice determination. *Id.* at 671, 672.

Eastwood was another defamation action in which we engaged in an independent review of actual malice. We thought that the jury was properly instructed, but in conducting the review we explained that "it is not enough for us to determine that a reasonable jury could have found for the plaintiff-- a kind of sufficiency-of-the-evidence test, permitting us to affirm even though we would have reached a different conclusion. Rather, 'First Amendment ***1070** questions of "constitutional fact" compel [us to conduct a] *de novo* review.' We ourselves must be convinced that the defendant acted with malice," even though we defer to the jury on questions of credibility. *Eastwood*, 123 F.3d at 1252 (citations omitted). *See also Hoffman*, 255 F.3d at 1186 (relying on *Eastwood*).

It is not easy to discern a rule from these cases that can easily be applied in a threats case where, by definition, a true threat is constitutionally unprotected. Indeed, FACE on its face requires that "threat of force" be defined and applied consistent with the First Amendment. Perhaps this explains why we have treated threat cases differently, explicitly holding that the question of whether there is a true threat is for the jury.

We conclude that the proper definition of a "threat" for purposes of FACE is a question of law that we review de novo. If it were clear that neither the Deadly Dozen nor the Crist poster, or the Nuremberg Files, was a threat as properly defined, the case should not have gone to the jury and summary judgment should have been granted in ACLA's favor. If there were material facts in dispute or it was not clear that the posters were protected expression instead of true threats, the question whether the posters and the Files amount to a "threat of force" for purposes of the statute was for the trier of fact. Assuming that the district court correctly defined "threat" and properly instructed the jury on the elements of liability pursuant to the statute, our review is for substantial evidence supporting the historical facts (including credibility determinations) and the elements of statutory liability (including intent). We review the district court's findings with respect to injunctive relief for clear error and its conclusions of law de novo. However, while we normally review the scope of injunctive relief for abuse of discretion, we will scrutinize the relief granted in this case to determine whether the challenged provisions of the injunction burden no more speech than necessary to achieve its goals. *Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753, 765, 114 S.Ct. 2516, 129 L.Ed.2d 593 (1994).

Given that the verdict for physicians and the injunctive relief granted in their favor restrict speech, we review the record independently in order to satisfy ourselves that the posters and the Files constitute a "true threat" such that they lack First Amendment protection. We will consider the undisputed facts as true, and construe the historical facts, the findings on the statutory elements, and all credibility determinations in favor of the prevailing party. In this way we give appropriate deference to the trier of fact, here both the jury and the district judge, yet assure that evidence of the core constitutional fact--a true threat--falls within the unprotected category and is narrowly enough bounded as a matter of constitutional law.

III

ACLA [FN5] argues that the First Amendment requires reversal because liability was based on political speech that constituted neither an incitement to imminent lawless action nor a true threat. It suggests that the key question for us to consider is whether these posters can be considered "***1071** true threats" when, in fact, the posters on their face contain no explicitly threatening language. Further, ACLA submits that classic political speech cannot be converted into non-protected speech by a context of violence that includes the independent action of others.

> FN5. Treshman and Miller filed a separate brief. We treat their arguments with ACLA's, as each adopts the others' brief. An amicus curiae brief in support of reversal was also submitted on behalf of The Thomas Jefferson Center for the Protection of Free Expression. Paul deParrie submitted a pro se, non-party-in-interest brief challenging the permanent injunction entered by the district court, and an amicus brief in opposition to reconsideration of the panel opinion.

Physicians [FN6] counter that this threats case must be analyzed under the settled threats law of this circuit. Following precedent, it was proper for the jury to take context into account. They point out that the district court limited evidence of anti-abortion violence to evidence tending to show knowledge of a particular defendant, and maintain that the objective standard on which the jury was instructed comports both with Ninth Circuit law and congressional intent.

As the First Amendment does not protect true threats of force, physicians conclude, ACLA's speech was not protected.

> FN6. Amicus briefs in support of affirmance were submitted on behalf of the American Medical Association; seventeen United States Senators and forty-two United States Representatives; the State of Connecticut; the Anti-Defamation League, the American Jewish Committee, and Hadassah, the Women's Zionist Organization of America, Inc.; Feminist Majority Foundation, Center for Reproductive Law and Policy, National Abortion and Reproductive Rights Action League and NARAL Foundation, National Abortion Federation, National Coalition of Abortion Providers, National Organization for Women Foundation, NOW Legal Defense and Education Fund, National Women's Health Foundation, Northwest Women's Law Center, Physicians for Reproductive Choice and Health, and Women's Law Project; and the ACLU Foundation of Oregon, Inc.

A

We start with the statute under which this action arises. Section 248(c)(1)(A) gives a private right of action to any person aggrieved by reason of the conduct prohibited by subsection (a). Subsection (a)(1) provides:

> (a) ... Whoever--
> (1) by force or threat of force or by physical obstruction, intentionally injures, intimidates or interferes with or attempts to injure, intimidate or interfere with any person because that person is or has been, or in order to intimidate such person or any other person or any class of persons from, obtaining or providing reproductive health services ...
> shall be subject to the ... civil remedies provided in subsection (c)....

18 U.S.C. § 248(a)(1). The statute also provides that "[n]othing in this section shall be construed ... to prohibit any expressive conduct (including peaceful picketing or other peaceful demonstration) protected from legal prohibition by the First Amendment to the Constitution." 18 U.S.C. § 248(d)(1).

FACE does not define "threat," although it does provide that "[t]he term 'intimidate' means to place a person in reasonable apprehension of bodily harm to him--or herself or to another." 18 U.S.C. § 248(e)(3). Thus, the first task is to define "threat" for purposes of the Act. This requires a definition that comports with the First Amendment, that is, a "true threat."

The Supreme Court has provided benchmarks, but no definition.

[2] *Brandenburg v. Ohio*, 395 U.S. 444, 447, 89 S.Ct. 1827, 23 L.Ed.2d 430 (1969), makes it clear that the First Amendment protects speech that advocates violence, so long as the speech is not directed to inciting or producing imminent lawless action and is not likely to incite or produce such action. So do *Hess v. Indiana*, 414 U.S. 105, 94 S.Ct. 326, 38 L.Ed.2d 303 (1973) (overturning disorderly conduct conviction of antiwar protestor who yelled "We'll take *1072 the fucking street later (or again)"), and *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 102 S.Ct. 3409, 73 L.Ed.2d 1215 (1982). If ACLA had merely endorsed or encouraged the violent actions of others, its speech would be protected.

However, while advocating violence is protected, threatening a person with violence is not. In *Watts v. United States*, 394 U.S. 705, 89 S.Ct. 1399, 22 L.Ed.2d 664 (1969), the Court explicitly distinguished between political hyperbole, which is protected, and true threats, which are not. Considering how toconstrue a statute which prohibited "knowingly and willfully ... (making) any threat to take the life of or to inflict bodily harm upon the President," the Court admonished that any statute which criminalizes a form of pure speech "must be interpreted with the commands of the First Amendment clearly in mind. What is a threat must be distinguished from what is constitutionally protected speech." *Id.* at 705, 707, 89 S.Ct. 1399. In that case, an 18-year old war protester told a discussion group of other young people at a public rally on the Washington Monument grounds: "They always holler at us to get an education. And now I have already received my draft classification as 1-A and I have got to report for my physical this Monday coming. I am not going. If they ever make me carry a rifle the first man I want to get in my sights is L.B.J." *Id.* at 706, 89 S.Ct. 1399. His audience laughed. Taken in context, and given the conditional nature of the statement and the reaction of the listeners, the Court concluded that the speech could not be interpreted other than as "a kind of very crude offensive method of stating a political opposition to

the President." *Id.* at 708, 89 S.Ct. 1399. Accordingly, it ordered judgment entered for Watts.

ACLA's position is that the posters, including the Nuremberg Files, are protected political speech under *Watts*, and cannot lose this character by context. But this is not correct. The Court itself considered context and determined that Watts's statement was political hyperbole instead of a true threat because of context. *Id.* at 708, 89 S.Ct. 1399. Beyond this, ACLA points out that the posters contain no language that is a threat. We agree that this is literally true. Therefore, ACLA submits, this case is really an incitement case in disguise. So viewed, the posters are protected speech under *Brandenburg* and *Claiborne*, which ACLA suggests is the closest analogue. We disagree that *Claiborne* is closely analogous.

In March 1966 black citizens in Claiborne County made a list of demands for racial equality and integration. Unsatisfied by the response, several hundred black persons at a meeting of the local National Association for the Advancement of Colored People (NAACP) voted to place a boycott on white merchants in the area. The boycott continued until October 1969. During this period, stores were watched and the names of persons who violated the boycott were read at meetings of the NAACP at the First Baptist Church, and published in a local paper called "Black Times." These persons were branded as traitors to the black cause, were called demeaning names, and were socially ostracized. A few incidents of violence occurred. Birdshot was fired at the houses of two boycott violators; a brick was thrown through a windshield; and a flower garden was damaged. None of the victims ceased trading with white merchants. Six other incidents of arguably unlawful conduct occurred. White business owners brought suit against the NAACP and Charles Evers, its field secretary, along with other individuals who had participated in the boycott, for violating Mississippi state laws on malicious interference with a business, antitrust, and illegal boycott. Plaintiffs pursued several theories of liability: participating in management of the ***1073** boycott; serving as an "enforcer" or monitor; committing or threatening acts of violence, which showed that the perpetrator wanted the boycott to succeed by coercion when it could not succeed by persuasion; and as to Evers, threatening violence against boycott breakers, and as to the NAACP because he was its field secretary when he committed tortious and constitutionally unprotected acts. Damages for business losses during the boycott and injunctive relief were awarded.

The Court held that there could be no recovery based on intimidation by threats of social ostracism, because offensive and coercive speech is protected by the First Amendment. "The use of speeches, marches, and threats of social ostracism cannot provide the basis for a damages award. But violent conduct is beyond the pale of constitutional protection." 458 U.S. at 933, 102 S.Ct. 3409. There was some evidence of violence, but the violence was not pervasive as it had been in *Milk Wagon Drivers Union Local 753 v. Meadowmoor Dairies, Inc.*, 312 U.S. 287, 61 S.Ct. 552, 85 L.Ed. 836 (1941). Accordingly, the Court made clear that only losses proximately caused by unlawful conduct could be recovered. Further, civil liability could not be imposed consistent with the First Amendment solely on account of an individual's association with others who have committed acts of violence; he must have incited or authorized them himself.

For the same reasons the Court held that liability could not be imposed on Evers for his participation in the boycott itself, or for his threats of vilification or ostracism. However, the merchants also sought damages from Evers for his speeches. He gave one in April 1966, and two others in April 1969. In the first, he told his audience that they would be watched and that blacks who traded with white merchants would be answerable to him; he also said that any "uncle toms" who broke the boycott would "have their necks broken" by their own people. In his April 19, 1969 speech, Evers stated that boycott violators would be "disciplined" by their own people and warned that the Sheriff could not sleep with boycott violators at night. And on April 21, Evers gave another speech to several hundred people calling for a total boycott of white-owned businesses and saying: "If we catch any of you going in any of them racist stores, we're gonna break your damn neck." The Court concluded that the "emotionally charged rhetoric" of Evers's speeches was within the bounds of *Brandenburg*. It was not followed by violence, and there was no evidence--apart from the speeches themselves--that Evers authorized, ratified, or directly threatened violence. "If there were other evidence of his authorization of wrongful conduct, the references to discipline in the speeches could be used to corroborate that evidence." *Claiborne*, 458 U.S. at 929, 102 S.Ct. 3409. As there was not, the findings were constitutionally inadequate to support the damages judgment against him and, in turn, the NAACP.

Claiborne, of course, did not arise under a threats statute. The Court had no need to consider whether Evers's statements were true threats of force within the meaning of a threats statute; it held only that his speeches did not incite illegal activity, thus could not have caused business losses and could not be the basis for liability to white merchants. As the opinion points out, there was no context to give the speeches (including the expression "break your neck") the implication of authorizing or directly threatening unlawful conduct. To the extent there was any intimidating overtone, Evers's rhetoric was extemporaneous, surrounded by statements supporting non-violent action, and primarily of the social ostracism sort. No specific individuals were targeted. For all that appears, "the break your neck" comments were hyperbolic ***1074** vernacular. Certainly there was no history that Evers or anyone else associated with the NAACP had broken anyone's neck who did not participate in, or opposed, this boycott or any others. Nor is there any indication that Evers's listeners took his statement that boycott breakers' "necks would be broken" as a serious threat that *their* necks would be broken; they kept on shopping at boycotted stores.

Thus, *Watts* was the only Supreme Court case that discussed the First Amendment in relation to true threats before we first confronted the issue. Apart from holding that Watts's crack about L.B.J. was not a true threat, the Court set out no standard for determining when a statement is a true threat that is unprotected speech under the First Amendment. Shortly after *Watts* was rendered, we had to decide in *Roy v. United States*, 416 F.2d 874 (9th Cir.1969), whether a Marine Corps private made a true threat for purposes of 18 U.S.C. § 871 against the President, who was coming to his base the next day, by saying: "I am going to get him." We adopted a "reasonable speaker" test. As it has come to be articulated, the test is:

> Whether a particular statement may properly be considered to be a threat is governed by an objective standard--whether a reasonable person would foresee that the statement would be interpreted by those to whom the maker communicates the statement as a serious expression of intent to harm or assault.

United States v. Orozco-Santillan, 903 F.2d 1262, 1265 (9th Cir.1990).

We have applied this test to threats statutes that are similar to FACE, *see, e.g., United States v. Gilbert (Gilbert II)*, 884 F.2d 454, 457 (9th Cir.1989) (Fair Housing Act banning threat of force to intimidate person based on race and housing practices, 42 U.S.C. § 3631); *United States v. Mitchell*, 812 F.2d 1250, 1255 (9th Cir.1987) (threats against the President, 18 U.S.C. § 871); *Merrill*, 746 F.2d at 462-63 (same); *United States v. Gordon*, 974 F.2d 1110, 1117 (9th Cir.1992) (threat to kill a former President, 18 U.S.C. § 879); *Orozco-Santillan*, 903 F.2d at 1265 (threats to assault a law enforcement officer with intent to intimidate, 18 U.S.C. § 115); *Melugin*, 38 F.3d at 1483-84 (threat to influence judicial proceeding under Alaska state law); *McCalden v. California Library Ass'n*, 955 F.2d 1214, 1222 (9th Cir.1990) (threat to disrupt conference under California's Unruh Act); and *Lovell*, 90 F.3d at 371 (9th Cir.1996) (§ 1983 action involving threat to shoot teacher). Other circuits have, too. [FN7] We see no reason not ***1075** to apply the same test to FACE. [FN8]

FN7. *See, e.g., United States v. Whiffen*, 121 F.3d 18, 20-21 (1st Cir.1997) (statement is threat under 18 U.S.C. § 875(c) if reasonable person would foresee that it would be interpreted as expression of intent to harm); *United States v. Sovie*, 122 F.3d 122, 125 (2d Cir.1997) (Second Circuit approach to threats, adopted in *United States v. Kelner*, 534 F.2d 1020 (2d Cir.1976), is objective test and requires assessing whether a reasonable recipient of statement would construe it as threat in light of context); *United States v. Kosma*, 951 F.2d 549, 556-57 (3d Cir.1991) (statement is threat under 18 U.S.C. § 871 if reasonable person would foresee that it would be interpreted as expression of intent to harm); *United States v. Darby*, 37 F.3d 1059, 1066 (4th Cir.1994) (statement is threat under 18 U.S.C. § 875(c) if reasonable person would interpret the statement as threat); *United States v. Morales*, 272 F.3d 284, 287 (5th Cir.2001) (statement is threat under 18 U.S.C. § 875(c) if recipient placed in reasonable fear of bodily harm); *United States v. Landham*, 251 F.3d 1072, 1080 (6th Cir.2001) (statement is threat under 18 U.S.C. § 875(c) if reasonable recipient of message would interpret it as expression of intent to harm); *United States v. Hartberger*, 148 F.3d 777, 782-83 (7th Cir.1998) (cross burning is threat under 42 U.S.C. § 3631 because the reasonable person would foresee that it would be interpreted as expression of intent to harm); *United States v. Hart*, 212

F.3d 1067, 1072 (8th Cir.2000) (placing Ryder truck in driveway of abortion clinic is threat under FACE because, in light of entire factual context, person would reasonably conclude that the act expresses an intent to harm); *United States v. Magleby*, 241 F.3d 1306, 1311-13 (10th Cir.2001) (cross burning is threat under the Fair Housing Act, 42 U.S.C. § 3631, because reasonable person would foresee that it would be interpreted as expression of intent to harm); *United States v. Callahan*, 702 F.2d 964, 965-66 (11th Cir.1983) (statement is threat under 18 U.S.C. § 871 if reasonable person would construe statement as expression of intent to harm); *Metz v. Dep't of Treasury*, 780 F.2d 1001, 1002 (Fed.Cir.1986) (threat evaluated by reasonable listener considering numerous factors).

Although all now apply an objective standard, several circuits have a "reasonable listener" test while others have a "reasonable speaker" test as we do. The difference does not appear to matter much because all consider context, including the effect of an allegedly threatening statement on the listener.

FN8. Both the House and Senate specifically referred to *Gilbert* 's interpretation of the Fair Housing Act's threat provision in adopting FACE's quite similar text. H. Rep. No. 103-306, 12 n. 19 (1993), 1994 U.S. Code Cong. & Admin. News at 699, 709 n. 19; S.Rep. No. 103-117, at 29 (1993).

[3][4] Under our cases, a threat is "an expression of an intention to inflict evil, injury, or damage on another." *Gilbert II*, 884 F.2d at 457; *Orozco-Santillan*, 903 F.2d at 1265. "Alleged threats should be considered in light of their entire factual context, including the surrounding events and reaction of the listeners." *Orozco-Santillan*, 903 F.2d at 1265; *see also Mitchell*, 812 F.2d at 1255 (citing *Watts*, 394 U.S. at 708, 89 S.Ct. 1399; *Merrill*, 746 F.2d at 462; *Roy*, 416 F.2d at 876). " 'The fact that a threat is subtle does not make it less of a threat.' " *Orozco-Santillan*, 903 F.2d at 1265 (quoting *Gilbert II*, 884 F.2d at 457). A true threat, that is one "where a reasonable person would foresee that the listener will believe he will be subjected to physical violence upon his person, is unprotected by the first amendment." *Id.* (citing *Merrill*, 746 F.2d at 462).

It is not necessary that the defendant intend to, or be able to carry out his threat; the only intent requirement for a true threat is that the defendant intentionally or knowingly communicate the threat. *Orozco-Santillan*, 903 F.2d at 1265 n. 3; *Gilbert II*, 884 F.2d at 456-57; *Mitchell*, 812 F.2d at 1256 (upholding § 871 conviction of defendant with no capacity to carry out threat); *Roy*, 416 F.2d at 877. [FN9] Other circuits are in accord. [FN10] Nevertheless, we are urged to adopt a subjective intent requirement for FACE. In particular, amicus ACLU Foundation of Oregon, Inc., advocates a subjective intent component to "require evidence, albeit circumstantial or inferential in many cases, that the speaker actually *intended* to induce fear, intimidation, or terror; namely, that the speaker intended to threaten. If a person did not ***1076** intend to threaten or intimidate (*i.e.*, did not intend that his or her statement be understood as a threat), then the speech should not be considered to be a 'true threat,' unprotected by the First Amendment." However, this much is subsumed within the statutory standard of FACE itself, which requires that the threat of force be made with the intent to intimidate. The "requirement of intent to intimidate serves to insulate the statute from unconstitutional application to protected speech." *Gilbert I*, 813 F.2d at 1529 (construing the Fair Housing Act's threat provision, 42 U.S.C. § 3631, which is essentially the same as FACE's). No reason appears to engraft another intent requirement onto the statute, because whether or not the maker of the threat has an actual intention to carry it out, "an apparently serious threat may cause the mischief or evil toward which the statute was in part directed." *Gilbert II*, 884 F.2d at 458 (quoting *Roy*, 416 F.2d at 877).

FN9. We have held that 28 U.S.C. § 876, which criminalizes knowingly mailing any communication containing a threat to injure, is a specific intent crime. *United States v. Twine*, 853 F.2d 676 (9th Cir.1988); *United States v. King*, 122 F.3d 808 (9th Cir.1997). However, we were not defining "threat" or considering what a true threat is, and we made it clear that specific intent or ability to carry out the threat is not an essential element. *King*, 122 F.3d at 810 (quoting *Twine*, 853 F.2d at 681 n. 4).

FN10. *See, e.g., United States v. Francis*, 164 F.3d 120, 123 (2d Cir.1999) (rejecting

addition of substantive intent requirement to objective test); *United States v. Miller*, 115 F.3d 361, 363-64 (6th Cir.1997) (same); *United States v. Aman*, 31 F.3d 550, 553-56 (7th Cir.1994) (same); *United States v. Patrick*, 117 F.3d 375, 377 (8th Cir.1997) (same); *United States v. Martin*, 163 F.3d 1212, 1215-16 (10th Cir.1998) (same). *But see United States v. Patillo*, 438 F.2d 13, 15 (4th Cir.1971) (including subjective intent element in § 871). The Fourth Circuit has abandoned this approach in its other true threat cases.

The dissents would change the test, either to require that the speaker actually intend to carry out the threat or be in control of those who will, or to make it inapplicable when the speech is public rather than private. However, for years our test has focused on what *a reasonable speaker* would foresee the *listener's* reaction to be under the circumstances, and that is where we believe it should remain. *See Madsen*, 512 U.S. at 773, 114 S.Ct. 2516 (noting that "threats ... however communicated, are proscribable under the First Amendment, and indicating that display of signs "that could be interpreted as threats or veiled threats" could be prohibited"). Threats are outside the First Amendment to "protect[ ] individuals from the fear of violence, from the disruption that fear engenders, and from the possibility that the threatened violence will occur." *R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 388, 112 S.Ct. 2538, 120 L.Ed.2d 305 (1992). This purpose is not served by hinging constitutionality on the speaker's subjective intent or capacity to do (or not to do) harm. Rather, these factors go to how reasonably foreseeable it is to a speaker that the listener will seriously take his communication as an intent to inflict bodily harm. This suffices to distinguish a "true threat" from speech that is merely frightening. Thus, no reasonable speaker would foresee that a patient would take the statement "You have cancer and will die within six months," or that a pedestrian would take a warning "Get out of the way of that bus," as a serious expression of intent *to inflict* bodily harm; the harm is going to happen anyway.

Neither do we agree that threatening speech made in public is entitled to heightened constitutional protection just because it is communicated publicly rather than privately. As *Madsen* indicates, threats are unprotected by the First Amendment "however communicated." *Madsen*, 512 U.S. at 753, 114 S.Ct. 2516. [FN11]

FN11. Judge Reinhardt chides us for failing to accord public speech more protection than private speech. He misses the point. *Threats*, in whatever forum, may be independently proscribed without implicating the First Amendment. *See e.g., Schenck v. Pro-Choice Network of Western New York*, 519 U.S. 357, 373, 117 S.Ct. 855, 137 L.Ed.2d 1 (1997) (so indicating in case involving public protest against abortion providers); *Madsen*, 512 U.S. at 774, 114 S.Ct. 2516 (same); *Kelner*, 534 F.2d 1020 (JDL press conference in connection with public demonstration about the Palestine Liberation Organization and its leader); *Hart*, 212 F.3d 1067 (public protest against abortion providers).
Nor does *Bauer v. Sampson*, 261 F.3d 775 (9th Cir.2001), turn on a public/private distinction, as Judge Kozinski's dissent suggests. No heightened scrutiny was given to the professor's speech on account of the fact that it had to do with a campus debate. Rather, the *Orozco-Santillan* test was applied, and we concluded that even though there was some violent content to his writings and cartoons, in the context of the underground campus newspaper in which they appeared, they would be perceived as hyperbole instead of as a serious expression of intent to inflict bodily harm.

***1077** [5][6] Therefore, we hold that "threat of force" in FACE means what our settled threats law says a true threat is: a statement which, in the entire context and under all the circumstances, a reasonable person would foresee would be interpreted by those to whom the statement is communicated as a serious expression of intent to inflict bodily harm upon that person. So defined, a threatening statement that violates FACE is unprotected under the First Amendment.

B

Although ACLA does not believe we should reach this point, if we do it submits that no claim was made out even under "true threats" cases. First, it argues that other threats cases were criminal actions against someone who made a real threat directly to others, not political speech as is the case here. It contrasts what it calls "a threat plus context" present in *United*

States v. Dinwiddie, 76 F.3d 913 (8th Cir.1996), and in other out-of-circuit cases, [FN12] with the absence of a direct threat in this case. However, our cases do not require that the maker of the threat personally cause physical harm to the listener. In *Orozco-Santillan*, we made it clear that the speaker did not need to be able to carry out the threat. Likewise in *Mitchell*, the speaker could not possibly have done so. In *Gilbert*, the threatening letter mentions neither the intended victim nor who would carry out the threat. No case to our knowledge has imposed such a requirement, [FN13] and we decline to now. It is the making of the threat with intent to intimidate--not the implementation of it--that violates FACE.

FN12. It relies on *United States v. Viefhaus*, 168 F.3d 392 (10th Cir.1999) (threat that bomb will be activated in 15 pre-selected major cities); *United States v. Schiefen*, 139 F.3d 638 (8th Cir.1998) (personal letter sent to judge); *United States v. Khorrami*, 895 F.2d 1186 (7th Cir.1990) (telephone calls and wanted posters sent directly to Jewish National Fund stating "death to the Fucking JNF"); *United States v. Cooper*, 865 F.2d 83 (4th Cir.1989) (scoping out areas in Washington, D.C. to blow Rajiv Gandhi's brains out); *United States v. Kosma*, 951 F.2d 549 (3d Cir.1991) (threat that 21 guns are going to put bullets through President Reagan's heart and brain); *United States v. Kelner*, 534 F.2d 1020 (2d Cir.1976) (statement over radio that people are trained who are out now and intend to make sure that Arafat is assassinated); *United States v. Sovie*, 122 F.3d 122 (2d Cir.1997) (reiterating Second Circuit test that "true threat" is one that "on its face and in the circumstances in which it is made is so unequivocal, unconditional, immediate and specific as to the person threatened, as to convey a gravity of purpose and imminent prospect of execution"); *United States v. Fulmer*, 108 F.3d 1486 (1st Cir.1997) (silver bullets are coming; considered in context, appeared to be a threat).

FN13. To the contrary, in *Viefhaus*, for example, the threat consisted of a hotline message from an unnamed person that violent acts would be executed by unnamed persons. In *Khorrami*, the purveyor of a "Crimes Against Humanity" poster made no statement that he would be the one to implement the threat. And in *United States v. Bellrichard*, 994 F.2d 1318 (8th Cir.1993), letters warned that God or unnamed parties would kill the addressees. The same is true of *Kelner*, where the court noted that it was not necessary under § 875(c) (prescribing a communication containing a threat) for the government to prove that Kelner had a specific intent or a present ability to carry out his threat. 534 F.2d at 1023.

We do not understand *Dinwiddie* to hold anything different. *Dinwiddie* was also a civil suit under FACE. Mrs. Dinwiddie made comments to Crist outside his clinic, warning "Robert, remember Dr. Gunn ... This could happen to you ... He is not in the world anymore. Whoever sheds man's blood, by man his blood shall be shed." 76 F.3d at 917. She also said: ***1078** "[Y]ou have not seen violence yet until you see what we do to you." *Id.* Writing for the Eighth Circuit, Judge Richard S. Arnold explained that in applying FACE's prohibition on using "threats of force," courts or juries must differentiate between "true threats" and protected speech. The alleged threat must be analyzed in light of its entire factual context to determine whether the recipient of the alleged threat could reasonably conclude that it expresses a determination or intent to injure presently or in the future. As outlined in the opinion, the Eighth Circuit considers a number of factors when deciding whether statements constitute threats of force: the reaction of the recipient and of other listeners, whether the threat was communicated directly to its victim, whether the maker of the threat had made similar statements to the victim in the past, and whether the victim had reason to believe that the maker had a propensity to engage in violence, but the list is not exhaustive and the presence or absence of any of these things is not dispositive. *Id.* at 925. The court concluded that although Mrs. Dinwiddie did not specifically say to Dr. Crist, "I am going to injure you," the statements in context, and Crist's reaction to them, show that they were "threats of force" that "intimidated" Crist. The court also noted that the fact that Mrs. Dinwiddie did not specifically say to Crist that *she* would injure him does not mean that her comments were not "threats of force." *Id.* at 925 n. 9. Accordingly, the court upheld an injunction ordering Mrs. Dinwiddie to stop violating FACE (which, as it pointed out, would have a *de minimis* effect on her ability to express herself) and approved

the injunction's nationwide scope.

[7] ACLA also maintains that "context" means the direct circumstances surrounding delivery of the threat, or evidence sufficient to resolve ambiguity in the words of the statement--not two weeks of testimony as occurred here in the district court. Otherwise, ACLA submits, FACE is facially invalid. However, none of our cases has limited "context" to explaining ambiguous words, or to delivery. We, and so far as we can tell, other circuits as well, consider the whole factual context and "all of the circumstances," *Merrill*, 746 F.2d at 462, in order to determine whether a statement is a true threat. ACLA points to *United States v. Kelner*, 534 F.2d 1020 (2d Cir.1976), but the Second Circuit's view is not to the contrary, as we noted in *Lovell*. *Lovell*, 90 F.3d at 372. The defendant in *Kelner*, who threatened to assassinate Yasser Arafat during a radio broadcast that also contained protected political expression, argued that this insulated his threat from prosecution; the court observed that this was not the case "[s]o long as the threat on its face and in the circumstances in which it is made is so unequivocal, unconditional, immediate and specific as to the person threatened, as to convey a gravity of purpose and imminent prospect of execution." *Kelner*, 534 F.2d at 1027. In *Kelner* as well as in *Lovell*, the threatening statement was considered in context to determine if it were a true threat or not. *See United States v. Malik*, 16 F.3d 45, 50 (2d Cir.1994) (once there is sufficient extrinsic evidence to show that an ordinary and reasonable recipient would interpret letter as threat, case should go to the jury).

Indeed, context is critical in a true threats case and history can give meaning to the medium. Use of Ryder trucks--which the Eighth Circuit found to be a true threat in *United States v. Hart*, 212 F.3d 1067 (8th Cir.2000)--is an example that is strikingly similar to the use of "wanted"-type posters in this case. Hart, who was a known anti-abortion activist, parked two Ryder trucks in the driveways of an abortion clinic. He was prosecuted and convicted of violating FACE. The court held that Hart had threatened the ***1079** clinic to intimidate it by using Ryder trucks, because a Ryder truck had been used in the Oklahoma City bombing of the Murrah Federal Building. Hart knew the clinicians knew this and would fear for their lives. Thus, use of the Ryder truck was a true threat. Like the poster format here, the Ryder truck in *Hart* was a symbol of something beyond the vehicle: there, a devastating bomb; in this case, murder. [FN14]

FN14. *See also, e.g., United States v. Magleby*, 241 F.3d 1306 (10th Cir.2001) (cross burning).

ACLA's contention that allowing consideration of context beyond the direct circumstances surrounding delivery of the words themselves creates a facial invalidity in FACE and the Hobbs Act is unavailing. Of the courts to consider the constitutionality of threats statutes, including the United States Supreme Court in *Watts*, all have upheld constitutionality and ACLA points to none that has disallowed consideration of context. [FN15] This makes sense, because without context, a burning cross or dead rat mean nothing. In any event, the requirement of intent to intimidate cures whatever risk there might be of overbreadth.

FN15. *See, e.g., United States v. Weslin*, 156 F.3d 292 (2d Cir.1998); *United States v. Wilson*, 154 F.3d 658 (7th Cir.1998); *United States v. Bird*, 124 F.3d 667 (5th Cir.1997); *Hoffman v. Hunt*, 126 F.3d 575 (4th Cir.1997); *Terry v. Reno*, 101 F.3d 1412 (D.C.Cir.1996); *United States v. Soderna*, 82 F.3d 1370 (7th Cir.1996); *Dinwiddie*, 76 F.3d 913; *Cheffer v. Reno*, 55 F.3d 1517 (11th Cir.1995).

Nor does consideration of context amount to viewpoint discrimination, as ACLA contends. ACLA's theory appears to be that because the posters did not contain any threat on their face, the views of abortion foes are chilled more than the views of abortion-right proponents because of the random acts of violence committed by some people against abortion providers. However, FACE itself is viewpoint neutral. *See, e.g., United States v. Weslin*, 156 F.3d 292, 296-97 (2d Cir.1998); *United States v. Wilson*, 154 F.3d 658, 663 (7th Cir.1998) ("The Act punishes anyone who engages in the prohibited conduct, irrespective of the person's viewpoint and does not target any message based on content. 'The Access Act thus does not play favorites: it protects from violent or obstructive activity not only abortion clinics, but facilities providing pre-pregnancy and pregnancy counseling services, as well as facilities counseling alternatives to abortion.' ") (quoting *Terry v. Reno*, 101 F.3d 1412, 1419 (D.C.Cir.1996)). Moreover, ACLA could not be liable under FACE unless *it* made a true threat *with the intent to*

intimidate physicians. Thus it is making a threat to intimidate that makes ACLA's conduct unlawful, not its viewpoint.

Because of context, we conclude that the Crist and Deadly Dozen posters are not just a political statement. Even if the Gunn poster, which was the first "WANTED" poster, was a purely political message when originally issued, and even if the Britton poster were too, by the time of the Crist poster, the poster format itself had acquired currency as a death threat for abortion providers. Gunn was killed after his poster was released; Britton was killed after his poster was released; and Patterson was killed after his poster was released. Knowing this, and knowing the fear generated among those in the reproductive health services community who were singled out for identification on a "wanted"-type poster, ACLA deliberately identified Crist on a "GUILTY" poster and intentionally put the names of Hern and the Newhalls on the Deadly Dozen "GUILTY" poster to intimidate them. This goes well beyond the political message (regardless of what one thinks of it) ***1080** that abortionists are killers who deserve death too.

The Nuremberg Files are somewhat different. Although they name individuals, they name hundreds of them. The avowed intent is "collecting dossiers on abortionists in anticipation that one day we may be able to hold them on trial for crimes against humanity." The web page states: "One of the great tragedies of the Nuremberg trials of Nazis after WWII was that complete information and documented evidence had not been collected so many war criminals went free or were only found guilty of minor crimes. We do not want the same thing to happen when the day comes to charge abortionists with their crimes. We anticipate the day when these people will be charged in PERFECTLY LEGAL COURTS once the tide of this nation's opinion turns against child- killing (as it surely will)." However offensive or disturbing this might be to those listed in the Files, being offensive and provocative is protected under the First Amendment. But, in two critical respects, the Files go further. In addition to listing judges, politicians and law enforcement personnel, the Files separately categorize "Abortionists" and list the names of individuals who provide abortion services, including, specifically, Crist, Hern, and both Newhalls. Also, names of abortion providers who have been murdered because of their activities are lined through in black, while names of those who have been wounded are highlighted in grey. As a result, we cannot say that it is clear as a matter of law that listing Crist, Hern, and the Newhalls on *both* the Nuremberg Files *and* the GUILTY posters is purely protected, political expression.

Accordingly, whether the Crist Poster, the Deadly Dozen poster, and the identification of Crist, Hern, Dr. Elizabeth Newhall and Dr. James Newhall in the Nuremberg Files as well as on "wanted"-type posters, constituted true threats was properly for the jury to decide.

C

ACLA next argues that the true threat instructions require reversal because they permitted consideration of motive, history of violence including the violent actions of others, and the defendants' subjective motives as part of context. We have already explained why it is proper for the whole factual context and all the circumstances bearing on a threat to be considered. The court also instructed the jury to consider evidence presented by the defense of non-violence and permissive exercise of free speech. That the contextual facts may have included the violent actions of others does not infect the instruction, because the issue is whether a reasonable person should have foreseen that the Crist Guilty Poster, the Deadly Dozen Poster, and the Nuremberg Files, would be interpreted as a serious threat of harm by doctors who provide abortions and were identified on them.

ACLA also contends that the district court employed the wrong standard of intent, allowing the jury to find in physicians' favor regardless of ACLA's subjective intent. The court instructed: "A statement is a 'true threat' when a reasonable person making the statement would foresee that the statement would be interpreted by those to whom it is communicated as a serious expression of an intent to bodily harm or assault." This language is taken from *Orozco-Santillan*, 903 F.2d at 1265, is an accurate statement of our law, and is faithful to the objective standard we use for determining whether a statement is a true threat. For reasons we have already explained, we decline to read into FACE (or the Hobbs Act) a specific intent to threaten violence or to commit unlawful acts in addition to the intent to intimidate which the statute itself requires.

***1081** ACLA additionally faults the court for failing to provide any standard of intent because the elements instruction merely states that FACE is violated by "a threat of force to intimidate or interfere

with, or attempt to intimidate or interfere with" physicians' ability to provide reproductive health services. As best we can tell, this boils down to a complaint that the instruction did not say "in order to" between "threat of force" and "to intimidate." However, this is the plain import of the instruction.

ACLA further suggests that the conspiracy instruction, combined with the "attempt to intimidate" instruction, could have resulted in liability for an "attempt to threaten" without proof of an actual threat. [FN16] We do not see how, because the jury had to find a true threat before reaching any other FACE or RICO issues. ACLA also posits that the standard form instruction, "[i]f you find a defendant was a member of a conspiracy, that defendant is responsible for what other conspirators said or did to carry out the conspiracy, whether or not that defendant knew what they said or did," had the effect in this case of violating the rule of *Claiborne* that one cannot be held accountable for the speech of others by reason of mere association, absent ratification or adoption of it. However, the jury was instructed that a person does not become a conspirator merely by associating with one or more persons who are conspirators; rather, one becomes a member of a conspiracy by willfully participating in an unlawful plan with the intent to advance or further some object or purpose of it. There is no right to associate with others to engage in activities that are unlawful and unprotected by the First Amendment, as the making of true threats to intimidate providers of reproductive health services is. *Madsen*, 512 U.S. at 776, 114 S.Ct. 2516 (upholding injunction restraining abortion protestors acting in concert with defendants). The Seventh Circuit had occasion to consider (and reject) a similar argument made by abortion protestors who had been convicted of conspiring to violate FACE in *United States v. Wilson*, 154 F.3d 658, 666-67 (7th Cir.1998). It explained that the Supreme Court in *Claiborne* was referring to individuals who were engaging in a peaceful protest and thus were properly exercising their First Amendment rights, whereas FACE is aimed at those who themselves intend to intimidate and thereby deprive others of their lawful rights. As in *Wilson*, we are not persuaded that the instructions allowed any defendant in this case to be found liable for threats to intimidate for ***1082** which he or she was not responsible. They either participated in making them, or agreed that they should be made.

FN16. ACLA argues more broadly that no claim for conspiracy to violate FACE exists, but we decline to consider the issue because it is raised for the first time on appeal. *Los Angeles News Serv. v. Reuters Television Int'l Ltd.*, 149 F.3d 987, 996 (9th Cir.1998). It had every opportunity to assert this view in the district court before judgment, having moved to dismiss, for summary judgment, and for judgment as a matter of law as well as having objected to proposed instructions (but not on conspiracy). Failing to raise the issue until now, absent any exceptional circumstances or change in the law, prejudices both the plaintiffs and the process. Considerable time and resources were devoted to litigating these claims to verdict. In any event, we cannot see that substantial injustice occurred. FACE came into being in part because of "organized," "concerted" campaigns by "groups" to disrupt access to reproductive health services, S.Rep. No. 103-117, at 6-7 (1993), and the instruction effectively channeled the jury away from finding defendants liable for mere association and instead required it to find that each defendant threatened physicians intending to intimidate them or willfully joined with others to do so. *See Madsen v. Women's Health Center, Inc.*, 512 U.S. 753, 776, 114 S.Ct. 2516, 129 L.Ed.2d 593 (1994) (freedom of association protected by First Amendment does not extend to joining with others for the purpose of depriving third parties of their lawful rights).

Finally, we note that the jury was instructed that "[e]ven speech that is coercive may be protected if the speaker refrains from violence or from making a true threat. Moreover, the mere abstract teaching of the moral propriety or even moral necessity for resort to force and violence is protected speech under the First Amendment." It was reminded that "plaintiffs' claims are based only on the three statements I have listed for you," and that it should determine the case as to each defendant and each claim separately. Accordingly, the court did not abuse its discretion in formulating the instructions, nor was the jury incorrectly instructed as a matter of law on true threats or the elements of FACE. [FN17]

FN17. ACLA cites other errors in the Hobbs Act and RICO instructions but offers no authority in support. Neither does it

indicate that any objection on these issues was preserved. Its argument on appeal is not developed. In any event, the instructions appear to track model instructions and are not obviously wrong. For these reasons, we do not discuss these challenges and summarily reject them.

ACLA also contends that the court compromised its right to a fair trial by telling the jury that the United States Supreme Court has declared that women have a constitutional right to abortion, and no one is permitted to violate the law because of their views about abortion. It objected on the ground that the charge was "death to us" but makes no substantial argument on appeal why there was reversible error on this account. We summarily reject this argument as well.

D

ACLA joins in Treshman's assertion that the court erroneously admitted prejudicial evidence by permitting: an FBI agent and two federal marshals to testify that the FBI and the Justice Department considered ACLA's two posters to be "serious threats"; references to non-party violence; introduction of defendants' arrests; physicians' counsel to tell the jury about Bray's invocations of the Fifth Amendment through a summary of his deposition; references to actions of certain defendants and non-parties on the abortion debate and to such things as the signing of "Defensive Action petitions" by five or six of the individual defendants; an exhibit with Rev. Sullivan's hearsay opinion that ACLA is a "cancer" which prolifers must "cut out immediately" before it "destroys the pro-life movement" to remain in the exhibit books;and by permitting deposition summaries to be introduced. ACLA recognizes that evidentiary rulings are normally reviewed for an abuse of discretion, but argues that in cases raising First Amendment issues appellate courts must independently examine the record for evidentiary errors which penalize political speech or allow "a forbidden intrusion on the field of free expression." *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 17, 110 S.Ct. 2695, 111 L.Ed.2d 1 (1990) (citation omitted). We decline ACLA's invitation to review evidentiary rulings de novo. No case of which we are aware suggests that the obligation to examine the record independently extends so far. Nor do we believe that appellate judges should retry cases, as ACLA's proposal would have us do. Accordingly, we review the district court's evidentiary rulings in this case, as we do evidentiary rulings in all cases, for abuse of discretion. None appears.

Testimony about the law enforcement officers' response to the Crist and Deadly Dozen "GUILTY" posters had some tendency to show the physicians' state of mind when they found out they were named on "wanted"-type posters, as well as to show the knowledge and intent of ACLA in distributing the posters regardless ***1083** of the reaction they precipitated. Both are non-hearsay purposes. No testimony was allowed about what officers thought the posters meant. That FBI agents and United States Marshals advised physicians to take security precautions relates to how Crist, Hern, and the Newhalls perceived their own safety. The court admonished the jury that it should not conclude that these agencies had decided that the threats were "true threats." We assume that the jury followed the court's limiting instruction, *Ortiz- Sandoval v. Gomez*, 81 F.3d 891, 899-900 (9th Cir.1996), which cured whatever potential there may have been for an unduly prejudicial effect from admission of this testimony.

ACLA's knowledge of prior violence and its effect on reproductive health services providers bore directly on its intent to intimidate physicians, and was limited by the district court to that relevant purpose. Bray's invocation of the Fifth Amendment was not improperly admitted as to him in a civil trial. *SEC v. Colello*, 139 F.3d 674, 677 (9th Cir.1998). Co-conspirator statements were admissible so long as they were connected to the conspiracy and the jury found that the statements were made in furtherance of it. The same is true of the Defensive Action petitions, which were clearly admissible against those defendants who signed them and as to others with whom the signatories were conspiring. Speech does not become inadmissible to show context or intent simply because standing alone it is protected. *Wisconsin v. Mitchell*, 508 U.S. 476, 489-90, 113 S.Ct. 2194, 124 L.Ed.2d 436 (1993) (First Amendment does not prohibit evidentiary use of speech to show motive or intent); *Dinwiddie*, 76 F.3d at 918, 925, n. 10 (although advocacy of view that violence is justifiable is protected, it was appropriate for district court to consider plaintiff's awareness of defendant's advocacy of lethal force in determining whether defendant intimidated him with threats of force). Terry Sullivan was a the Chicago meeting that led to the founding of ACLA, and to the extent that he expressed any opinion about how ACLA was undermining a commitment to nonviolence, it was

part of what happened at the time, was relevant to show that ACLA knew how its actions were being interpreted, and was within the district court's discretion to admit once Sullivan's testimony had laid a foundation. Neither Sullivan nor Flip Benham was available to testify at trial; as both had been examined at a deposition, their former testimony was not excluded by the hearsay rule, Fed.R.Evid. 804(b), and its presentation in the form of summaries was within the court's discretion under Rule 611(a). *Oostendorp v. Khanna*, 937 F.2d 1177, 1180 (7th Cir.1991) (requiring deposition summaries not an abuse of discretionary authority to regulate conduct of civil trials); *Walker v. Action Indus., Inc.*, 802 F.2d 703, 712 (4th Cir.1986) (same); *Kingsley v. Baker/Beech Nut Corp.*, 546 F.2d 1136, 1141 (5th Cir.1977) (same); MANUAL FOR COMPLEX LITIGATION, Third, § 22.331 (1995). [FN18]

> FN18. After noting that the decision to admit deposition testimony at all is within the sound discretion of the district court, Judge Flaum explained in *Oostendorp*:
> It follows that the court may control the manner in which deposition testimony is presented; indeed, trial courts are charged to "exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth [and to] avoid needless consumption of time...." Fed.R.Evid. 611(a). The district court adopted its rule to serve these objectives, and we agree that requiring deposition summaries can be a reasonable means of implementing the mandate of Rule 611. We therefore conclude that the district court's requirement was not an abuse of its discretionary authority to regulate the conduct of civil trials.
> *Oostendorp*, 937 F.2d at 1179-80. We hold only, for these reasons, that the district court did not abuse its discretion in requiring summaries in lieu of transcripts. As there was no challenge along the lines of Judge Berzon's dissent to the particular summaries that were presented, we have no occasion to consider whether the court did or did not err in receiving them.

*1084 E

ACLA also joins Treshman's argument that mistrials should have been granted because a juror objected to use of the word "abortionist"; the judge made a remark about Bill Clinton in admonishing a witness to tell the truth; jurors were invited to watch a criminal sentencing proceeding; three jurors had a conversation with one of the physicians during a lunch hour; and physicians' counsel likened defendants to the Oklahoma City and World Trade Center bombers and Islamic terrorists during his closing. We are asked to review the record de novo on this issue as well, although ACLA acknowledges that the normal standard for refusing to grant mistrials is abuse of discretion. We decline to change our standard, and see no reversible error.

When a juror informed the court that the defense's use of the term "abortionist" was becoming distracting, the district court instructed the jury that "[i]t is perfectly legal, and proper, and within any free speech right, for one group, that is opposing another group, to refer to them in the terms they choose. And it's clear the pro-life people, traditionally, I believe, call abortion providers abortionists. So, there should not be any adverse reaction to these people using the lingo and terminology of their protest." The jurors all responded that they could live with that, and keep an open mind with respect to all the evidence. There was no objection to the process, and no abuse of discretion on account of taking no further action. Similarly, after learning of a chance encounter in the courthouse elevator between Elizabeth Newhall and three jurors in the presence of defense counsel, the court inquired whether the jurors had discussed anything substantive and whether their judgment would be impaired by the contact. They responded negatively and the court acted within its discretion in taking no further action. The court also instructed that anything the jury may have seen or heard when the court was not in session is not evidence, and that the case was to be decided solely on the evidence received at trial. Finally, ACLA fails to explain why allowing the jurors to watch two sentencing proceedings was objectionable or prejudicial, and we cannot see how it was.

The judge himself recognized that his Clinton reference was inappropriate. He apologized to the jury about it, and explained that the court was attempting to suggest to the witness that she should just go ahead and answer a question. (The witness had remarked to counsel after being impeached with a prior inconsistent statement under oath, "I am not sure what you mean by truthful.") The judge told jurors to put his comment out of their minds,

permitted the defense to re-open direct examination to allow the witness to explain her prior answer, and told the jury again in his final instructions that any remarks of his were not to be taken as an indication of how much weight to give the testimony of any witness. Whatever the impropriety, it was cured.

As might be expected, closing argument was robust on both sides; the court gave all counsel considerable latitude. Images of famous and infamous figures alike were evoked. The district judge was in the best position to decide whether any particular reference went too far. The court reminded ***1085** the jury that counsels' statements were not evidence, and we cannot say that the defense was so prejudiced by the argument that a mistrial should have been granted.

F

[8] Having concluded that "threat of force" was properly defined and that no trial error requires reversal, we consider whether the core constitutional fact--a true threat--exists such that the Crist and Deadly Dozen Posters, and the Nuremberg Files as to Crist, Hern, and the Newhalls, are without First Amendment protection. The task in this case does not seem dramatically different from determining that the issue should have gone to the jury and that the jury was properly instructed under FACE. Nevertheless, we review the evidence on true threats independently.

The true threats analysis turns on the poster pattern. Neither the Crist poster nor the Deadly Dozen poster contains any language that is overtly threatening. Both differ from prior posters in that the prior posters were captioned "WANTED" while these are captioned "GUILTY." The text also differs somewhat, but differences in caption or words are immaterial because the language itself is not what is threatening. Rather, it is use of the "wanted"-type format in the context of the poster pattern--poster followed by murder--that constitutes the threat. Because of the pattern, a "wanted"-type poster naming a specific doctor who provides abortions was perceived by physicians, who are providers of reproductive health services, as a serious threat of death or bodily harm. After a "WANTED" poster on Dr. David Gunn appeared, he was shot and killed. After a "WANTED" poster on Dr. George Patterson appeared, he was shot and killed. After a "WANTED" poster on Dr. John Britton appeared, he was shot and killed. None of these "WANTED" posters contained threatening language, either. Neither did they identify who would pull the trigger. But knowing this pattern, knowing that unlawful action had followed "WANTED" posters on Gunn, Patterson and Britton, and knowing that "wanted"-type posters were intimidating and caused fear of serious harm to those named on them, ACLA published a "GUILTY" poster in essentially the same format on Dr. Crist and a Deadly Dozen "GUILTY" poster in similar format naming Dr. Hern, Dr. Elizabeth Newhall and Dr. James Newhall because they perform abortions. Physicians could well believe that ACLA would make good on the threat. One of the other doctors on the Deadly Dozen poster had in fact been shot before the poster was published. This is not political hyperbole. Nor is it merely "vituperative, abusive, and inexact." *Watts*, 394 U.S. at 708, 89 S.Ct. 1399 (comparing language used in political arena to language used in labor disputes). In the context of the poster pattern, the posters were precise in their meaning to those in the relevant community of reproductive health service providers. They were a true threat.

The posters are a true threat because, like Ryder trucks or burning crosses, they connote something they do not literally say, yet both the actor and the recipient get the message. To the doctor who performs abortions, these posters meant "You're Wanted or You're Guilty; You'll be shot or killed." This was reinforced by the scorecard in the Nuremberg Files. The communication was not conditional or casual. It was specifically targeted. Crist, Hern, and the Newhalls, who performed abortions, were not amused. *Cf. Watts*, 394 U.S. at 708, 89 S.Ct. 1399 (no true threat in political speech that was conditional, extemporaneous, and met with laughter); *Claiborne*, 458 U.S. at 928, 102 S.Ct. 3409 (spontaneous and emotional appeal ***1086** in extemporaneous speech protected when lawless action not incited).

The "GUILTY" posters were publicly distributed, but personally targeted. While a privately communicated threat is generally more likely to be taken seriously than a diffuse public one, this cannot be said of a threat that is made publicly but is about a specifically identified doctor and is in the same format that had previously resulted in the death of three doctors who had also been publicly, yet specifically, targeted. There were no individualized threats in *Brandenburg*, *Watts* or *Claiborne*. However, no one putting Crist, Hern, and the Newhalls on a "wanted"-type poster, or participating in selecting these particular abortion providers for such a poster or publishing it, could possibly believe anything other than that each would be seriously

worried about being next in line to be shot and killed. And they were seriously worried.

As a direct result of having a "GUILTY" poster out on them, physicians wore bullet-proof vests and took other extraordinary security measures to protect themselves and their families. ACLA had every reason to foresee that its expression of intent to harm (the "GUILTY" poster identifying Crist, Hern, Elizabeth Newhall and James Newhall by name and putting them in the File that tracks hits and misses) would elicit this reaction. Physicians' fear did not simply happen; ACLA intended to intimidate them from doing what they do.

This is the point of the statute and is conduct that we are satisfied lacks any protection under the First Amendment.

Violence is not a protected value. Nor is a *true threat* of violence *with intent to intimidate.* ACLA may have been staking out a position for debate when it merely advocated violence as in Bray's *A Time to Kill,* or applauded it, as in the Defense Action petitions. Likewise, when it created the Nuremberg Files in the abstract, because the First Amendment does not preclude calling people demeaning or inflammatory names, or threatening social ostracism or vilification to advocate a political position. *Claiborne,* 458 U.S. at 903, 909-12, 102 S.Ct. 3409. But, after being on "wanted"-type posters, Dr. Gunn, Dr. Patterson, and Dr. Britton can no longer participate in the debate. By replicating the poster pattern that preceded the elimination of Gunn, Patterson and Britton, and by putting Crist, Hern, and the Newhalls in an abortionists' File that scores fatalities, ACLA was not staking out a position of debate but of threatened demise. This turns the First Amendment on its head.

Like "fighting words," true threats are proscribable. We therefore conclude that the judgment of liability in physicians' favor is constitutionally permissible.

IV

ACLA submits that the damage award must be reversed or limited to the compensatory damages because the punitive award amounts to judgment without notice contrary to *BMW of North America, Inc. v. Gore,* 517 U.S. 559, 116 S.Ct. 1589, 134 L.Ed.2d 809 (1996). We have since discussed the subject in depth in *In re Exxon Valdez,* 270 F.3d 1215, 1241 (9th Cir.2001). Although our review is de novo, the district court should be given the opportunity to evaluate the punitive damages award and to make findings with respect to its propriety. Therefore, we vacate the award of punitive damages and remand for the district court to consider in the first instance whether the award is appropriate in light of *Exxon Valdez.*

V

After trial, the district court found that each defendant used intimidation as a means of interfering with the provision of reproductive health services and acted ***1087** with malice and with specific intent in threatening physicians. It found that physicians remain threatened by ACLA's threats, and have no adequate remedy at law. The court concluded that physicians had proved by clear and convincing evidence that each defendant acting independently and as a co-conspirator prepared and published the Deadly Dozen Poster, the Crist Poster, and the Nuremberg Files with specific intent to make true threats to kill or do bodily harm to physicians, and to intimidate them from engaging in legal medical practices. It "totally reject[ed] the defendants' attempts to justify their actions as an expression of opinion or as a legitimate and lawful exercise of free speech in order to dissuade the plaintiffs from providing abortion services." *PPCW III,* 41 F.Supp.2d at 1154. Applying *Madsen* 's standard, the court found that ACLA's actions were not protected under the First Amendment. Accordingly, it permanently enjoined each of the defendants, their agents, and all persons in active concert with any of them who receive actual notice, from threatening, with the specific intent to do so, Crist, Hern, Dr. Elizabeth Newhall, Dr. James Newhall, PPCW and PFWHC in violation of FACE; publishing, republishing, reproducing or distributing the Deadly Dozen Poster, or the Crist poster, or their equivalent, with specific intent to threaten physicians, PPCW or PFWHC; and from providing additional material concerning Crist, Hern, either Newhall, PPCW or PFWHC to the Nuremberg Files or any mirror web site with a specific intent to threaten, as well as from publishing the personally identifying information about them in the Nuremberg Files with a specific intent to threaten. The court also ordered ACLA to turn over possession of materials that are not in compliance with the injunction.

ACLA complains principally about the restraint on possessing the posters. Pointing to *Stanley v. Georgia,* 394 U.S. 557, 567, 89 S.Ct. 1243, 22 L.Ed.2d 542 (1969), where the Court observed that "the State may no more prohibit mere possession of

obscene matter on the ground that it may lead to antisocial conduct than it may prohibit possession of chemistry books on the ground that they may lead to the manufacture of homemade spirits," ACLA contends that the injunction treats the posters worse than obscenity. However, the posters in this case are quite different from a book; the "wanted"--type posters themselves--not their ideological content--are the tool for threatening physicians. In this sense the posters' status is more like conduct than speech. *Cf. United States v. O'Brien*, 391 U.S. 367, 376-82, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968) (explaining distinction between speech and conduct, and holding that expressive aspect of conduct does not exempt it from warranted regulation). The First Amendment interest in retaining possession of the threatening posters is *de minimis*, while ACLA's continued possession of them constitutes part of the threat. The court heard all the evidence, which included testimony that some defendants obstructed justice and ignored injunctions. Accordingly, we cannot say that the turn-over order was broader than necessary to assure that this particular threat will not be used again.

[9] ACLA also suggests that the injunction is an improper prior restraint on speech because it prohibits dissemination of the posters. It is not. The Supreme Court has rejected the notion that all injunctions which incidentally affect expression are prior restraints. *Madsen*, 512 U.S. at 764 n. 2, 114 S.Ct. 2516; *Schenck v. Pro-Choice Network of Western New York*, 519 U.S. 357, 374 n. 6, 117 S.Ct. 855, 137 L.Ed.2d 1 (1997). Like *Madsen* and *Schenck*, the injunction here was not issued because of the content of ACLA's ***1088** expression, but because of prior unlawful conduct.

The terms of the injunction are finely tuned and exceedingly narrow. Only threats or use of the posters or their equivalent with the specific intent to threaten Crist, Hern, either Newhall, PPCW or PFWHC are prohibited. Only personal information about these particular persons may not be used in the Nuremberg Files with the specific intent to threaten them. This leaves huge room for ACLA to express its views. [FN19]

> FN19. Assuming that he has standing, deParrie's challenges fail for most of the same reasons. The district court found that he was an employee and agent of ALM and it is proper for the injunction to apply to him as well. Fed.R.Civ.P. 65.

CONCLUSION

A "threat of force" for purposes of FACE is properly defined in accordance with our long-standing test on "true threats," as "whether a reasonable person would foresee that the statement would be interpreted by those to whom the maker communicates the statement as a serious expression of intent to harm or assault." This, coupled with the statute's requirement of intent to intimidate, comports with the First Amendment.

We have reviewed the record and are satisfied that use of the Crist Poster, the Deadly Dozen Poster, and the individual plaintiffs' listing in the Nuremberg Files constitute a true threat. In three prior incidents, a "wanted"-type poster identifying a specific doctor who provided abortion services was circulated, and the doctor named on the poster was killed. ACLA and physicians knew of this, and both understood the significance of the particular posters specifically identifying each of them. ACLA realized that "wanted" or "guilty" posters had a threatening meaning that physicians would take seriously. In conjunction with the "guilty" posters, being listed on a Nuremberg Files scorecard for abortion providers impliedly threatened physicians with being next on a hit list. To this extent only, the Files are also a true threat. However, the Nuremberg Files are protected speech.

There is substantial evidence that these posters were prepared and disseminated to intimidate physicians from providing reproductive health services. Thus, ACLA was appropriately found liable for a true threat to intimidate under FACE.

Holding ACLA accountable for this conduct does not impinge on legitimate protest or advocacy. Restraining it from continuing to threaten these physicians burdens speech no more than necessary.

Therefore, we affirm the judgment in all respects but for punitive damages, as to which we remand.

AFFIRMED IN PART; VACATED AND REMANDED IN PART.

REINHARDT, Circuit Judge, with whom KOZINSKI, KLEINFELD, and BERZON, Circuit Judges, join, dissenting:

I concur fully in both Judge Kozinski's and Judge Berzon's dissents. The differences between the majority and dissenting opinions with respect to the First Amendment are clear. I write separately to emphasize one point: the majority rejects the concept that speech made in a political forum on issues of public concern warrants heightened scrutiny. *See* Majority Op. at 1076. This rejection, if allowed to stand, would significantly weaken the First Amendment protections we now enjoy. It is a fundamental tenet of First Amendment jurisprudence that political speech in a public arena is different from purely private speech directed at an individual. *See* ***1089***NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 926-27, 102 S.Ct. 3409, 73 L.Ed.2d 1215 (1982); *Watts v. United States*, 394 U.S. 705, 708, 89 S.Ct. 1399, 22 L.Ed.2d 664 (1969); *New York Times Co. v. Sullivan*, 376 U.S. 254, 270, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964); *Terminiello v. City of Chicago*, 337 U.S. 1, 4, 69 S.Ct. 894, 93 L.Ed. 1131 (1949). Political speech, ugly or frightening as it may sometimes be, lies at the heart of our democratic process. Private threats delivered one-on-one do not. The majority's unwillingness to recognize the difference is extremely troublesome. For this reason alone, I would be compelled to dissent.

KOZINSKI, Circuit Judge, with whom Circuit Judges REINHARDT, O'SCANNLAIN, KLEINFELD and BERZON join, dissenting:

The majority writes a lengthy opinion in a vain effort to justify a crushing monetary judgment and a strict injunction against speech protected by the First Amendment. The apparent thoroughness of the opinion, addressing a variety of issues that are not in serious dispute, [FN1] masks the fact that the majority utterly fails to apply its own definition of a threat, and affirms the verdict and injunction when the evidence in the record does not support a finding that defendants threatened plaintiffs.

FN1. For example, it is clear that context may be taken into account in determining whether something is a true threat, an issue to which the majority devotes 16 pages. *See* Maj. op. at 1070-75. Nor is there a dispute that someone may be punished for uttering threats, even though he has no intent to carry them out, *see id.* at 1076-77, or that we defer to the factfinder on questions of historical fact in First Amendment cases, *id.* at 1067-68.

After meticulously canvassing the caselaw, the majority correctly distills the following definition of a true threat: "a statement which, in the entire context and under all the circumstances, a reasonable person would foresee would be interpreted by those to whom the statement is communicated as *a serious expression of intent to inflict bodily harm* upon that person." Maj. op. at 1076-77 (emphasis added). [FN2] The emphasized language is crucial, because it is not illegal--and cannot be made so-merely to say things that would frighten or intimidate the listener. For example, when a doctor says, "You have cancer and will die within six months," it is not a threat, even though you almost certainly will be frightened. Similarly, "Get out of the way of that bus" is not a threat, even though it is said in order to scare you into changing your behavior. By contrast, "If you don't stop performing abortions, I'll kill you" is a true threat and surely illegal.

FN2. Although the majority's definition does not specify *who* is to inflict the threatened harm, use of the active verb "inflict" rather than a passive phrase, such as "will be harmed," strongly suggests that the speaker must indicate he will take an active role in the inflicting. Recent academic commentary supports the view that this requirement is an integral component of a "true threat" analysis. *See* Steven G. Gey, *The Nuremberg Files and the First Amendment Value of Threats*, 78 Tex. L.Rev. 541, 590 (2000) (part of what "separates constitutionally unprotected true threats from constitutionally protected *Claiborne Hardware*-style political intimidation is [that] the speaker communicates the intent to carry out the threat personally or to cause it to be carried out"); Jennifer E. Rothman, *Freedom of Speech and True Threats*, 25 Harv. J.L. & Pub. Pol'y 283, 289 (2001) ("determining what is a true threat [should] require[ ] proof that the speaker explicitly or implicitly suggest that he or his co-conspirators will be the ones to carry out the threat").

The difference between a true threat and protected expression is this: A true threat warns of violence or other harm that the speaker controls. Thus, when a

doctor tells a patient, "Stop smoking or you'll die of lung cancer," that is not a threat because the doctor obviously can't ***1090** cause the harm to come about. Similarly, "If you walk in that neighborhood late at night, you're going to get mugged" is not a threat, unless it is clear that the speaker himself (or one of his associates) will be doing the mugging.

In this case, none of the statements on which liability was premised were overtly threatening. On the contrary, the two posters and the web page, by their explicit terms, foreswore the use of violence and advocated lawful means of persuading plaintiffs to stop performing abortions or punishing them for continuing to do so. Nevertheless, because context matters, the statements could reasonably be interpreted as an effort to intimidate plaintiffs into ceasing their abortion-related activities. If that were enough to strip the speech of First Amendment protection, there would be nothing left to decide. But the Supreme Court has told us that "[s]peech does not lose its protected character ... simply because it may embarrass others *or coerce them into action.*" *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 910, 102 S.Ct. 3409, 73 L.Ed.2d 1215 (1982) (emphasis added). In other words, some forms of intimidation enjoy constitutional protection.

Only a year after *Claiborne Hardware*, we incorporated this principle into our circuit's true threat jurisprudence. Striking down as overbroad a Montana statute that made it a crime to communicate to another "a threat to ... commit a criminal offense," we stated: "The mere fact that communication induces or 'coerces' action in others does not remove it from first amendment protection." *Wurtz v. Risley*, 719 F.2d 1438, 1441 (9th Cir.1983) (quoting *Claiborne Hardware*, 458 U.S. at 911, 102 S.Ct. 3409). We noted--referring to *Claiborne Hardware* again--that the statute criminalized pure speech designed to alter someone else's conduct, so that a "civil rights activist who states to a restaurant owner, 'if you don't desegregate this restaurant I am going to organize a boycott' could be punished for the mere statement, even if no action followed." *Id.* at 1442. *Claiborne Hardware* and *Wurtz* hold that statements that are intimidating, even coercive, are protected by the First Amendment, so long as the speaker does not threaten that he, or someone acting in concert with him, will resort to violence if the warning is not heeded.

The majority recognizes that this is the standard it must apply, yet when it undertakes the critical task of canvassing the record for evidence that defendants made a true threat--a task the majority acknowledges we must perform de novo, Maj. op at 1070--its opinion fails to come up with any proof that defendants communicated an intent to inflict bodily harm upon plaintiffs.

Buried deep within the long opinion is a single paragraph that cites evidence supporting the finding that the two wanted posters prepared by defendants constituted a true threat. Maj. op at 1079-80; *see also id.* at 1085-86 (same analysis). The majority does not point to any statement by defendants that they intended to inflict bodily harm on plaintiffs, nor is there any evidence that defendants took any steps whatsoever to plan or carry out physical violence against anyone. Rather, the majority relies on the fact that "the poster format itself had acquired currency as a death threat for abortion providers. Gunn was killed after his poster was released; Britton was killed after his poster was released; and Patterson was killed after his poster was released." *Id.* at 1079; *see also id.* at 1085-86. But neither Dr. Gunn nor Dr. Patterson was killed by anyone connected with the posters bearing their names. *Planned Parenthood of the Columbia/Willamette, Inc. v. Am. Coalition* ****1091*** *of Life Activists*, 41 F.Supp.2d 1130, 1134-35 (D.Or.1999). In fact, Dr. Patterson's murder may have been unrelated to abortion: He was killed in what may have been a robbery attempt five months after his poster was issued; the crime is unsolved and plaintiffs' counsel conceded that no evidence ties his murderer to any anti-abortion group. R.T. at 131, 1197.

The record reveals one instance where an individual--Paul Hill, who is not a defendant in this case--participated in the preparation of the poster depicting a physician, Dr. Britton, and then murdered him some seven months later. All others who helped to make that poster, as well as those who prepared the other posters, did not resort to violence. And for years, hundreds of other posters circulated, condemning particular doctors with no violence ensuing. *See* R.T. at 1775-76, 1783-84, 2487, 2828. There is therefore no pattern showing that people who prepare wanted-type posters then engage in physical violence. To the extent the posters indicate a pattern, it is that almost all people engaged in poster-making were non-violent. [FN3]

FN3. The majority so much as admits that the Nuremberg Files website does not constitute a threat because of the large number of people listed there. Maj. op. at

> 1080. The majority does point out that doctors were listed separately, and that the names of doctors who were killed or wounded were stricken or greyed out, *id.* at 1080, but does not explain how this supports the inference that the posting of the website in any way indicated that *defendants* intended to inflict bodily harm on plaintiffs. At most, the greying out and strikeouts could be seen as public approval of those actions, and approval of past violence by others cannot be made illegal consistent with the First Amendment. *See Hess v. Indiana,* 414 U.S. 105, 108-09, 94 S.Ct. 326, 38 L.Ed.2d 303 (1973); *Brandenburg v. Ohio,* 395 U.S. 444, 447, 89 S.Ct. 1827, 23 L.Ed.2d 430 (1969); *Edwards v. South Carolina,* 372 U.S. 229, 237-38, 83 S.Ct. 680, 9 L.Ed.2d 697 (1963); *Noto v. United States,* 367 U.S. 290, 297-99, 81 S.Ct. 1517, 6 L.Ed.2d 836 (1961).

The majority tries to fill this gaping hole in the record by noting that defendants "kn[ew] the fear generated among those in the reproductive health services community who were singled out for identification on a 'wanted'-type poster." Maj. op at 1079. But a statement does not become a true threat because it instills fear in the listener, as noted above, many statements generate fear in the listener, yet are not true threats and therefore may not be punished or enjoined consistent with the First Amendment. *See* pp. 1089-90 *supra.* In order for the statement to be a threat, it must send the message that the speakers themselves--or individuals acting in concert with them--will engage in physical violence. The majority's own definition of true threat makes this clear. Yet the opinion points to no evidence that defendants who prepared the posters would have been understood by a reasonable listener as saying that *they* will cause the harm.

Plaintiffs themselves explained that the fear they felt came, not from defendants, but from being singled out for attention by abortion protesters across the country. For example, plaintiff Dr. Elizabeth Newhall testified, "I feel like my risk comes from being identified as a target. And ... all the John Salvis in the world know who I am, and that's my concern." [FN4] *Planned Parenthood of the Columbia/Willamette, Inc. v. Am. Coalition of Life Activists,* No. CV-95-01671-JO, at 302 (D.Or. Jan. 8, 1999); *see also id.* at 290 ("[U]p until January of '95, I felt relatively diluted by the--you know, in the pool of providers of abortion services. I didn't feel particularly visible to the people who were--you know, to the John Salvis of the world, you know. I sort of felt one of a big, big group."). Likewise, Dr. Warren Martin Hern, another plaintiff, testified that when he heard he was on the list, "I was terrified. [I]t's hard to describe the feeling that--that you are on a list of people to--who have been ***1092** brought to public attention in this way. I felt that this was a--a list of doctors to be killed." *Planned Parenthood,* No. CV-95-01671 JO, at 625 (Jan. 11, 1999).

> FN4. In December 1994, John Salvi killed two clinic workers and wounded five others in attacks on two clinics in Brookline, Massachusetts; Salvi later fired shots at a clinic in Norfolk, Virginia before he was apprehended. *See Planned Parenthood,* 41 F.Supp.2d at 1135-36. Salvi is not a defendant in this case and, as far as the record reveals, was not engaged in the preparation of any posters.

From the point of view of the victims, it makes little difference whether the violence against them will come from the makers of the posters or from unrelated third parties; bullets kill their victims regardless of who pulls the trigger. But it makes a difference for the purpose of the First Amendment. Speech--especially political speech, as this clearly was--may not be punished or enjoined unless it falls into one of the narrow categories of unprotected speech recognized by the Supreme Court: true threat, *Watts v. United States,* 394 U.S. 705, 707, 89 S.Ct. 1399, 22 L.Ed.2d 664 (1969), incitement, *Brandenburg v. Ohio,* 395 U.S. 444, 447, 89 S.Ct. 1827, 23 L.Ed.2d 430 (1969), conspiracy to commit criminal acts, *Scales v. United States,* 367 U.S. 203, 229, 81 S.Ct. 1469, 6 L.Ed.2d 782 (1961), fighting words, *Chaplinsky v. New Hampshire,* 315 U.S. 568, 572-73, 62 S.Ct. 766, 86 L.Ed. 1031 (1942), etc.

Even assuming that one could somehow distill a true threat from the posters themselves, the majority opinion is still fatally defective because it contradicts the central holding of *Claiborne Hardware:* Where the speaker is engaged in public political speech, the public statements themselves cannot be the sole proof that they were true threats, unless the speech directly threatens actual injury to identifiable individuals. Absent such an unmistakable, specific threat, there must be evidence *aside from the political statements themselves* showing that the public speaker would

himself or in conspiracy with others inflict unlawful harm. 458 U.S. at 932-34, 102 S.Ct. 3409. The majority cites not a scintilla of evidence--other than the posters themselves--that plaintiffs or someone associated with them would carry out the threatened harm.

Given this lack of evidence, the posters can be viewed, at most, as a call to arms for *other* abortion protesters to harm plaintiffs. However, the Supreme Court made it clear that under *Brandenburg*, encouragement or even advocacy of violence is protected by the First Amendment: "[M]ere *advocacy* of the use of force or violence does not remove speech from the protection of the First Amendment." *Claiborne Hardware*, 458 U.S. at 927, 102 S.Ct. 3409 (citing *Brandenburg*, 395 U.S. at 447) (emphasis in the original). [FN5] *Claiborne Hardware* in fact goes much farther; it cautions that where liability is premised on "politically motivated" activities, we must "examine critically the basis on which liability was imposed." *Id.* at 915, 102 S.Ct. 3409. As the Court explained, "Since respondents would impose liability on the basis of a public address--which predominantly contained highly charged political rhetoric lying at the core of the First Amendment--we approach this suggested basis for liability with extreme care." *Id.* at 926-27, 102 S.Ct. 3409. This is precisely what the majority does *not* do; were it to do so, it would have no choice but to reverse.

> FN5. Under *Brandenburg*, advocacy can be made illegal if it amounts to incitement. But incitement requires an immediacy of action that simply does not exist here, which is doubtless why plaintiffs did not premise their claims on an incitement theory.

The activities for which the district court held defendants liable were unquestionably of a political nature. There is no allegation that any of the posters in this case disclosed private information improperly obtained. We must therefore assume that the information in the posters was obtained from public sources. All defendants did was reproduce this public information in a format designed to convey a political viewpoint and to achieve political goals. The "Deadly Dozen" posters and the "Nuremberg Files" dossiers were unveiled at ***1093** political rallies staged for the purpose of protesting *Roe v. Wade*, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973). Similarly, defendants presented the poster of Dr. Crist at a rally held on the steps of the St. Louis federal courthouse, where the *Dred Scott* decision was handed down, in order to draw a parallel between "blacks being declared property and unborn children being denied their right to live." *Planned Parenthood*, CV- 95-01671-JO, at 2677 (Jan. 22, 1999). The Nuremberg Files website is clearly an expression of a political point of view. The posters and the website are designed both to rally political support for the views espoused by defendants, and to intimidate plaintiffs and others like them into desisting abortion- related activities. This political agenda may not be to the liking of many people--political dissidents are often unpopular--but the speech, including the intimidating message, does not constitute a direct threat because there is no evidence other than the speech itself that the speakers intend to resort to physical violence if their threat is not heeded.

In determining whether the record here supports a finding of true threats, not only the reasoning but also the facts of *Claiborne Hardware* are highly relevant. *Claiborne Hardware* arose out of a seven-year effort (1966 to 1972) to obtain racial justice in Claiborne County, Mississippi. *Claiborne Hardware*, 458 U.S. at 898, 102 S.Ct. 3409. The campaign employed a variety of tactics, one among them being the boycotting of white merchants. *Id.* at 900, 102 S.Ct. 3409. The boycott and other concerted activities were organized by the NAACP, in the person of its Mississippi field secretary Charles Evers, as well as by other black organizations and leaders. *Id.* at 898-900, 102 S.Ct. 3409.

In order to persuade or coerce recalcitrant blacks to join the boycott, the organizers resorted to a variety of enforcement mechanisms. These included the posting of store watchers outside the boycotted stores. These watchers, also known as "Black Hats" or "Deacons," would "identif[y] those who traded with the merchants." *Id.* at 903, 102 S.Ct. 3409. [FN6] The names were collected and "read aloud at meetings at the First Baptist Church and published in a local black newspaper." *Id.* at 909, 102 S.Ct. 3409. Evers made several speeches containing threats-including those of physical violence- against the boycott violators. *Id.* at 900 n. 28, 902, 926-27, 102 S.Ct. 3409. In addition, a number of violent acts--including shots fired at individuals' homes--were committed against the boycott breakers. *Id.* at 904-06, 102 S.Ct. 3409.

> FN6. It would appear that in the small

> Mississippi community in Claiborne County, black residents knew each other on sight.

The lawsuit that culminated in the *Claiborne Hardware* opinion was brought against scores of individuals and several organizations, including the NAACP. The state trial court found defendants liable in damages and entered "a broad permanent injunction," which prohibited the defendants from engaging in virtually all activities associated with the boycott, including picketing and using store watchers. *Id.* at 893, 102 S.Ct. 3409. The Mississippi Supreme Court affirmed, finding liability based on a variety of state law theories, some of which had as their gravamen the use of force or threat of force by those engaged in the boycott. *Id.* at 894-95, 102 S.Ct. 3409.

The United States Supreme Court began its opinion in *Claiborne Hardware* by noting that "[t]he term 'concerted action' encompasses unlawful conspiracies and constitutionally protected assemblies" and that "certain joint activities have a 'chameleon-like' character." *Id.* at 888, 102 S.Ct. 3409. The Claiborne County boycott, the Court noted, "had such a character; it included elements of criminality and elements of majesty." *Id.* The Court concluded ***1094** that the state courts had erred in ascribing to all boycott organizers illegal acts--including violence and threats of violence--of some of the activists. The fact that certain activists engaged in such unlawful conduct, the Court held, could not be attributed to the other boycott organizers, unless it could be shown that the latter had personally committed or authorized the unlawful acts. *Id.* at 932-34, 102 S.Ct. 3409.

In the portion of *Claiborne Hardware* that is most relevant to our case, *id.* at 927-32, 102 S.Ct. 3409, the Court dealt with the liability of the NAACP as a result of certain speeches made by Charles Evers. In these speeches, Evers seemed to threaten physical violence against blacks who refused to abide by the boycott, saying that:

- the boycott organizers knew the identity of those members of the black community who violated the boycott, *id.* at 900 n. 28, 102 S.Ct. 3409;
- discipline would be taken against the violators, *id.* at 902, 927, 102 S.Ct. 3409;
- "[i]f we catch any of you going in any of them racist stores, we're gonna break your damn neck," *id.* at 902, 102 S.Ct. 3409;
- "the Sheriff could not sleep with boycott violators at night" in order to protect them, *id.*;
- "blacks who traded with white merchants would be *answerable to him*," *id.* at 900 n. 28, 102 S.Ct. 3409 (emphasis in the original).

These statements, the Supreme Court recognized, "might have been understood as inviting an unlawful form of discipline or, at least, *as intending to create a fear of violence whether or not improper discipline was specifically intended*." *Id.* at 927, 102 S.Ct. 3409 (emphasisadded). Noting that such statements might not be constitutionally protected, the Court proceeded to consider various exceptions to the rule that speech may not be prohibited or punished.

The Court concluded that the statements in question were not "fighting words" under the rule of *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572-73, 62 S.Ct. 766, 86 L.Ed. 1031 (1942); nor were they likely to cause an immediate panic, under the rule of *Schenck v. United States*, 249 U.S. 47, 52, 39 S.Ct. 247, 63 L.Ed. 470 (1919) ("The most stringent protection of free speech would not protect a man in falsely shouting fire in a theater and causing a panic."). *Id.* at 927, 102 S.Ct. 3409. Nor was the speech in question an incitement under *Brandenburg v. Ohio*, 395 U.S. 444, 89 S.Ct. 1827, 23 L.Ed.2d 430 (1969), because it resulted in no immediate harm to anyone. *Id.* at 927-28, 102 S.Ct. 3409. The Court also cited, and found inapplicable, its one case that had held "true threats" were not constitutionally protected, *Watts v. United States*, 394 U.S. 705, 705, 89 S.Ct. 1399, 22 L.Ed.2d 664 (1969). *Id.* at 928 n. 71, 102 S.Ct. 3409. The mere fact that the statements could be understood "as intending to create a fear of violence," *id.* at 927, 102 S.Ct. 3409, was insufficient to make them "true threats" under *Watts*.

The Court then considered the theory that the speeches themselves--which suggested violence against boycott violators--might constitute authorization or encouragement of unlawful activity, but flatly rejected it. *Id.* at 929, 102 S.Ct. 3409. The Court noted that the statements were part of the "emotionally charged rhetoric of Charles Evers' speeches," and therefore could not be viewed as authorizing lawless action, even if they literally did so: "Strong and effective extemporaneous rhetoric cannot be nicely channeled in purely dulcet phrases. An advocate must ***1095** be free to stimulate his audience with spontaneous and emotional appeals for unity and action in a common cause. When such appeals do not incite lawless action, they must be regarded as protected speech." *Id.* at 928, 102 S.Ct. 3409. Absent "evidence--apart from the speeches

themselves--that Evers authorized ... violence" against the boycott breakers, neither he nor the NAACP could be held liable for, or enjoined from, speaking. *Id.* at 929, 102 S.Ct. 3409. In other words, even when public speech sounds menacing, even when it *expressly* calls for violence, it cannot form the basis of liability unless it amounts to incitement or directly threatens actual injury to particular individuals.

While set in a different time and place, and involving a very different political cause, *Claiborne Hardware* bears remarkable similarities to our case:

- Like *Claiborne Hardware*, this case involves a concerted effort by a variety of groups and individuals in pursuit of a common political cause. Some of the activities were lawful, others were not. In both cases, there was evidence that the various players communicated with each other and, at times, engaged in concerted action. The Supreme Court, however, held that mere association with groups or individuals who pursue unlawful conduct is an insufficient basis for the imposition of liability, unless it is shown that the defendants actually participated in or authorized the illegal conduct.
- Both here and in *Claiborne Hardware*, there were instances of actual violence that followed heated rhetoric. The Court made clear, however, that unless the violence follows *promptly* after the speeches, thus meeting the stringent *Brandenburg* standard for incitement, no liability could be imposed on account of the speech.
- The statements on which liability was premised in both cases were made during the course of political rallies and had a coercive effect on the intended targets. Yet the Supreme Court held in *Claiborne Hardware* that coercion alone could not serve as the basis for liability, because it had not been shown-by evidence aside from the political speeches themselves-that defendants or their agents were involved in or authorized actual violence.
- In *Claiborne Hardware*, the boycott organizers gathered facts--the identity of those who violated the boycott--and publicized them to the community by way of speeches and a newspaper. As in our case, this ostentatious gathering of information, and publication thereof, were intended to put pressure on those whose names were publicized, and perhaps put them in fear that they will become objects of violence by members of the community. Yet the Supreme Court held that this could not form the basis for liability.

To the extent *Claiborne Hardware* differs from our case, the difference makes ours a far weaker case for the imposition of liability. To begin with, Charles Evers's speeches in *Claiborne Hardware* explicitly threatened physical violence. Referring to the boycott violators, Evers repeatedly went so far as to say that

***1096** "we," presumably including himself, would "break your damn neck." 458 U.S. at 902, 102 S.Ct. 3409. In our case, the defendants never called for violence at all, and certainly said nothing suggesting that they personally would be involved in any violence against the plaintiffs.

Another difference between the two cases is that the record in *Claiborne Hardware* showed a concerted action between the boycott organizers, all of whom operated within close physical proximity in a small Mississippi county. By contrast, there is virtually no evidence that defendants had engaged in any concerted action with any of the other individuals who prepared "wanted" posters in the past. [FN7]

> FN7. The closest connection the district court could find between defendants and any of these individuals was a visit paid by two defendants, Andrew Burnett and Catherine Ramey, to John Burt, a maker of such posters. At that meeting, they "discussed 'wanted' posters." *Planned Parenthood*, 41 F.Supp.2d at 1135. The district court did not find that defendants participated in the preparation of Burt's posters, nor that they otherwise engaged in concerted activities with other abortion protesters.

The most striking difference between the two cases is that one of Evers's speeches in *Claiborne Hardware*, which expressly threatened violence against the boycott violators, was in fact followed by violence; he then made additional speeches, again referring to violence against boycott breakers. 458 U.S. at 900, 102 S.Ct. 3409 (April 1966 speech), at 902, 102 S.Ct. 3409 (April 1969 speeches). [FN8] By contrast, the record here contains *no* evidence that violence was committed against any doctor after his name appeared on defendants' posters or web page. [FN9]

> FN8. On April 1, 1966, Evers made a speech "directed to all 8,000 plus black residents of Claiborne County," where he said tha

"blacks who traded with white merchants would be *answerable to him* " and that "any 'uncle toms' who broke the boycott would 'have their necks broken' by their own people." *Claiborne Hardware*, 458 U.S. at 900 n. 28, 102 S.Ct. 3409 (emphasis in the original). Later that year, violence was, indeed, committed against blacks who refused to join the boycott. *Id.* at 928, 102 S.Ct. 3409. In April 1969, Evers reiterated his message in two other speeches, saying that "boycott violators would be 'disciplined' by their own people" and that " 'If we catch any of you going in any of them racist stores, we're gonna break your damn neck.' " *Id.* at 902, 102 S.Ct. 3409.

FN9. The majority mentions that "[o]ne of the ... doctors on the Deadly Dozen poster had in fact been shot before the poster was published." Maj. op. at 1073. The physician in question, Dr. Tiller, was shot and wounded in August 1993, a year and a half before the Deadly Dozen poster was unveiled. *Planned Parenthood*, 41 F.Supp.2d at 1131-32, 1135. The majority does not explain how including Dr. Tiller's name on the Deadly Dozen poster contributed to the poster's threatening message. To the extent it is relevant at all, inclusion of Dr. Tiller's name cuts the other way because it goes counter to the supposed pattern that the majority is at such pains to establish, namely that listing of a name on a poster was followed by violence against that person. As to Dr. Tiller, that order is obviously reversed.

The opinion's effort to distinguish *Claiborne Hardware* does not bear scrutiny. The majority claims that in *Claiborne Hardware*, "there was no context to give the speeches (including the expression 'break your neck') the implication of ... directly threatening unlawful conduct." Maj. op. at 1073. As explained above, the majority is quite wrong on this point, *see* pp. 1063 *supra*, but it doesn't matter anyway: Evers's statements were threatening on their face. Not only did he speak of breaking necks and inflicting "discipline," he used the first person plural "we" to indicate that he himself and those associated with him would be doing the neck-breaking, 458 U.S. at 902, 102 S.Ct. 3409, and he said that "blacks who traded with ***1097** white merchants would be *answerable to him*," *id.* at 900 n. 28, 102 S.Ct. 3409 (emphasis in the original).

It is possible--as the majority suggests--that Evers's statements were "hyperbolic vernacular," Maj. op. at 1073, [FN10] but the trier of fact in that case found otherwise. The Supreme Court nevertheless held that the statements ought to be treated as hyperbole because of their political content. By any measure, the statements in our case are far less threatening on their face, yet the majority chooses to defer to the jury's determination that they were true threats.

FN10. In support of this claim, the majority states that there was no "indication that Evers's listeners took his statement that boycott breakers' 'necks would be broken' as a serious threat that *their* necks would be broken; they kept on shopping at boycotted stores." Maj. op. at 1073. The majority extrapolates this conclusion from only four out of ten incidents of boycott-related violence cited in *Claiborne Hardware*. *See* 458 U.S. at 904-06, 102 S.Ct. 3409. Although these were the four incidents about which the most information was available--perhaps because these four particular victims were not afraid to lodge a complaint or to come forward and testify--they alone are hardly sufficient to support a conclusion that Evers's audience largely ignored his warnings.

The majority also relies on the fact that the posters here "were publicly distributed, but personally targeted." Maj. op. at 1085. But the threats in *Claiborne Hardware* were also individually targeted. Store watchers carefully noted the names of blacks who entered the boycotted stores, and those names were published in a newspaper and read out loud at the First Baptist Church, where Evers delivered his speeches. 458 U.S. at 903-04, 102 S.Ct. 3409. When speaking of broken necks and other discipline, Evers was quite obviously referring to those individuals who had been identified as defying the boycott; in fact, he stated explicitly that he knew their identity and that they would be answerable to him. *Id.* at 900 n. 28, 102 S.Ct. 3409. The majority's opinion simply cannot be squared with *Claiborne Hardware*.

Claiborne Hardware ultimately stands for the proposition that those who would punish or deter

protected speech must make a very substantial showing that the speech stands outside the umbrella of the First Amendment. This message was reinforced recently by the Supreme Court in *Ashcroft v. Free Speech Coalition*, 535 U.S. ----, 122 S.Ct. 1389, 152 L.Ed.2d 403 (2002), where the government sought to prohibit simulated child pornography without satisfying the stringent requirements of *Miller v. California*, 413 U.S. 15, 93 S.Ct. 2607, 37 L.Ed.2d 419 (1973). The Court rejected this effort, even though the government had earnestly argued that suppression of the speech would advance vital legitimate governmental interests, such as avoiding the exploitation of real children and punishing producers of real child pornography. *See id.* at 1402-04; *see also id.* at 1406-07 (Thomas, J., concurring in the judgment); *id.* at 1407-09 (O'Connor, J., concurring in the judgment in part and dissenting in part); *id.* at 1411-12 (Rehnquist, C.J., dissenting). The Court held that the connection between the protected speech and the harms in question is simply too "contingent and indirect" to warrant suppression. *Id.* at 1401-02; *see also id.* at 1403-04 ("The Government has shown no more than a remote connection between speech that might encourage thoughts or impulses and any resulting child abuse."). As Judge Berzon notes in her inspired dissent, defendants' speech, on its face, is political speech on an issue that is at the cutting edge of moral and political debate in our society, *see* Berzon Dissent at 1101-02, and political speech lies far closer to the core of the First Amendment than does simulated child pornography. "The right to ***1098** think is the beginning of freedom, and speech must be protected from the government because speech is the beginning of thought." *Free Speech Coalition*, 122 S.Ct. at 1403-04. If political speech is to be deterred or punished, the rationale of *Free Speech Coalition* requires a far more robust and direct connection to unlawful conduct than these plaintiffs have offered or the majority has managed to demonstrate. The evidence that, despite their explicitly non-threatening language, the Deadly Dozen poster and the Nuremberg Files website were true threats is too "contingent and indirect" to satisfy the standard of *Free Speech Coalition*.

The cases on which the majority relies do not support its conclusion. *United States v. Hart*, 212 F.3d 1067 (8th Cir.2000), is a case where the communication did not merely threaten harm in the future, but was itself perceived as dangerous. The defendant there parked two Ryder trucks in the driveway of an abortion clinic, as close to the building as possible. *Hart*, 212 F.3d at 1069, 1072. Given the association of Ryder trucks with the Oklahoma City bombing, and the timing and location of the incident, the trucks could reasonably be suspected of containing explosives. They were much like mailing a parcel containing a ticking clock or an envelope leaking white powder. The threat in *Hart* came not from the message itself, but from the potentially dangerous medium used to deliver it.

To make *Hart* even remotely analogous to our case, the defendant there would have had to be picketing abortion clinics with a placard depicting a Ryder truck. We know that the Eighth Circuit would not have permitted the imposition of liability in that situation because of the careful manner in which it circumscribed its holding. The court noted that the trucks were parked in a driveway of the abortion clinic, near the entrance, rather than on the street, and that the incident was timed to coincide with a visit by the President to the area, which heightened security concerns. *Id.* at 1072. In light of these facts, a reasonable person could believe that the trucks might be filled with explosives, which would not have been the case, had defendant merely carried a placard with a picture of a Ryder truck. In our case, the defendants merely displayed posters at locations nowhere near the plaintiffs' homes or workplaces. The threat, if any there was, came not from the posters themselves, but from the effect they would have in rousing others to take up arms against the plaintiffs. *Hart* has no relevance whatsoever to our case.

Nor does *United States v. Dinwiddie*, 76 F.3d 913 (8th Cir.1996), a case involving repeated face-to-face confrontations between the defendant and the targets of her harangues, help the majority. Dinwiddie, a pro-life activist, stood outside Dr. Crist's abortion clinic and shouted various threats through a bullhorn, making it clear that she herself intended to carry them out. As Dinwiddie told one of Dr. Crist's co-workers: "[Y]ou have not seen violence yet until you see what *we* do to you." *Id.* at 925 (emphasis added). Where the speaker directly confronts her target and expressly states that she is among those who will carry out the violence, it is hardly surprising when the court finds that there has been a true threat. [FN11]

FN11. Even then, *Dinwiddie* is instructive for the restraint it exercised in granting relief. Dinwiddie was not subjected to a crushing and punitive award of damages, and the injunction against her was narrowly

drawn and carefully tailored to accommodate her legitimate interests, including her interest in free expression. She was not banned from all speech of a certain kind, but only from speech that expressly violates the Freedom of Access to Clinic Entrances Act or is delivered through a bullhorn within 500 feet of an abortion clinic. *Dinwiddie*, 76 F.3d at 928-29. The Eighth Circuit emphasized that "[t]he types of activity that the injunction would proscribe are quite narrow," and that Dinwiddie would be free to "carry signs, distribute literature, and speak at a reasonable volume even when she is within 500 feet of an abortion clinic." *Id.* By contrast, the injunction in our case indefinitely bars defendants from publishing, reproducing, distributing (and even owning) the posters, the website or anything similar, anywhere in the United States. *Planned Parenthood*, 41 F.Supp.2d at 1155-56.

***1099** We have recognized that statements communicated directly to the target are much more likely to be true threats than those, as here, communicated as part of a public protest. Our caselaw also instructs that, in deciding whether the coercive speech is protected, it makes a big difference whether it is contained in a private communication-a face-to-face confrontation, a telephone call, a dead fish wrapped in newspaper [FN12]-- or is made during the course of public discourse. The reason for this distinction is obvious: Private speech is aimed only at its target. Public speech, by contrast, seeks to move public opinion and to encourage those of like mind. Coercive speech that is part of public discourse enjoys far greater protection than identical speech made in a purely private context. We stated this clearly in *McCalden v. Cal. Library Ass'n*, 955 F.2d 1214 (9th Cir.1990), where, relying on *Brandenburg*, *Claiborne Hardware* and *Wurtz*, we allowed "public speeches advocating violence" substantially more leeway under the First Amendment than "privately communicated threats." *McCalden*, 955 F.2d at 1222. [FN13]

FN12. *See The Godfather* (Paramount Pictures 1972).

FN13. In my dissent from the failure to take *McCalden* en banc, I argued that this distinction was inapposite in *McCalden* because the statement involved--a warning by Holocaust survivors that they will disrupt an exhibit by a Holocaust revisionist with a demonstration--could not be characterized as a threat, even if communicated in private. *McCalden*, 955 F.2d at 1229 (Kozinski, J., dissenting from denial of rehearing en banc). I did not, of course, disagree with *McCalden*'s holding that public statements are entitled to more protection than private ones.

We reaffirmed the importance of the public-private distinction in *Melugin v. Hames*, 38 F.3d 1478 (9th Cir.1994). Finding a death threat communicated to a magistrate judge by mail to be a "true threat," we expressly distinguished between "[t]he 'threat' in *Watts* against President Johnson [which] was made during a *public* political rally opposing the Vietnam War" and defendant's threats, which "were directed in a *private* communication to a state judicial officer with the intent to obtain an immediate jury trial." *Id.* at 1484 (footnote omitted) (emphasis added).

In *Bauer v. Sampson*, 261 F.3d 775 (9th Cir.2001), two members of today's majority emphasized the importance of the public character of speech in deciding whether it constitutes a "true threat." *Bauer* involved a college professor who published an underground campus newsletter containing threatening criticism of the college's board of trustees. [FN14] Noting that "[e]xpression involving a matter of public concern enjoys robust First Amendment protection," the opinion states that "although [the] writings have some violent content," the fact that they were made "in an underground campus newspaper in the ***1100** broader context of especially contentious campus politics" rendered them a "hyperbole" and not a "true threat." *Id.* at 783- 84. [FN15] The majority seems perfectly willing to have this court treat expressly violent statements by Charles Evers and Roy Bauer as hyperbole, but to hold the entirely *non-violent* statements by defendants to be true threats.

FN14. These writings included a reference to a "two-ton slate of polished granite" that defendant "hope[d to] drop" on the college president; a comment that "no decent person could resist the urge to go postal" at a meeting of the board; a fantasy description of a funeral for one of the trustees; and

creating "a satisfying acronym: MAIM" from the college president's name. *Bauer*, 261 F.3d at 780.

FN15. In fact, *no* prior case in our circuit has ever found statements charged with political content and delivered in a public arena to be true threats. See, in addition to the cases already cited, *Lovell v. Poway Unified Sch. Dist.*, 90 F.3d 367 (9th Cir.1996) (finding a "true threat" where a student directly threatened to kill the school counselor in her own office); *United States v. Gordon*, 974 F.2d 1110 (9th Cir.1992) (imposing liability where defendant entered former President Reagan's house and, when apprehended, repeatedly asserted his wish to kill the President); *United States v. Orozco-Santillan*, 903 F.2d 1262 (9th Cir.1990) (holding that defendant's statements to an INS agent, delivered face-to-face and by phone, that the agent "will pay" for defendant's arrest, were "true threats"); *United States v. Gilbert*, 884 F.2d 454 (9th Cir.1989) (finding a true "threat" where a white supremacist mailed a threatening letter and several posters directly to the founder of an adoption agency that placed minority children with white families); *United States v. Mitchell*, 812 F.2d 1250 (9th Cir.1987) (finding a "true threat" where defendant, when questioned by customs officials and Secret Service agents in isolation, repeatedly threatened to kill President Reagan); *United States v. Merrill*, 746 F.2d 458, 460 (9th Cir.1984) (finding a "true threat" where defendant mailed to several individuals "letters [with] macabre and bloody depictions of President Reagan along with the words 'Kill Reagan' "); *Roy v. United States*, 416 F.2d 874, 876 & n. 6 (9th Cir.1969) (finding that a statement by a marine to the telephone operator that he is "going to get" arriving President Johnson constitutes a threat, but suggesting that its decision could have been different if the "words were stated in a political ... context").

Finally, a word about the remedy. The majority affirms a crushing liability verdict, including the award of punitive damages, in addition to the injunction. [FN16] An injunction against political speech is bad enough, but the liability verdict will have a far more chilling effect. Defendants will be destroyed financially by a huge debt that is almost certainly not dischargeable in bankruptcy; it will haunt them for the rest of their lives and prevent them from ever again becoming financially self-sufficient. The Supreme Court long ago recognized that the fear of financial ruin can have a seriously chilling effect on all manner of speech, and will surely cause other speakers to hesitate, lest they find themselves at the mercy of a local jury. *See N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 277-79, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964). The lesson of what a local jury has done to defendants here will not be lost on others who would engage in heated political rhetoric in a wide variety of causes.

FN16. Although the majority remands the award of punitive damages, such award is affirmed unless grossly disproportionate. *See In re Exxon Valdez*, 270 F.3d 1215, 1241 (9th Cir.2001).

In that regard, a retrospective liability verdict is far more damaging than an injunction; the latter at least gives notice of what is prohibited and what is not. The fear of liability for damages, and especially punitive damages, puts the speaker at risk as to what a jury might later decide is a true threat, and how vindictive it might feel towards the speaker and his cause. In this case, defendants said nothing remotely threatening, yet they find themselves crucified financially. Who knows what other neutral statements a jury might imbue with a menacing meaning based on the activities of unrelated parties. In such circumstances, it is especially important for an appellate court to perform its constitutional function of reviewing the record to ensure that the speech in question clearly falls into one of the narrow ***1101** categories that is unprotected by the First Amendment. The majority fails to do this.

While today it is abortion protesters who are singled out for punitive treatment, the precedent set by this court--the broad and uncritical deference to the judgment of a jury--will haunt dissidents of all political stripes for many years to come. Because this is contrary to the principles of the First Amendment as explicated by the Supreme Court in *Claiborne Hardware* and its long-standing jurisprudence stemming from *Brandenburg v. Ohio*, I respectfully dissent.

BERZON, Circuit Judge, with whom REINHARDT, KOZINSKI, and KLEINFELD, Circuit Judges, join, and O'SCANNLAIN, Circuit Judge, joins as to Part III only, dissenting:

This case is proof positive that hard cases make bad law, and that when the case is *very* hard--meaning that competing legal and moral imperatives pull with impressive strength in opposite directions--there is the distinct danger of making *very* bad law.

The majority opinion in this case suitably struggles with the difficult First Amendment issues before us concerning whether the posters and website at issue are or are not First Amendment protected speech. The legal standard the majority applies, however, is, in my view, insufficiently cognizant of underlying First Amendment values, for reasons that are largely explained in Judge Kozinski's dissent, and for additional reasons that I develop below.

Moreover, the majority, in an offhand way, also decides two evidentiary issues that, I can say with some confidence, would not be decided so summarily, and would probably not be decided in the same way, were this a less wrenching case on its facts. Keeping one's eyes on the broader picture is not always easy when people's lives--in this case the lives of medical professionals--are being severely disrupted because they are performing constitutionally protected activities in a perfectly lawful manner at the behest of people who want their services and are entitled to have them. As judges, though, we need to recognize that we are *not* writing for this day and place only, and that rulings that appear peripheral in the present context will take on great significance as applied in another.

I
The First Amendment and True Threats

1. *Clarifying the issue:* The reason this is a hard First Amendment case becomes somewhat obscured in all the factual detail and quotation of precedent that we as judges engage in. The essential problem--one that, as far as I am aware, is unique in the plethora of "threat" cases and perhaps more generally in First Amendment jurisprudence--is that the speech for which the defendants are being held liable in damages and are enjoined from reiterating in the future is, on its face, clearly, indubitably, and quintessentially the kind of communication that is fully protected by the First Amendment.

The point is not simply that the two posters and the Nuremberg files contain no *explicit* threats that take them outside the free speech umbrella. We are not talking simply about ambiguous or implicit threats that depend on context for their meaning, such as the Ryder trucks in *United States v. Hart*, 212 F.3d 1067 (8th Cir.2000). Rather, the pivotal issue for me is that what the communications in this case *do* contain has all the attributes that numerous cases and commentators have identified as core factors underlying the special protection accorded communication under our Constitution.

***1102** The posters and website are all public presentations on a matter of current moral and political importance; they provide information to the public on that matter and propose a--peaceful, legal--course of action; and they were presented with explicit reference to great moral and political controversies of the past. Cases that are a virtual First Amendment "greatest hits" establish that these kinds of expressions--those that provide information to the public (particularly when directed at publicly-available media), publish opinions on matters of public controversy, and urge others to action--are the kinds of speech central to our speech-protective regime, and remain so even when the message conveyed is, in substance, form, or both, anathema to some or all of the intended audience. *See, e.g., Garrison v. Louisiana*, 379 U.S. 64, 74-75, 85 S.Ct. 209, 13 L.Ed.2d 125 (1964) ("[S]peech concerning public affairs is more than self-expression; it is the essence of self- government."); *Roth v. United States*, 354 U.S. 476, 484, 77 S.Ct. 1304, 1 L.Ed.2d 1498 (1957) (The First Amendment "was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people."); *New York Times Co. v. Sullivan*, 376 U.S. 254, 266, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964) (The First Amendment "attempt[s] to secure the widest possible dissemination of information from diverse and antagonistic sources."); *Id.* at 271, 84 S.Ct. 710 ("The constitutional protection does not turn upon the truth, popularity, or social utility of the ideas and beliefs which are offered."); *Thornhill v. Alabama*, 310 U.S. 88, 102, 60 S.Ct. 736, 84 L.Ed. 1093 (1940) ("Freedom of discussion, if it would fulfill its historic function in this nation, must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period."); *Thomas v. Collins*, 323 U.S. 516, 537, 65 S.Ct. 315, 89 L.Ed. 430 (1945) (" 'Free trade in ideas' means free trade in the opportunity to persuade to action, not merely to describe facts."); *Terminiello v. City of Chicago*, 337

U.S. 1, 4, 69 S.Ct. 894, 93 L.Ed. 1131 (1949) (Speech "may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea.").

Tested against these most basic premises, there can be no doubt that the documents upon which the damages judgment and injunction in this case were based were, on their face, "expression[s] of grievance and protest on one of the major public issues of our time," and, as such, documents that "would seem clearly to qualify for ... constitutional protection." *New York Times*, 376 U.S. at 271, 84 S.Ct. 710. The posters and website could not and would not have been proscribed, as "true threats" or otherwise, had there been no (1) history of similar--although not at all identical--publications put out by other people that were followed by murders-by other people, not members of either of the two defendant organizations--of health professionals who performed abortions; and (2) repeated advocacy by these defendants of the proposition that violence against abortion providers can be morally justified, advocacy that all concede was, standing alone, itself protected by the First Amendment. *See Brandenburg v. Ohio*, 395 U.S. 444, 447-48, 89 S.Ct. 1827, 23 L.Ed.2d 430 (1969) ("[T]he mere abstract teaching ... of the moral propriety or even moral necessity for a resort to force and violence, is not the same as preparing a group for violent action and steeling it to such action.") (quoting ***1103** *Noto v. United States*, 367 U.S. 290, 297-98, 81 S.Ct. 1517, 6 L.Ed.2d 836 (1961)). [FN1] The precise question before us is therefore whether that context is sufficient to turn a set of communications that contain speech at the core of the First Amendment's protections into speech that can be proscribed pursuant to an injunction and compensated for through damages.

FN1. In so stating--and elsewhere in this opinion--I do not address the constitutional viability of a cause of action for putting another in harm's way by publicizing information that makes it easier for known or suspected potential assailants to find an intended victim. There was no such cause of action in this case, as Judge Kozinski observes, and I express no view upon whether or under what circumstances such a cause of action could be stated under the law, including under the First Amendment.

2. *An analogy:* Stated in those terms, the issue bears a close resemblance to that faced by the courts with regard to First Amendment limitations on defamation actions, beginning with *New York Times Co. v. Sullivan*. Like "true threats," false speech has long been understood as a category of communication that contains few of the attributes that trigger constitutional speech protection and so great a likelihood of harming others that we refer to the speech as being beyond the protection of the First Amendment. *See R.A.V. v. City of St. Paul*, 505 U.S. 377, 383, 112 S.Ct. 2538, 120 L.Ed.2d 305 (1992). Like "true threats," false, defamatory speech can severely disrupt peoples' lives, both by affecting them emotionally (as does apprehension of danger) and by impairing their social ties, their professional activities, and their ability to earn a living (as does the perceived need to protect oneself from physical harm).

The Supreme Court since the 1960s has developed a set of discrete principles designed *not* to provide false speech with constitutional protection, but to erect, on an ascending scale depending upon the perceived value of the particular kind of speech to the common dialogue that the First Amendment is designed to foster, doctrinal protections within defamation law that minimize self-censorship of truthful speech. Those protections are based upon realistic assessment of the vagaries of litigation and the fear of crippling damages liability. [FN2]

FN2. Similarly, the First Amendment's overbreadth doctrine extends some protection to speech that is without First Amendment value in order to limit self-censorship of speech that does possess this value. *See Massachusetts v. Oakes*, 491 U.S. 576, 581, 109 S.Ct. 2633, 105 L.Ed.2d 493 (1989).

For example, *New York Times* observed that "[a]llowance of the defense of truth ... does not mean that only false speech will be deterred," because "[u]nder such a rule, would be critics of official conduct may be deterred from voicing their criticism, even though it is believed to be true and even though it is in fact true, because of doubt whether it can be proved in court or fear of the expense of having to do so." 376 U.S. at 279, 84 S.Ct. 710; *see also Gertz v.*

Robert Welch, Inc., 418 U.S. 323, 342, 94 S.Ct. 2997, 41 L.Ed.2d 789 (1974) ("[T]o assure to the freedoms of speech and press that 'breathing space' essential to their fruitful exercise ... this Court has extended a measure of strategic protection to defamatory falsehood.") (internal citation omitted). Without a federal constitutional requirement focusing on the speaker's state of mind with regard to the truth of what he was saying (as well as careful scrutiny bythe courts of any jury verdict based purely upon speech), the Court concluded, there would be a distinct danger that fear of defamation liability would "dampen[ ] the vigor and limit[ ] the variety of public debate," to the detriment of First Amendment values. *Id.* The problem has been treated as one of balancing the very real injury caused by unwarranted ***1104** damage to reputation against the dangers to the system of free expression worked by rules of liability that are easy to misperceive or to misapply in particular instances. And the Court's answer to this problem has, as noted, been far from unitary. Instead, the balance has been struck with regard to subcategories of defamation cases, according to the nature of the communication, the nature of the parties and, to some degree, the purpose of the speech. [FN3]

FN3. *See New York Times*, 376 U.S. at 279-80, 84 S.Ct. 710 (a public official may not recover damages "for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice'--that is, with knowledge that it was false or with reckless disregard of whether it was false or not"); *Curtis Publ'g Co. v. Butts*, 388 U.S. 130, 164, 87 S.Ct. 1975, 18 L.Ed.2d 1094 (1967) (opinion of Warren, C.J., concurring in the result) (*New York Times* standard applies to defamation cases brought by public figures); *Gertz*, 418 U.S. at 347-49, 94 S.Ct. 2997 (*New York Times* standard not required for cases brought by private figure plaintiffs; instead, the states may only not "impose liability without fault" for the defamation of a private figure plaintiff--although a different standard may apply if "the substance of the defamatory statement [does not] make[ ] substantial danger to reputation apparent"--but the states "may not permit recovery of presumed or punitive damages" without proof of actual malice); *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 761, 105 S.Ct. 2939, 86 L.Ed.2d 593 (1985) (opinion of Powell, J.) (states may allow private figure plaintiffs to recover, without proof of actual malice, presumed or punitive damages for defamatory speech "involving no matters of public concern.").

Our problem here is similar. Any "true threats" within the three communications at issue were encased in documents and public events that promoted--at least for those listeners not "in the know"--precisely the kind of "debate on public issues [that] should be uninhibited, robust, and wide- open, and that ... may well include vehement, caustic, and sometimes unpleasantly sharp attacks...." *New York Times*, 376 U.S. at 270, 84 S.Ct. 710. True, the targeted medical professionals and clinics were not public officials, but they were engaged in activities that the defendants, rightly or wrongly, regarded as both morally reprehensible and a matter for eventual governmental proscription through the political process (presumably through a constitutional amendment). Moreover, as both the majority and Judge Kozinski recognize, the posters and website remained core First Amendment speech even though--quite aside from any coded threat of physical harm--they exposed the targeted plaintiffs to other, nonviolent but still extremely disturbing, interference with their daily lives (in the form of unwanted public exposure and inflammatory rhetoric directed at them, their families, and their customers, both at home and at work) and even if they induced fear in the plaintiffs that people *unconnected with the defendants* might harm them. [FN4]

FN4. I discuss below the constitutional importance of the latter requirement--that any proscribed threat communicate the intention of the speaker or his or her agents.

Under these circumstances, the question for me becomes devising standards that, like the constitutional defamation standards that vary with the strength of the protection of the communication, rely not on an unitary "true threats" standard, as does the majority, but on considerations that lessen the danger of mistaken court verdicts and resulting self-censorship to a greater or lesser degree depending upon the nature of the speech in question and the role of speech of that nature in the scheme of the First Amendment. [FN5]

FN5. I note that there is one way in which the speech here differs from defamation: False, defamatory speech, even on matters of public concern, does not have *any* significant First Amendment value. *R.A.V.*, 505 U.S. at 383, 112 S.Ct. 2538. Although "true threats" also lack such value as a general matter, a "true threat" that includes only facially- protected speech nonetheless *does* have First Amendment value, because it not only is threatening but also has another meaning--the literal, facially-protected meaning--which here falls within the heart of First Amendment speech. For this and other reasons, the categories of defamatory speech and the rules applicable to them cannot rigidly determine the analysis applicable in threats cases.

***1105** 3. *Some constitutional parameters:* Judge Kozinski, in his dissent, makes one important suggestion toward this end with which, for all the reasons already canvassed, I fully agree: He suggests that "statements communicated directly to the target are much more likely to be true threats than those, as here, communicated as part of a public protest." Kozinski dissent at 7162. As a first cut at separating out the kinds of allegedly threatening communications that are central to First Amendment values and therefore must be tested by particularly stringent criteria before they can be prohibited, these two criteria--the public nature of the presentation and content addressing a public issue (which can include matters of social or economic as well as political import for the individuals involved, *see Bartnicki v. Vopper*, 532 U.S. 514, 535, 121 S.Ct. 1753, 149 L.Ed.2d 787 (2001); *Thornhill*, 310 U.S. at 102-03, 60 S.Ct. 736)--are critical.

In a rare instance, a threat uttered in the course of a public political protest might conceivably exceed the bounds of protected speech. *United States v. Kelner*, 534 F.2d 1020 (2d Cir.1976), is illustrative. (I am not aware of any case in this circuit in which a defendant was, as in *Kelner*, punished or held liable for a threat uttered in the course of public protest activity--a gap in itself telling with regard to the importance and novelty of this case.) In *Kelner*, a member of the Jewish Defense League stated at a press conference held in New York just before Yassir Arafat was scheduled to be in the city that "We have people who have been trained and who are out now and who intend to make sure that Arafat and his lieutenants do not leave this country alive.... We are planning to assassinate Mr. Arafat.... Everything is planned in detail .... It's going to come off." *Id.* at 1021. The press conference was broadcast on television that evening. [FN6] *Id.* The Second Circuit upheld the defendant's conviction for uttering the threat, over the objection that the speech was simply an extreme statement of opposition to Mr. Arafat, protected under the First Amendment as hyperbolic public discussion of a public issue. *Id.* at 1024-28.

FN6. During the press conference, Mr. Kelner, the defendant, "was seated in military fatigues behind a desk with a .38 caliber 'police special' in front of him," next to "another man ... dressed in military fatigues." *Id.* The gun and uniform seem to me simply a prop and costume designed to enhance the communication of seriousness of purpose, not proof that the defendant was involved contemporaneously in actual violence.

In doing so, the Second Circuit recognized that where the asserted threat "is made in the midst of what may be other protected political expression," courts must be vigilant to permit liability or conviction only in circumstances in which the danger to free expression is minimal; where that is the case, "the threat itself may affront such important social interests that it is punishable." *Id.* at 1027. The criteria the Second Circuit suggested to police the dividing line were that "the threat on its face and in the circumstances in which it is made is so unequivocal, unconditional, immediate and specific as to the person threatened, as to convey a gravity of purpose and imminent prospect of execution." *Id.* Measured against these criteria, *Kelner* held that, although politically motivated and designed to convey a public position of protest to Mr. Arafat's ***1106** policies, the speech in question was not protected speech. *Id.* at 1028.

Kelner 's criteria for adjudging the protection accorded alleged threats uttered in the course of public communications on public issues seem appropriate to me--and, as I show below, consistent with *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 102 S.Ct. 3409, 73 L.Ed.2d 1215 (1982)--with one exception, an addition, and some explication:

First, the exception: I would not include the imminence or immediacy of the threatened action as

a prerequisite to finding a true threat delivered as part of a public speech, if all of the other factors were present. The immediacy requirement calls to mind the standard the Supreme Court erected for proscription of inciting speech in *Brandenburg*. But as the majority can be read to recognize and as Judge Kozinski well explains, the separate constitutional category of unprotected speech for threats does not include statements that induce fear of violence by third parties.

Where there is no threat, explicit or implicit, that the speaker or someone under his or her control intends to harm someone, a statement inducing fear of physical harm must be either (1) a prediction or warning of injury, or (2) an inducement or encouragement of someone else to cause the injury. The former is, as Judge Kozinski suggests, clearly entitled to protection under the First Amendment as either informative or persuasive speech. The latter kind of statement may or may not be protected. Whether it is or not must be governed by the strict inducement standard of *Brandenburg* if the more than fifty years of contentious development of the protection of advocacy of illegal action is not to be for naught. *See* *Brandenburg*, 395 U.S. at 447-48, 89 S.Ct. 1827 (overruling *Whitney v. California*, 274 U.S. 357, 47 S.Ct. 641, 71 L.Ed. 1095 (1927)), and holding that "the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action"); *see also id.* at 450-454, 89 S.Ct. 1827 (Douglas, J., concurring) (recounting the history of the "clear and present danger" doctrine for adjudging the constitutionality of restrictions upon advocacy of illegal action).

One can, however, justify a somewhat different standard for judging the constitutionality of a restriction upon threats than for a restriction upon inducement of violence or other illegal action. There is a difference for speech-protective purposes between a statement that one oneself intends to do something and a statement encouraging or advocating that someone else do it. The latter will result in harmful action only if someone else is persuaded by the advocacy. If there is adequate time for that person to reflect, any harm will be due to another's considered act. The speech itself, in that circumstance, does not create the injury, although it may make it more likely. The Supreme Court has essentially decided that free expression would be too greatly burdened by anticipatory squelching of advocacy which can work harm only indirectly if at all. *See* *Kelner*, 534 F.2d at 1027 n. 9 ("Short of [advocacy that is close, direct, effective and instantaneous in its impact] the community must satisfy itself with punishment of the one who committed the violation of law or attempted to do so, not punishment of the person who communicated with him about it.") (quoting Thomas Emerson, *The System of Freedom of Expression* 404-05 (1970)); *see also* *Ashcroft v. Free Speech Coalition*, 535 U.S. ----, 122 S.Ct. 1389, 1403, 152 L.Ed.2d 403 (2002) (because "the Court's First Amendment cases draw vital distinctions between words and deeds," the ***1107** government may not punish speech because it increases the chance that someone other than the speaker will commit an unlawful act).

A true threat, in contrast, implies a firmness of purpose by the person speaking, not mediated through anyone else's rational or emotional reaction to the speech. Threatening speech thereby works directly the harms of apprehension and disruption, whether the apparent resolve proves bluster or not and whether the injury is threatened to be immediate or delayed. Further, the social costs of a threat can be heightened rather than dissipated if the threatened injury is promised for some fairly ascertainable time in the future--the "specific" prong--for then the apprehension and disruption directly caused by the threat will continue for a longer rather than a shorter period. So, while I would police vigorously the line between inducement and threats--as the jury instructions in this case did, [FN7] although the majority opinion is less clear on this point--I would, where true threats are alleged, not require a finding of immediacy of the threatened harm.

> FN7. The jury in this case was instructed that "the mere abstract teaching of the moral propriety or even moral necessity for a resort to force and violence is protected speech under the First Amendment," and that "[y]ou are not to consider any evidence that the three statements allegedly 'incite' violence against plaintiffs."

Second, the addition: Although this court's cases on threats have not generally set any state of mind requirements, I would add to the *Kelner* requirements for proscribable threats in the public protest context the additional consideration whether the defendant subjectively intended the specific victims to understand the communication as an unequivocal

threat that the speaker or his agents or coconspirators would physically harm them. [FN8] Especially where the plaintiffs in such circumstances are relying *only* on surrounding context and are doing so to overcome the literal import of the words spoken, impairment of free public debate on public issues through self-censorship is a distinct possibility unless there is convincing proof that the literal meaning of the words was not what the defendants intended to convey.

> FN8. In *Kelner*, the jury was instructed that it needed to find that "Kelner 'intended the words as a threat against Yassir Arafat and his lieutenants.' " 534 F.2d at 1025. The *Kelner* court rejected a different intent requirement, namely, an intent to carry out the threatened action. *Id.* at 1025-27. The majority erroneously concludes that the dissenters would require that to find a "true threat," the speaker must have had the latter sort of intent--that is, the speaker must "actually intend to carry out the threat." *See* Majority Op. at 1075. To the contrary, there has been no intimation in either dissent that the speaker need have the intention, or the ability, to do so. Rather, I propose the inclusion of a "specific intent" requirement with regard to the speaker's intent *to threaten*-that is, a requirement that the judge or jury determine whether the speaker intended to place the listener in fear of danger from the speaker or his agents.

The subjective intent requirement for alleged threats delivered in the course of public protest comports with Supreme Court precedent, both directly and by analogy. Although the Supreme Court has yet to outline fully the constitutional limitations applicable to proscription of threats, in its most direct look at the subject the Court expressed "grave doubts" that a person could be liable for threatening expression solely on the basis of an objective standard. *Watts v. United States*, 394 U.S. 705, 707-08, 89 S.Ct. 1399, 22 L.Ed.2d 664 (1969). A few months later, in *Brandenburg*, the Court held that in an incitement case, the plaintiff or the government must not only prove that a statement "is likely to incite or produce" ***1108** imminent lawless action, but must also prove that the statement "is directed to inciting or producing" such action. 395 U.S. at 447, 89 S.Ct. 1827. This latter requirement is a subjective intent prerequisite, as it turns the speaker's liability in an incitement case on how the speaker intends others to understands his words. *See also Hess v. Indiana*, 414 U.S. 105, 109, 94 S.Ct. 326, 38 L.Ed.2d 303 (1973) (speech cannot be punished when no evidence exists that "words were intended to produce" imminent disorder).

With regard to this subjective intent requirement, there is no meaningful distinction between incitement cases and threat cases such as this one--that is, cases involving public protest speech, especially where the alleged threat, on its face, consisted entirely of advocacy. The First Amendment protects advocacy statements that are likely to produce imminent violent action, so long as the statements are not directed at producing such action. To do otherwise would be to endanger the First Amendment protection accorded advocacy of political change by holding speakers responsible for an impact they did not intend.

Similarly, a purely objective standard for judging the protection accorded such speech would chill speakers from engaging in facially protected public protest speech that some might think, in context, will be understood as a true threat although not intended as such. Unsure of whether their rough and tumble protected speech would be interpreted by a reasonable person as a threat, speakers will silence themselves rather than risk liability. Even though the Supreme Court has stated that protected political speech "is often vituperative, abusive, and inexact," speakers wishing to take advantage of these protected rhetorical means may be fearful of doing so under the majority's purely objective approach. *Watts*, 394 U.S. at 708, 89 S.Ct. 1399; *see also Rogers v. United States*, 422 U.S. 35, 47, 95 S.Ct. 2091, 45 L.Ed.2d 1 (1975) (Marshall, J., concurring). [FN9]

> FN9. The majority opinion does not appear to embrace any such subjective intent standard as a *constitutional* requirement, but does suggest that any such requirement was met here through the instruction on FACE's statutory elements. The jury, however, was specifically instructed several times, quite emphatically, that there is *no* subjective intent requirement in adjudging whether or not a statement is a "true threat." In closing argument, counsel for plaintiffs also informed the jury that subjective intent was not relevant. Further, in a separate instruction devoted to the case's various intent issues, the trial judge reminded the jury that it *did* have to find some form of

intent when it considered the RICO charges against the defendants and when it considered punitive damages, but did not state that the jury had to find intent when considering whether the defendants violated FACE.

The very next instruction concerned the FACE cause of action and stated, ungrammatically and nearly incoherently, that the plaintiffs must prove that the defendant "made the threat of force to intimidate ... the plaintiff's ... ability to ... provide reproductive health services." Although "intimidate" was defined, correctly, as "place a person in reasonable apprehension of bodily harm," the FACE instruction *left out* the statute's clear motive or purpose requirement--that to be liable the defendant must act "because that person is or has been, or in order to intimidate such person ... from ... providing reproductive health services," 18 U.S.C. § 248(a)(1), substituting a confused and confusing locution. A jury specifically and repeatedly admonished not to take into account the defendants' subjective intent would not likely understand the obscure FACE instruction as a requirement that it should do so.

There was also a RICO cause of action with separate elements. While the RICO instruction required, in addition to a true threat, an "intent of depriving a plaintiff of his or her ... protected right to provide abortion services," that is not equivalent to requiring an intent to communicate that the speaker or his or her confederates would physically injure the plaintiff.

***1109** When the district court issued the injunction against the defendants, the court, for reasons it does not explain, relied on a different definition of threat than the one it instructed the jury to use. In contrast to the definition relied upon by the jury, the definition used for purposes of the injunction correctly incorporated the subjective intent requirement mandated by the First Amendment. *Planned Parenthood of the Columbia/Willamette, Inc. v. American Coalition of Life Activists*, 41 F.Supp.2d 1130, 1155 n. 1 (D.Or.1999). In addition, the district court found that the defendants did intend to threaten. As a result, the injunction comes close to conforming on its face to the dictates of the First Amendment. The injunction still falls short, however, because the district court did not state that a threat must be unequivocal, nor did it find the posters to be unequivocal threats. As I explain below, any definition of threats that does not include the unequivocal requirement provides too little protection for public political speech. [FN10]

FN10. Part of the injunction fails to comply with the First Amendment for an additional reason. The injunction not only prevents the defendants from further distributing the posters, it also prevents them from possessing the posters or their equivalents. In effect, this latter part of the injunction regulates the type of written materials that the defendants may possess in the privacy of their homes, directly contradicting the Supreme Court's holding in *Stanley v. Georgia*, 394 U.S. 557, 89 S.Ct. 1243, 22 L.Ed.2d 542 (1969):

If the First Amendment means anything, it means that a State has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch. Our whole constitutional heritage rebels at the thought of giving government the power to control men's minds.

Id. at 565; *see also Free Speech Coalition*, 122 S.Ct. at 1403 ("First Amendment freedoms are most in danger when the government seeks to control thought. ").

The majority nonetheless upholds the injunction against possession of the posters, distinguishing *Stanley* on the basis that "the posters in this case are quite different from a book; the 'wanted'--type posters themselves--not their ideological content--are the tool for threatening physicians. In this sense, the posters' status is more like conduct than speech." Majority Op. at 1087. But, whatever else they may be, the posters are speech--they express ideas through the use of words and pictures.

The majority also asserts that the "First Amendment interest in retaining possession of the threatening posters is *de minimis*, while ACLA's continued possession of them constitutes part of the threat." *Id.* at 1087. This summation ignores the fact that the posters do have First Amendment value--they express ideas about one of the most contentious political and moral issues of our time. And confined to the defendants' homes, the posters do not place anyone in

> apprehension of danger or disrupt their lives; they only influence "the moral content of [the defendants'] thoughts." *Stanley*, 394 U.S. at 565, 89 S.Ct. 1243. As such, the First Amendment value of the posters is not outweighed by any competing considerations.

Third, the explication: "Unequivocal" cannot mean literal: Ryder trucks, in the United States in the 1990s, and burning crosses, in the United States in the twentieth and twenty-first centuries, have unambiguous meanings that the individuals targeted will be hurt (at least unless they do what the perpetrator of the threat wants them to do, whether it be stop performing abortions or move out of town). Instead, "unequivocal" means to me unambiguous, given the context. As such, the requirement is essentially a heightened burden of proof, requiring that a threatening meaning be clearly and convincingly apparent. And in determining whether that proof standard has been met, I would continue to apply the objective standard the majority embraces, based on our cases, in determining whether the speech in fact communicates an intent to harm specific individuals.

***1110** This case, I repeat, is uniquely difficult because to perceive a threat, one must *disregard* the actual language used and rely on context to *negate* the ordinary meaning of the communication. Further, the actual language is, in its own right, core First Amendment speech, speech that to a naive reader communicates protected information and ideas. So the crux of the plaintiffs' cause of action (once one accepts that only statements that evince an intention by the speaker or his or her agents to carry out the threat can be actionable) is really an assertion that the defendants were using Aesopian language or could be understood as doing so, and that the context in which the speech must be viewed provides the necessary evidence of the defendants' true, albeit coded, meaning. [FN11]

> FN11. The term "Aesopian language" developed in Tsarist Russia to refer to language that, like Aesop's fables, disguises the true meaning of speech by the use of metaphors, symbols and analogies, in order to avoid censorship.

The first set of contextual evidence involves the poster /~murder / poster / murder pattern the majority principally relies upon. Had the murders--or any murders, or any serious violence--been committed by the defendants and had the plaintiffs known that, the inference from the poster/murder pattern that the publication by them of posters similar to those previously followed by a murder might be a strong one. [FN12] The inference would be stronger had the defendants also put out the earlier posters and had the plaintiffs known that. Neither is the case.

> FN12. One defendant had been convicted of serious violence some years before the posters and website were published, so I except him from this part of the discussion.

Plaintiffs' main submission to fill this gap was extensive evidence concerning the defendants' opinions condoning the use of violence against medical professionals who perform abortions, including general statements to that effect and particular statements concerning the people who murdered the doctors depicted on the previous posters, stating that their actions were justified and that they should be acquitted. Plaintiffs' closing argument, for example, went on for pages and pages about defendants' meetings and writings concerning the "justifiability of the use of force."

This evidence is certainly of some pertinence as to what the defendants may have intended to do. [FN13] It is more likely that someone who believes in violence would intentionally threaten to commit it. It is also pertinent to what persons in the plaintiffs' position-that is, persons involved in the abortion controversy and alert to the division of opinion within it--would likely understand concerning defendants' communication. Individuals who believe in violence are not only more likely to *threaten* to commit it but also actually to commit it, and so defendants' views might well influence plaintiffs' perception of their speech. And since the defendants would know that, defendants' *public* statements approving the use of violence against doctors who perform abortion are relevant to whether reasonable speakers in defendants' position would expect their communications to be understood as threats.

> FN13. I note that on the instructions actually given to the jury, it is not easy to perceive the pertinence of much of this evidence. In particular, apart from extensive evidence of

> defendants' public statements concerning violence against abortion providers, there was also a great deal of evidence concerning their statements in meetings among anti-abortion activists. The jury was instructed that although speech can be a "true threat" no matter what defendants' subjective intent, that intent is nonetheless pertinent context. I am not sure I see why, but since I would make subjective intent directly relevant, the point is not of great importance to this dissent.

***1111** At the same time, heavy reliance on evidence of this kind raises profound First Amendment issues of its own. One can not read plaintiffs' closing argument in this case without fearing that the jury was being encouraged to hold the defendants liable for their abstract advocacy of violence rather than for the alleged coded threats in the posters and website, the instructions to the jury to the contrary notwithstanding. And while advocacy evidence may make both an intent to threaten and a perception that there was a threat more likely, that is not unequivocally so. People do not always practice what they preach, as the stringent incitement standard recognizes. If we are serious about protecting advocacy of positions such as defendants' sanctioning of violence, as we are constrained to be, then permitting that protected speech to be the determinative "context" for holding other facially protected, public protest speech--the posters and website in this case--to be a "true threat" seems to me simply unacceptable under the First Amendment.

Finally, I note that the approach I've outlined here fully comports with *Claiborne Hardware*. *Claiborne Hardware* applied an "extreme care" standard in determining "liability on the basis of a public address-which predominantly contained highly charged political rhetoric." 458 U.S. at 926-927, 102 S.Ct. 3409. It went on to note that "[i]n the passionate atmosphere in which the speeches were delivered, they *might* have been understood as inviting an unlawful form of discipline or, at least, as intending to create a fear of violence whether or not improper discipline was specifically intended." *Id.* at 927, 102 S.Ct. 3409 (emphasis added). After reviewing the actual words used in context, however, the Court concluded that "Evers' addresses did not exceed the bounds of protected speech." *Id.* at 929, 102 S.Ct. 3409. As I read the opinion, it held, essentially, that the supposed threats were not on their face unequivocal and were not made unequivocal by any contextual factors. So here.

I would therefore hold that under the special rules I would apply to public protest speech such as that in this case, plaintiffs' judgment cannot stand because, after a proper review of the record, we would have to conclude that there was no unequivocal, unconditional [FN14] and specific threat. [FN15]

> FN14. "Unconditional" refers to the degree of determination contained in the threat, not whether it is "conditioned" in the sense that the target could avoid the harm by bowing to the speaker's will.

> FN15. I note as well that the majority, while it articulated a *de novo* review standard with respect to the true threat standard it did apply, did not in fact review the record with an eye to First Amendment concerns such as those I have discussed, nor did it include the intent issue within its review. (Actual malice, a state of mind standard, is precisely the issue upon which the Supreme Court has closely scrutinized the record in defamation cases. *See, e.g.*, *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657, 686, 109 S.Ct. 2678, 105 L.Ed.2d 562 (1989)).

II
Federal Law Enforcement Officers' Testimony Regarding Threats

I also disagree with the majority's conclusion that permitting law enforcement officers to testify as to their opinions about the meaning and import of the posters at issue was within the district court's discretion. The government may not seek to persuade a jury that certain speech contains characteristics that place it outside the realm of constitutionally protected speech by providing in testimony, as opposed to in a criminal indictment, its "nonjudicial determination" on the ultimate legal ***1112** issue to be decided. *Hill v. Rolleri*, 615 F.2d 886, 890 (9th Cir.1980).

The district court permitted the officers to repeat in testimony the warnings that the officers gave the plaintiffs after the release of the posters, purportedly in order to show the plaintiffs' state-of-mind in response to the posters. Under this rationale, the

testimony had very little, if any, relevance to the issues before the jury, and, especially in light of the First Amendment concerns the testimony raises, the resulting prejudice greatly outweighed its minimal probative value. The district court, therefore, abused its discretion in failing to exclude this testimony under Fed.R.Evid. 403. [FN16]

FN16. Rule 403 provides:
Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

1. *The testimony:* The district court permitted the plaintiffs to call to testify an FBI agent, with 25 years experience, and two United States Marshals, one with 26 years and the other with 14 years experience. The following testimony was given:

"I told her that I was in receipt of *threat information* in the form of a flyer."
"That I had received a copy of a list called the Deadly Dozen List, which listed 13 doctors, who perform abortions, and that it was *threatening in nature* ...."
"I told her that I thought that her teachers, the teachers of her children, should know about *this threat,* as well, in order to maintain the security of the children."
"I told her that the children should be aware of--of *the threat.*"
"I told him that he was on *a threat list* ...."
"I told her that if she received *additional threats* or wanted protection, these were the numbers to contact ...."
"And we discussed the reasons we believed that *the threat was serious* .... We discussed the escalation in the incidents over the prior couple of years. We talked about the murder of Dr. Gunn in Florida. We talked about shootings involving Dr. Tiller in Kansas. We talked about shootings involving Dr. Christ. We talked about Michael Bray and his affiliation with the American Coalition of Life Advocates."
"Well, because of *the nature of the threats,* and--I asked Dr. Hern to--he had a bulletproof vest. I thought it would be a good thing if he wore that."

(emphases added). The testimony not only revealed the individual law enforcement officers' opinions of the meaning of the posters, but also informed the jury about the opinion of "headquarters," as follows:

"I told him ... that *I had been given instructions* to notify--*to immediately notify him,* so that he could take some personal precautions for his safety."
"I was contacted by my *headquarters in Washington, D.C.* ... I advised her that the Marshal's Service was offering her protection, because her name appeared on the list, and stated that if she wanted protection, I would forward the request to our headquarters, who would then forward it to *the Department of Justice.*"
"*I was directed by my headquarters to immediately contact Dr. Warren Hern, because he was listed on the--the document. But, additionally, I was directed to contact all of the clinics in the district of Colorado." The officer further testified that he did contact all of the clinics in Colorado.*
***1113** "*[H]eadquarters was taking this threat very seriously.*"
"I explained to Dr. Hern that Michael Bray had been a conspirator in--or involved in a conspiracy to blow up several abortion clinics. And because of his affiliation, in addition to the other things we discussed, that *my headquarters believed that this was [a] serious threat, and something that-- that we had to act on immediately.*"

(emphases added).

My major concern here involves the First Amendment repercussions of allowing testimony by government employees as to the government's opinion concerning whether speech is outside the First Amendment's protections. In keeping with traditional Rule 403 analysis, however, I first explain why the testimony did not serve to elucidate any of the issues properly before the jury and then turn to the prejudicial effect the testimony had on the defendants' First Amendment rights.

2. *Basic Rule 403 analysis:* The majority holds the law enforcement testimony probative because it has "some tendency to show the physicians' state of mind when they found out they were named on 'wanted'--type posters...." Majority Op. at 1082. Under the definition of a true threat that the majority uses (and under the one I would adopt, *see* Part I, *supra*) the *plaintiffs'* state of mind is relevant only to the extent that it tends to show "whether a reasonable person would foresee" that the plaintiffs would interpret the posters as threats. Majority Op. at 1074. The officers' testimony concerning the warnings muddled rather than illuminated the inquiry into the question how a reasonable lay person would understand the posters, as that testimony revealed the officers'

reaction to the posters, not the plaintiffs'. The true threat standard focuses on how "those to whom the maker communicates the statement" would "interpret[ ]" it, not on the government's determination of whether a threat was made. *See id.* So the officers' reaction to the posters is largely irrelevant. Further, to the extent the testimony did tend to show the plaintiffs' state of mind, it suggested what the plaintiffs' reaction may have been to the officers' warnings or to the combination of learning about the posters and receiving the warnings, not simply to the posters themselves.

During the testimony of one of the officers, the district court instructed the jury to consider the testimony only for what it revealed about the state of mind of the recipient of the warnings and not to take the testimony as an "administrative decision" that the posters constituted true threats. To the extent that the officers' testimony did bear on any pertinent issue--which, as I indicated above, is little if at all--the court's limiting instruction did not do much to maintain the jury's focus on this issue, as the court did not repeat the instruction when each of the law enforcement officers testified, nor did the court instruct the jury on this issue before deliberations, despite the defendants' request that the court do so.

It is unlikely that a jury can put aside the opinions of an FBI agent and United States Marshals--and their headquarters--as to the nature of the speech and instead focus solely on how those opinions bore on the plaintiffs' state of mind. *See* United States v. Gutierrez, 995 F.2d 169, 172 (9th Cir.1993) ("[T]he expert testimony of a law enforcement officer ... often carries an aura of special reliability and trustworthiness.") (quoting United States v. Espinosa, 827 F.2d 604, 613 (9th Cir.1987)). On traditional evidentiary grounds alone, such testimony should not be admitted in threats cases.

3. *First Amendment-related prejudice:* Turning now to the issue I find most troubling, *1114 the First Amendment ramifications of the law enforcement officers' testimony:

Admitting testimony by law enforcement officers as to whether certain speech has the primary characteristic of an unprotected category (for instance, is a serious threat, or is obscene, or is false) allows the government not only to prohibit or burden that category of speech (true threats, obscenity, defamation), but also persuasively to shape the jury's determination of what speech falls into the unprotected category. The obvious risk is that the government will use its "aura of special reliability and trustworthiness," Gutierrez, 995 F.2d at 172, to describe as undeserving of constitutional protection speech that in fact is only unpopular with the government. In Watts, the Court looked to the reaction of those to whom the speech was directed to determine how the speech should be taken. 394 U.S. at 708, 89 S.Ct. 1399. Had the Secret Service run to the President to inform him of Watts' speech and warn him of the "threat," the Secret Service's reaction, and the President's resulting fear, presumably would not have been allowed to override the reaction of the actual audience to the speech.

Furthermore, the officers' testimony here quite naturally tended to blur the lines between various categories of speech--true threats, incitement, and perhaps some form of "putting in harm's way"--and therefore risked a jury finding of liability for speech that may not fall within the "threat" category as narrowly defined for First Amendment purposes. The officers testified that they told the plaintiffs the speech was a threat and one that should be taken seriously, but there is no indication that the officers distinguished between a "true" threat--a threat of violence by the speaker--and speech warning that a third party would harm the plaintiffs or speech containing a threatening quality because of its tendency to incite others or to put the plaintiffs in harm's way. Nor did the district court instruct the jury that the officers might use the term "threat" in a way that differed from the type of "threat" that does not receive constitutional protection.

The majority also concludes that the district court properly admitted the officers' testimony "to show the knowledge and intent of ACLA in distributing the posters regardless of the reaction they precipitated." Majority Op. at 1082. Testimony as to the statements made by the officers to the plaintiffs has littlerelevance to the intent and knowledge of the defendants. And, more importantly, the same First Amendment concerns come into play here: Under this rationale, if federal law enforcement officials dislike certain speech, they can take a substantial step towards rendering it unprotected by expressing publicly the view that such speech is threatening, because if the speaker then repeats the speech he does so with knowledge of the reaction it precipitated.

To the extent that our law allows law enforcement officers otherwise to testify directly on ultimate factual and legal questions that the jury must decide, we should draw the line at permitting the use of this persuasive aura in testimony that certain speech is of

such a nature that it is undeserving of constitutional protection. Permitting such testimony cannot be reconciled with the role of the First Amendment to protect freedom of speech from suppression by the government.

III
Deposition Summaries

The majority approves--quite in passing--the district court's insistence that the parties submit *as evidence* summaries of deposition testimony, not the testimony itself. Majority Op. at 1083. As I read ***1115** Federal Rule of Civil Procedure 32, which governs the admission of deposition testimony, it does not permit the substitution of summaries for actual testimony. Nor is there anything in the Federal Rules of Evidence or this court's case law to the contrary. Rather, it is a fundamental precept of our system for ascertaining facts that a jury is entitled to learn what a witness actually *said*, rather than an inexact rendition presented by counsel (and probably initially drafted by paralegals).

Language can be subtle, ambiguous and malleable. Paraphrases, as any judge reading lawyers' briefs knows, are no substitute for quotation of the actual words spoken by a witness. As often as not, a check of the transcript will reveal that the language the witness actually spoke, in context, may well mean something other than what counsel has represented.

That does not mean that counsel is lying, but that shades of meaning can be critical. "[A]s the childhood game of 'telephone' well demonstrates, words change significantly in the course of their re-telling by third parties." *United States v. Pena-Espinoza*, 47 F.3d 356, 364 (9th Cir.1995) (Reinhardt, J., dissenting). Indeed, the game of "telephone" requires only that a listener repeat the exact language that he or she heard; a summary, in contrast, necessarily requires the more subjective choice of *different* words to convey the general idea communicated by the original language. "There is simply no way to summarize the contents of a transcript without offering to some degree a subjective view of their meaning and import." *Id.* Because that is so, summaries of witnesses' testimony are likely to distort the import of the actual testimony given and so impede the jury's search for truth.

Our legal system recognizes, in various contexts, that the same set of words may frequently lend itself to more than one reasonable interpretation. *See, e.g., Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984). There is no reason to believe that a lawyer will not adopt the interpretation most favorable to his or her client, so long as the interpretation is reasonable, even if not perhaps the most reasonable. *See United States v. Leon-Reyes*, 177 F.3d 816, 820 (9th Cir.1999) ("Summaries are normally prepared by an interested party and therefore may not be completely accurate or may be tainted with the preparing party's bias."). In our adversary system, it is the role of the trier of fact--not the advocate--ultimately to determine the meaning of witness testimony.

Further, access to the actual language a witness used--even on a cold record--is often essential to determining the witness's credibility and hence the weight, if any, to be accorded the testimony. Equivocations, hesitations, and internal contradictions may all be smoothed over by summaries that purport to extract the content of a witness's testimony. Requiring counsel to summarize testimony without allowing the trier of fact to have access to the testimony itself necessarily precludes the trier of fact from properly exercising his or her truth-determining role.

The record here provides concrete examples of various ways in which summaries can distort the import of the actual testimony and thereby impair the truth- ascertaining process. For instance, the summary of Michael Dodds' deposition condensed inaccurately the testimony he gave. The summary stated:

> The other physician, on the Deadly Dozen List, from Dodds' region, Dr. Douglas Karpen, is from the Houston, Texas, area. Dodds believes that defendant Donald Treshman provided that name.

What Dodds actually said in his deposition regarding the source of Karpen's name for ***1116** the Deadly Dozen list was "I don't know." [FN17]

> FN17. The district court did not allow Treshman to respond in his closing argument to the plaintiffs' argument based on the summaries because the actual transcripts were not in evidence.

The deposition of Roy McMillan provides an example of testimony that could reasonably be interpreted in either of two ways, but the summary provided the jury with only one interpretation. The summary stated:

> As for the additional murder of Mr. Barrett [Dr. Britton's escort], McMillan felt that if it was, quote, right for one person, it would be right for someone else, end quote.

A look at McMillan's deposition transcript (which the defendants introduced in rebuttal) sheds a somewhat different light on the quotation included in the summary. In his deposition, McMillan was first asked about a petition in support of Michael Griffin, who killed Dr. Gunn, and then asked about "the second petition which was for Mr. Hill," who killed Mr. Barrett and Dr. Britton. The testimony went as follows:

> [Answer:] This is identical--pretty much identical to the one that was circulated about the first abortionist's termination. And this was--this, the second one was regarding Paul Hill.
>
> Question, and this one was put out by Michael Bray, is that right?
>
> Answer, I am not sure who put it out, but I concurred that if it was right for one person, it would be right for someone else.

Thus, it appears that McMillan likely meant that if a petition in support of Griffin was right, so too was a petition in support of Hill. Either way, the interpretation should have been left entirely to the jury. (It is quite unlikely that this difference in meaning could have substantively affected the verdict, but that conclusion would require a separate inquiry.)

Finally, the record here also contains summary language that although technically accurate may nonetheless have conveyed a subtly different, but potentially important, sense of the speaker or of the events described from the testimony itself. Thesummary of Dawn Stover's deposition began with the sentence:

> Dawn Stover is the associate director of defendant Advocates for Life Ministries....

Here is the excerpt from Stover's deposition transcript:

> Question, are you still the associate director of Advocates for Life Ministries? Answer, I would guess that, but I have been inactive for so long that--I am still affiliated. I still talk to a couple of people in Advocates, but I don't do any directing and haven't done any directing for years. So-- and having a title has never been that big of an issue. Question, was that ever a paid position? Answer, no. Question, so you don't know whether or not your status is currently associate director in terms of the eyes of the organization? Answer, I honestly don't know how they would perceive me as. I don't know, just because I have been inactive for so long, but they may still.

Certainly, the jury reasonably could have found from Stover's testimony that she "is the associate director" of Advocates for Life Ministries, as the summary stated. At the same time, however, the jury might have considered Stover's current role in the organization as quite different depending on which of the above versions of her testimony they heard. One set of words rarely conveys precisely the same meaning as a second, truncated version.

The majority today pays no heed to all these "dangers of witnesses summarizing ***1117** oral testimony." *United States v. Baker*, 10 F.3d 1374, 1412 (9th Cir.1993), *overruled on other grounds by United States v. Nordby*, 225 F.3d 1053, 1059 (9th Cir.2000), and instead notes, without qualification, only that the presentation of deposition testimony "in the form of summaries was within the court's discretion under Rule 611(a)." Majority Op. at 1083. The very first mandate of Rule 611(a), however, requires the trial court to "make the interrogation and presentation [of evidence] effective for the ascertainment of truth." Fed.R.Evid. 611(a)(1). [FN18] For all the reasons just discussed, substituting summaries of testimony for a word-for-word transcript itself can hardly serve as an "effective" mode "for the ascertainment of truth." *See id.*

> FN18. Rule 611(a) provides in its entirety:
> The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment.

Moreover, it is Fed. R. Civ. Proc. 32, not Rule 611(a) of the Rules of Evidence, that directly, and with particularity, governs the presentation of deposition testimony. As I read it, Rule 32 decidedly does *not* permit courts to authorize the use of summaries in place of actual testimony.

Rule 32 begins with this general provision:

> At the trial ... any part or all of a deposition, *so far as admissible under the rules of evidence applied as though the witness were then present and testifying*, may be used....

Rule 32(a) (emphasis added); *see also* Rule 32(b) ("[O]bjection may be made at the trial or hearing to receiving in evidence any deposition or part thereof for any reason which would require the exclusion of the evidence if the witness were then present and testifying."). A witness who is "present and testifying" is doing just that--"testifying," not providing capsule versions of his or her testimony. And using "any part or all of a deposition" does not equate to using a paraphrased, condensed version of a deposition, any more than a course syllabus directing students to read "Hamlet" intends to subsume within that directive the Classic Comics version of "Hamlet."

Rule 32 also specifically addresses the "Form of Presentation" of deposition testimony, giving no indication that a district court may admit a summary of deposition testimony in lieu of the testimony itself. The pertinent section states, in relevant part:

> Except as otherwise directed by the court, a party offering *deposition testimony* pursuant to this rule *may offer it in stenographic or nonstenographic form*, but, if in nonstenographic form, the party shall also provide the court with a transcript of the portions so offered.

Rule 32(c) (emphasis added). The rule therefore clearly anticipates the admission of stenographic or nonstenographic forms of *testimony*, not summaries. [FN19] Although ***1118** Rule 32(c) does apply "[e]xcept as otherwise directed by the court," this caveat is most sensibly read to give the court discretion to direct either stenographic or non-stenographic presentation of deposition testimony, not to permit the presentation as "evidence" of summaries that approximate but do not reproduce the language the witness used in *any* form.

> FN19. The rules make clear that "nonstenographic" refers to audio or visual recording. *See, e.g.*, Rule 32 Advisory Comm. Note: ("This new subdivision [c] ... is included in view of the increased opportunities for video-recording and audio-recording of depositions under revised Rule 30(b)."); Fed. R. Civ. Proc. 30(b)(2) ("Any party may arrange for a transcription to be made from the recording of a deposition taken by non- stenographic means."); Rule 30 Advisory Comm. Note ("The primary change in subdivision (b) is that parties will be authorized to record deposition testimony by nonstenographic means without first having to obtain permission of the court or agreement from other counsel."); Rule 30 Advisory Comm. Note ("A party choosing to record a deposition only by videotape or audiotape should understand that a transcript will be required by Rule 26(a)(3)(B) and Rule 32(c) if the deposition is later to be offered as evidence at trial ...."); Rule 26(a)(3) ("[A] party must provide ... the following information regarding the evidence that it may present at trial ...:(B) the designation of those witnesses whose testimony is expected to be presented by means of a deposition and, if not taken stenographically, a transcript of the pertinent portions of the deposition testimony.").

Bolstering this conclusion regarding Rule 32(c), Rule 28 provides for the taking of depositions in foreign countries "pursuant to a letter of request," and expressly grants the district court the discretion to admit the response to such a letter even if it is not a "verbatim transcript" of the testimony or if it exhibits "any similar departure from the requirements for depositions taken within the United States under these rules." *See* Rule 28(b). The assumption quite obviously underlying Rule 28 is that any report of testimony other than a "verbatim transcript" *is* a "departure from the requirements for depositions taken within the United States under these rules."

More generally, Rule 32 demonstrates an overall preference for the presentation of testimony in the manner that, to the extent practical, best provides the jury with complete information concerning the witness's demeanor. Rule 32(a), for example, clearly favors live testimony over deposition evidence by limiting the use of depositions to three situations: when an adverse party is the deponent; for impeachment purposes; or when the deponent is not available to testify at trial. Rule 32(a)(1)-(3). By so doing, the rule reflects the historical belief that live testimony better enables the jury to adjudge the credibility of a witness and therefore to determine the weight and import ascribed to the witness's testimony. Deposition testimony is itself only second-best.

When the rules do allow the admission of deposition testimony in a jury trial, Rule 32(c) permits a party in some instances to insist upon the presentation of testimony in "non-stenographic form," allowing the jury to hear and/or see the testimony as it was given. Rule 32(c) ("On request of any party in a case tried before a jury, *deposition testimony* offered other than

for impeachment purposes *shall be presented in nonstenographic form*, if available, unless the court for good cause orders otherwise.") (emphasis added). Rule 32(c), by favoring audio and video recordings over the reading of a cold transcript, therefore establishes a preference for testimony that is the most like live testimony. Under this scheme, the presentation of deposition testimony in stenographic form is third-best.

Such presentation, however, at least allows the jury to hear or read the actual words used by the witness. Deposition summaries, unless accompanied by a transcript of the testimony, deprive the jury of even this opportunity. With Rule 32's clear preference for live testimony, or for testimony most resembling it, it makes little sense to think the rule tacitly allows for this new, fourth-best, form of evidence, so far removed from the in- person live testimony for which it is a substitute. I conclude that Fed. R. Civ. Proc. Rule 32 withholds from district courts the authority to require the substitution of summaries of deposition testimony for the testimony itself, where truth and falsity are at issue, and that the general language of ***1119**Fed.R.Evid. Rule 611 cannot override that determination.

There is nothing in our case law to the contrary. We have, while expressing great caution, allowed summaries of evidence in narrow circumstances, but never as a complete substitute for actual transcripts on material matters of historical fact.

For instance, in *Leon-Reyes*, 177 F.3d at 820, a perjury case, we held that the district court did not abuse its discretion in allowing the use of summaries of testimony from a prior trial in which the defendant had allegedly committed perjury, emphasizing that the district court instructed the jury to consider the summaries only for determining the materiality of the false statements and not for the truth of the witnesses' underlying testimony. *Pena-Espinoza*, 47 F.3d at 360, permitted--although making clear that it did "not wish to condone such procedures"--admission of summaries prepared by the prosecution of telephone call transcripts. The court specifically noted that:

> The transcripts themselves were in evidence and the jury had them to examine during deliberations; the ruling expressly permitted defense counsel to require a reading of the full transcript on cross-examination and to dispute the veracity of the readers' summaries.

Id. Similarly, *Baker*, 10 F.3d at 1411-12, found district court discretion pursuant to Fed.R.Evid. 611(a) to permit a government witness to present summary testimony and a chart estimating, on the basis of testimony at trial, the value of narcotics transactions. Critically, the district court made clear to the jury that the testimony and chart did *not* constitute evidence:

> The [district] court instructed the jury that the summary testimony and exhibits were not evidence, did not represent an opinion of the court or the prosecution on the credibility of witnesses, and were to be disregarded to the extent the jury found them conflicting with the testimony and evidence received at trial.

Id. at 1411. As in *Pena-Espinoza*, the *Baker* court emphasized that this court is "not blind to the dangers of witnesses summarizing oral testimony" and that "such summaries should be admitted under Rule 611(a) only in exceptional cases." *Id.* at 1412.

Thus, when this court has upheld the admission of summary evidence under the abuse of discretion standard, we have done so not as a *substitute* for transcript evidence on matters of historical fact, but either on issues *other* than the truth of the matter testified to or as an assistance to the jury, while also including the actual transcripts in the record for the use of the jury or reviewing courts. And none of our cases discuss the provisions of Fed. R. Civ. Proc. Rule 32, because none of them involved deposition summaries as opposed to summaries of other forms of evidence. [FN20]

> FN20. Although the Fourth, Fifth, and Seventh Circuits have generally approved the use of deposition summaries for the oral presentation of deposition evidence, I have found no case in which it is clear that the pertinent portions of the transcripts were not also admitted as evidence and available for jury review. *See Oostendorp v. Khanna*, 937 F.2d 1177, 1179-80 (7th Cir.1991); *Walker v. Action Indus., Inc.*, 802 F.2d 703, 712 (4th Cir.1986); *Kingsley v. Baker/Beech Nut Corp.*, 546 F.2d 1136, 1141 (5th Cir.1977) (deposition transcripts definitely admitted as evidence).

This is not a case in which the parties reached any agreement as to the summaries presented, so I do not consider whether such an agreement would be permissible. Nor did the defendants agree to the use of summaries at all; instead, they maintained a continuing objection to this procedure. And the district court did not review or ***1120** revise the

summaries after receiving objections prepared by the defendants, as it had originally planned to do. *Cf. Leon-Reyes*, 177 F.3d at 820 ("Summaries ... must be scrutinized by the trial court to ensure that they are accurate, complete, not unduly prejudicial, limited to the relevant issues, and confined by appropriate jury instructions.").

The district court did allow the defendants to present counter-summaries, colored with argument, and, in rebuttal, to introduce excerpts from the transcripts. Such an adversarial procedure, however, does not ensure that the jury will have before it the evidence necessary to informed decision-making. The party responsible for summarizing the testimony may have little reason to move for the admission of the underlying testimony, precisely because that party may prefer its summary to the testimony itself. Likewise, the adverse party will, hopefully, point out blatant inconsistencies between the summary and the testimony, but may choose otherwise to avoid providing the jury with testimony that largely supports a summary introduced by the other side.

Nevertheless, the fact remains that the jury must have the opportunity to review the actual evidence--the transcripts of the testimony--when deliberating as to the meaning of testimony. It is nonsensical to expect the jury to determine the credibility of witnesses and testimony, the special province of the jury, without providing the jury with access to that testimony. Just as we, as judges, do not read attorneys' paraphrases of statutes when we try to discover what the legislature meant, *see* Fed. R.App. Proc. Rule 28(f), jurors cannot sensibly evaluate the meaning and credibility of words without knowing what those words are.

One final note: The majority presumably finds that the district court has the discretion under Rule 611(a) to require deposition summaries in lieu of the testimony itself in order to "avoid needless consumption of time." Rule 611(a)(2). Because the presentation of deposition summaries, without the agreement of the parties and the admission of the corresponding excerpts, is not "effective for the ascertainment of truth," Rule 611(a)(1), the consumption of time caused by the presentation of actual testimony is not "needless." Moreover, by providing an additional issue for the parties to dispute, the use of summaries is just as likely to increase as to decrease the time spent by counsel and by the court.

I recognize that district courts can and should reasonably limit the amount of time expended on the presentation of deposition testimony. This authority does not, however, give trial courts the discretion to replace such testimony entirely with a Reader's Digest Condensed Books version.[FN21]

FN21. I do not address whether the use of deposition summaries in this case was harmless error, *see Cerrato v. San Francisco Cmty. Coll. Dist.*, 26 F.3d 968, 974 (9th Cir.1994) ("The harmless error standard in civil cases is whether the jury's verdict is more probably than not untainted by the error."), because the majority does not so hold.

IV.
Conclusion

As waves of fervent protest movements have ebbed and flowed, the courts have been called upon to delineate and enforce the line between protected speech and communications that are both of little or no value as information, expression of opinion or persuasion of others, and are of considerable harm to others. This judicial task has never been an easy one, as it can require--as here-- recognizing the right of ***1121** protesting groups to question deeply held societal notions of what is morally, politically, economically, or socially correct and what is not. The defendants here pose a special challenge, as they vehemently condone the view that murdering abortion providers--individuals who are providing medical services protected by the Constitution--is morally justified.

But the defendants have not murdered anyone, and for all the reasons I have discussed, neither their advocacy of doing so nor the posters and website they published crossed the line into unprotected speech. If we are not willing to provide stringent First Amendment protection and a fair trial to those with whom we as a society disagree as well as those with whom we agree--as the Supreme Court did when it struck down the conviction of members of the Ku Klux Klan for their racist, violence--condoning speech in *Brandenburg*--the First Amendment will become a dead letter. Moreover, the next protest group--which may be a new civil rights movement or another group eventually vindicated by acceptance of their goals by society at large--will (unless we cease fulfilling our obligation as judges to be evenhanded) be censored according to

the rules applied to the last. I do not believe that the defendants' speech here, on this record and given two major erroneous evidentiary rulings, crossed the line into unprotected speech. I therefore dissent.

290 F.3d 1058, 2 Cal. Daily Op. Serv. 4198, 2002 Daily Journal D.A.R. 5559

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TO: Rep Weyhrauch

FROM: Bob Briggs

DATE: 5/7/03

FAX: 465-2273

No. of pages, including cover sheet: (6)

Comments:

Letter & list of amendments to HB 149

Am on my way back up, will bring 10 copies of this

BBB

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May 7, 2003

By hand delivery and via e-mail

Rep. Bruce Weyhrauch
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Alaska Legislature
State Capitol, Room 102
Juneau, Alaska
E-mail: <ginny.austerman@legis.state.ak.us>

Re: **HB 149: Notice by 501(c)(3)s of lobbying expenditures; Suggested amendments**

Dear Representative Weyhrauch:

In the spirit of offering potential solutions to the problems I see with House Bill 149, attached please find a refined series of amendments that polishes what was distributed to the committee earlier this morning. These amendments assume the committee accepts the sponsor's substitute bill, with the Amendment #1 that the sponsor has offered. Please disregard my prior handwritten amendments, which were hastily drafted and had a few errors in the details that would have caused further confusion. Please consider the attachment in its place. This amendment has been reviewed in principle within my organization, but has not been released or reviewed by other affected non-profit organizations, who may have doubts of the wisdom of even what is proposed by this amendment. I will circulate these ideas, but make no representation as to their popularity.

The starting part for the rationale for this series of amendments is my belief that first and foremost, the officers, employees and other agents of non-profit corporations should be and are accountable to their board of directors, and for membership organizations, to their members. The sponsor of HB 149 alluded to the conduct of a very small number of non-profit corporations who, it is said, raise money for one purpose but then spend that money for a diametrically different purpose, without accountability for the misrepresentation.

I am doubtful that Alaska can shoulder the asserted failure of the federal IRS to police the conduct of a small number of apparently errant 501(c)(3) non-profits. However, the bill sponsor's search for accountability might be served by giving a 501(c)(3) the option of demonstrating accountability to its membership and board of directors by changing the reporting requirement to give a corporation one of three options: (1) a newspaper notice (similar to the original bill); (2) a mailed notice; or (3) an e-mailed notice. The sponsor's substitute bill would exempt corporations that

file APOC reports, likely under the rationale that the reporting rules under APOC laws and regulations are good enough. I believe it is only fair – and in accord with principles of equal protection – that the reports prepared under this bill shall be no less, and no more, specific than is required under laws and regulations governing lobbying reports filed with APOC. While my amendments do not say this specifically, it would be sufficient for purposes of future application of the act for the committee members to express their views on this point in describing what is, in their view, "reasonable specificity."

Second, the likelihood of "prior restraint" on exercise of Free Speech/Free Petition rights is reduced if the reporting requirement is changed to a *post-communication* requirement. For ease of administration, my amendment simplifies the reporting requirement to two easily understood time deadlines for reporting of lobbying activity: either July 31 (for lobbying activities conducted between January 1 and June 30), or January 31 (for lobbying activities conducted between July 1 and December 31). These times were chosen so that reports will be required while lobbying activity is relatively fresh in the memory of those involved, but hopefully not so frequently as to present an onerous burden on the reporting non-profit organizations.

Third, to make this bill more palatable to small non-profits with very modest budgets, I suggest increasing the reporting threshold from $500 to $2,000. Others may have a better threshold figure to suggest.

Finally, because I believe the primary accountability for corporate activity rests with the boards of directors and members of 501(c)(3) nonprofits, the bill would delete the requirement that the reports affirmatively be made "public" at the expense and effort of a reporting corporation. Instead, it is suggested that a member of the public investigating the conduct of a particular 501(c)(3) may obtain a copy of the organization's Form 990, any APOC reports filed on the organization's behalf (or by the organization's lobbyist), any federal lobbying reports the organization may have filed, and any documents required to be made available for public inspection under other federal statutes or regulations.

Corporate reports required by this bill may be subject to public disclosure under federal law or regulations, such as the Taxpayer Bill of Rights 2, Pub. L. 104-268, 100 Stat. 1452, or the Tax and Trade Relief Extension Act of 1998, Pub. L. No. 105-277, 112 Stat. 2681. I understand that the IRS has recently adopted regulations to implement the corporation disclosure requirements of these acts, although I have not studied the regulations themselves. To the extent that the reports required by HB 149 are also required to be made available to the public under other statutes or regulations, I have included a provision in HB 149 that would require the corporation to keep a copy of the lobbying report (i.e., a copy of the newspaper publication, the report to its members, or the report to its board of directors) on hand in the organization's headquarters files for two years after the publication or delivery of the notice. However, under

the amendments I have drafted, there would be no independent right (under this bill) of public access to lobbying reports prepared under this bill, except perhaps for those reports that a corporation chooses to publish in a newspaper (which by their publication would have not claim of right of confidentiality).

I have not analyzed the question of whether there is a right of privacy or confidentiality in the conduct of lobbying activity by 501(c)(3) non-profit organizations, but the issue does occur to the lawyer's mind. I know that Alaska legislators generally treat communications from constituents confidentially in many instances, and I do not pretend to understand the full landscape on that subject. APOC reports, for example, require a fairly innocuous description of the subjects of lobbying activity, without requiring public disclosure of actual lobbying communications. I believe this level of disclosure serves the public purpose of ensuring candidness in communications with legislators and their staff. Thus if this committee passes a bill that requires disclosure of lobbying activity with more specificity than is required in APOC filings, there does arise the question of whether such a requirement invades a right of confidentiality or privacy, or violates equal protection. These are issues that perhaps better taken up in the House Judiciary Committee.

These amendments are suggested in the spirit of assisting in addressing the concerns raised by the bill sponsor, although it is not clear to me that there is a systemic problem that truly needs to be addressed. These amendments are focused on reducing the burden of the reporting requirement, reducing any "chilling" effect on the exercise of free speech and free petition rights, while still trying to enhance accountability of 501(c)(3) lobbying activity. However, in the absence of a clearly demonstrated legislative problem that is well-documented (rather than vague allusions) I believe treating 501(c)(3) lobbying activity differently than other corporations still raises significant equal protection concerns that even the amendments I have suggested may not completely remove.

Very truly yours,

Bob Briggs

Robert B. Briggs, staff attorney

Encl.

Cc: (w/ encl.)
Members, House State Affairs Committee
Rep. Kelly Wolf
Dave Fleurant, executive director, DLC-Anchorage

AMENDMENT TO
SPONSOR'S SUBSTITUTE TO HOUSE BILL NO. 149 (Version H)

AMENDMENT NO. _____ OFFERED BY: _____

At page 1, line 2, delete "public"

At page 1, line 9, delete "public"

At page 1, lines 11-13, delete "a copy of the newspaper's certificate of publication with a copy of the notice published and the dates of publication within seven days after the last publication of the notice" and insert "written evidence of satisfaction of this section."

At page 1, line 13, delete "public"

At page 1, lines 13-14, delete "is required to be conducted by publication" and insert "may be evidenced by"

At page 2, line 1, delete "$500" and insert "$2,000"

At page 2, line 4, after "specificity, the" insert "lobbying"

At page 2, lines 4-5, delete "proposed, the proposed budget, the location, and the time period in which the lobbying activity has occurred or will occur" and insert "conducted, that has been either"

At page 2, line 6, delete "(2) of the notice" and insert "(i) published

At page 2, lines 6-7, delete "; (3)" and join text with preceding sentence

At page 2, line 7, delete "judicial district" and insert "Alaska judicial district"

At page 2, lines 10-11, delete "and (4) within 15 days before or after the lobbying expenditure occurs." And insert the following:

"(ii) delivered by mail or electronic means to the members of the corporation or, if the corporation is not a membership organization, to its board of directors;

(2) For lobbying expenditures incurred between January 1 and June 30 of a calendar year, the notice provided under subsection (1) shall be published or delivered no less than thirty days after July 1 of the same calendar year. For lobbying expenditures incurred between July 1 and December 31 of a calendar year, the notice provided shall be published or delivered no less than thirty days after January 1 of the succeeding calendar year.

(3) Each corporation subject to this Act shall maintain in its corporate headquarters a true and correct copy of each notice provided under subsection (1) for a period of not less than two calendar years after publication or delivery."

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May 6, 2003

By hand delivery and via e-mail

Rep. Bruce Weyhrauch
Chairman, House State Affairs Committee
Alaska Legislature
State Capitol, Room 102
Juneau, Alaska
E-mail: <ginny.austerman@legis.state.ak.us>

Re: **HB 149: Newspaper notice by non-profit corporations of lobbying expenditures**

Dear Representative Weyhrauch:

I am writing to respectfully urge a "no" vote on House Bill 149, either in its present form or in the form of a committee substitute (with or without an amendment) that was discussed on May 1. I apologize for not being able to attend the May 1 hearing due to other commitments. I have reviewed the KTOO archived audiotape, however, and these comments address the remarks given during that hearing.

The bill sponsor's testimony about the federal interpretation of "substantial lobbying activity" was, I believe, a bit off the mark.[1] I am aware of a 1955 circuit court of appeals case that determined that an organization which had spent less than 5% of its budget on "propaganda" had not engaged in "substantial" propaganda activity, which is proscribed by the same provision of the Internal Revenue Code as is lobbying.[2] This 1955 case found spending under 5% was "not substantial," but I am unaware of any case which has firmly set a percentage figure on what is considered to be "substantial." There may be a federal regulation on this subject, but I have not discovered it, and so I would say in this area there is uncertainty in the law.

[1] The comments of this letter should not be taken or relied upon as legal advice. Any reader of this letter should consult legal counsel before making decisions on this subject.

[2] 26 U.S.C. § 501(c)(3), construed in Seasongood v. Commissioner, Internal Revenue, 227 F.2d 907 (6th Cir. 1955)(holding that expenditures of "something under" 5% of budget on propaganda did not constitute "substantial part" of organization's activities). But see Krohn v. U.S., 246 F.Supp. 341, 347-48 (D.Colo. 1965)(questioning the wisdom of the percent approach to defining "substantial" as espoused in Seasongood).

On the other hand, a 1976 revision of the tax code has provided some certainty in a different way. In 1976, Congress passed the "Lobbying by Public Charities Act," codified at 26 U.S.C. §501(h), which appears to provide a "safe harbor" of sorts for 501(c)(3)s who want to help shape legislation, but do not want to change their essential charitable, educational or public service nature. Under that Act, some but not all 501(c)(3) corporations[3] may file a simple election form – Form 5768[4] – to give notice of intent to lobby. The form must be signed and postmarked within the first taxable year to which it applies. The form is operative thereafter for each tax year until it is revoked; a revocation is operative for the succeeding tax year after submission.

501(c)(3)s who elect to file a Form 5768 gain substantial protections under the Lobbying for Public Charities Act. First, any electing organization may be able to safely spend up to 20% of its budget without losing its 501(c)(3) status – this is substantially more than the 5% that has been represented as the threshold for engaging in "substantial lobbying activity." Second, any technical violations of the rules result in payment of an excise tax – not loss of 501(c)(3) status. Third, corporate managers or directors of an electing 501(c)(3) corporation are insulated from personal liability to pay excise tax penalties if a corporation is found to have violated the thresholds. See 26 U.S.C. § 501(h). In operation, the Act permits 501(c)(3)s to a least try to "be a player" in the legislative arena, one that often directly affects the lives of the people the corporations are organized to serve.[5]

I believe the U.S. Congress decided to establish some clear guidelines on 501(c)(3) lobbying because these organizations are an important part of the fabric of our society, perform many valuable services to our citizens (at a cost that is cheaper than government), and the views of these corporations on proposed legislation are important, and should be heard. I believe the same holds true for the Alaska Legislature.

HB 149 proposes what is in essence a special state surcharge or "tax" on 501(c)(3)s that choose to be involved in state legislative matters, albeit an indirect tax that is paid to newspaper organizations around the State. The result of this bill is, in my opinion, very likely a violation of

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[3] Churches, church auxiliaries, and members of churches or church auxiliaries appear to be disqualified from electing under Section 501(h). See enclosure.

[4] See http://www.irs.gov/pub/irs-pdf/f5768.pdf.

[5] See generally, Gail M. Harmon, et al., "*Being a Player: A Guide to the IRS Lobbying Regulations for Advocacy Charities* (Alliance for Justice 2000); Bob Smucker, *The NonProfit Lobbying Guide: Advocating Your Cause – and Getting Results* (Independent Sector Press, Jossey-Bass Publishers 1991); Independent Sector, *Tax-Exempt Organizations' Lobbying and Political Activities Accountability Act of 1987: A Guide for Volunteers and Staff of NonProfit Organizations* (Washington, D.C. January 1988); for other publications on this subject, see the Independent Sector website, http://www.independentsector.org/.

the Free Speech, Free Petition, and equal protection clauses of the Alaska and federal constitutions[6] if the same notice requirements are not imposed on all who exert influence on the legislative process.[7]

The bill sponsor's proposed amendment to exempt corporations that file APOC reports lessens the impact of the bill, but the bill still threatens to silence smaller non-profits – whose very voice the Legislature may want to hear most.

The bill sponsor also discussed an amendment that would eliminate the end-of-year reporting requirement to the Department of Revenue. This amendment may be in recognition that the existing APOC reporting requirements are essentially the same. The amendment would avoid a duplicative filing requirement.

If the committee passes this bill, the committee should adopt the sponsor's substitute, with the amendment discussed by the bill sponsor. With these revisions, the resulting bill would contain less of a "prior restraint" on the exercise of free speech than the original version proposes. However, I remain doubtful about the constitutionality of the sponsor's substitute bill (with or without the suggested amendment).

We are concerned that the bill's effect will be to chill the modest efforts of smaller Alaskan 501(c)(3)s to give input to the Legislature. These are the organizations whose voices should be heard, whose board memberships are filled by community leaders from business, trade, education, government, and the professions, who represent a cross-section of Alaska.

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[6] Art. XIV, § 1, U.S. CONST.; Art. I, §§ 1, 5, and 6, ALASKA CONST.

[7] The U.S. Supreme Court and other courts have found that lobbying registration acts, which may require a registration fee, may prohibit campaign contributions by lobbyists, or may require some form of post-communication reporting of lobbying activity, are not a violation of the Constitution. E.g., Regan v. Taxation with Representation of Washington, 461 U.S. 540 (1983)(upholding Section 501(c)(3) of the IRC); United States v. Harriss, 347 U.S. 612 (1954)(upholding Federal Regulation of Lobbying Act); Florida League of Professional Lobbyists, Inc. v. Meggs, 87 F.3d 457 (7th Cir. 1996), cert. denied, 519 U.S. 1010 (1996)(upholding Florida law regulating lobbying). The Supreme Court has ruled that lobbying activity is a First Amendment activity. Eastern R. Conf. v. Noerr Motors, 365 U.S. 127, 137-38 (1961)("In a representative democracy such as this, these branches of government act on behalf of the people and, to a very large extent, the whole concept of representation depends upon the ability of the people to make their wishes known to their representatives. . . . The right to petition is one of the freedoms protected by the Bill of Rights, and we cannot, of course, lightly impute to Congress an intent to invade these freedoms."). However, *pre-communication* impediments to lobbying activity, other than registration, may constitute a "prior restraint" on First Amendment freedoms that invokes strict constitutional scrutiny. As was said in Regan, "[g]enerally, statutory classifications are valid if they bear a rational relation to a legitimate governmental purpose. *Statutes are subjected to a higher level of scrutiny if they interfere with the exercise of a fundamental right, such as freedom of speech.* . . . "[A]lthough *government may not place obstacles in the path of a [person's] exercise of . . . freedom of [speech]*, it need not remove those not of its own creation." 461 U.S. at 547, 549, quoting Harriss, 448 U.S. at 316 (Rehnquist, C.J.).

These are people who know their communities, know what works and what doesn't work. Their voice should be strengthened, not silenced.

For these reasons, we urge a "no" vote on HB 149, either in its original form or in the sponsor's substitute, with or without the amendment suggested by the bill's sponsor. The goals behind this bill are laudable goals – truth in advertising, truth in legislative advocacy, full disclosure by 501(c)(3)s. However, we believe this bill takes the wrong approach. As always we will work with the bill sponsor to discuss our views of any alternative approaches that are suggested.

Very truly yours,

Bob Briggs

Robert B. Briggs, staff attorney

Encl. (IRS Form 5768)

Cc: (w/ encl.)
Members, House State Affairs Committee
Rep. Kelly Wolf
Dave Fleurant, executive director, DLC-Anchorage

Form **5768**

(Rev. December 1996)

Department of the Treasury
Internal Revenue Service

Election/Revocation of Election by an Eligible Section 501(c)(3) Organization To Make Expenditures To Influence Legislation

(Under Section 501(h) of the Internal Revenue Code)

For IRS Use Only ▶

Name of organization	Employer identification number
Number and street (or P.O. box no., if mail is not delivered to street address)	Room/suite
City, town or post office, and state	ZIP + 4

1 Election—As an eligible organization, we hereby elect to have the provisions of section 501(h) of the Code, relating to expenditures to influence legislation, apply to our tax year ending ..... and all subsequent tax years until revoked.
(Month, day, and year)

Note: *This election must be signed and postmarked within the first taxable year to which it applies.*

2 Revocation—As an eligible organization, we hereby revoke our election to have the provisions of section 501(h) of the Code, relating to expenditures to influence legislation, apply to our tax year ending .....
(Month, day, and year)

Note: *This revocation must be signed and postmarked before the first day of the tax year to which it applies.*

Under penalties of perjury, I declare that I am authorized to make this (check applicable box) ▶ ☐ election ☐ revocation on behalf of the above named organization.

(Signature of officer or trustee)	(Type or print name and title)	(Date)

General Instructions

Section references are to the Internal Revenue Code.

Section 501(c)(3) states that an organization exempt under that section will lose its tax-exempt status and its qualification to receive deductible charitable contributions if a substantial part of its activities are carried on to influence legislation. Section 501(h), however, permits certain eligible 501(c)(3) organizations to elect to make limited expenditures to influence legislation. An organization making the election will, however, be subject to an excise tax under section 4911 if it spends more than the amounts permitted by that section. Also, the organization may lose its exempt status if its lobbying expenditures exceed the permitted amounts by more than 50% over a 4-year period. For any tax year in which an election under section 501(h) is in effect, an electing organization must report the actual and permitted amounts of its lobbying expenditures and grass roots expenditures (as defined in section 4911(c)) on its annual return required under section 6033. See Schedule A (Form 990). Each electing member of an affiliated group must report these amounts for both itself and the affiliated group as a whole.

To make or revoke the election, enter the ending date of the tax year to which the election or revocation applies in item **1** or **2**, as applicable, and sign and date the form in the spaces provided.

Eligible Organizations.—A section 501(c)(3) organization is permitted to make the election if it is not a disqualified organization (see below) and is described in:

1. Section 170(b)(1)(A)(ii) (relating to educational institutions),
2. Section 170(b)(1)(A)(iii) (relating to hospitals and medical research organizations),
3. Section 170(b)(1)(A)(iv) (relating to organizations supporting government schools),
4. Section 170(b)(1)(A)(vi) (relating to organizations publicly supported by charitable contributions),
5. Section 509(a)(2) (relating to organizations publicly supported by admissions, sales, etc.), or
6. Section 509(a)(3) (relating to organizations supporting certain types of public charities other than those section 509(a)(3) organizations that support section 501(c)(4), (5), or (6) organizations).

Disqualified Organizations.—The following types of organizations are not permitted to make the election:

a. Section 170(b)(1)(A)(i) organizations (relating to churches),

b. An integrated auxiliary of a church or of a convention or association of churches, or

c. A member of an affiliated group of organizations if one or more members of such group is described in **a** or **b** of this paragraph.

Affiliated Organizations.—Organizations are members of an affiliated group of organizations only if **(1)** the governing instrument of one such organization requires it to be bound by the decisions of the other organization on legislative issues, or **(2)** the governing board of one such organization includes persons (i) who are specifically designated representatives of another such organization or are members of the governing board, officers, or paid executive staff members of such other organization, and (ii) who, by aggregating their votes, have sufficient voting power to cause or prevent action on legislative issues by the first such organization.

For more details, see section 4911 and section 501(h).

Note: *A private foundation (including a private operating foundation) is not an eligible organization.*

Where To File.—Mail Form 5768 to the Internal Revenue Service Center, Ogden, UT 84201-0027.

adopted 5/7/03

23-LS0354\H.1
Craver
5/1/03

AMENDMENT ~~#~~ 1

OFFERED IN THE HOUSE BY REPRESENTATIVE WOLF

TO: SSHB 149

Page 1, lines 2 - 3:

Delete "**and an annual report of lobbying expenditures to the Department of Revenue**"

Page 1, lines 7 - 8:

Delete "**, civil penalty, annual report**"

Insert "**, civil penalty**"

Page 2, lines 17 - 23:

Delete all material.

Reletter the following subsections accordingly.

O. UPDATE: THE FINAL REGULATIONS ON THE DISCLOSURE REQUIREMENTS FOR ANNUAL INFORMATION RETURNS AND APPLICATIONS FOR EXEMPTION

by
Michael Seto and Toussaint Tyson

1. Introduction

The Internal Revenue Service ("Service") has published final regulations (T.D. 8818) concerning the public disclosure requirements pursuant to IRC 6104(d)(IRC 6104(e) prior to redesignation as (d) under the Tax and Trade Relief Extension Act of 1998) for tax-exempt organizations other than private foundations. The term tax-exempt organization is defined as any organization that is described in IRC 501(c)(including 501(e) and (f) organizations, which are described under 501(c)(3)) and (d), and is exempt from taxation under IRC 501(a). Private foundation means a private foundation as defined in IRC 509(a).

Taxpayer Bill of Rights 2 ("TBOR2"), P.L. 104-268, 110 Stat. 1452, amended IRC 6104. The Service issued proposed regulations ((REG-246250-96), 62 Fed. Reg. 50533 (1997)(proposed Sept. 26, 1997) on the public disclosure requirements for exemption applications and annual information returns to implement the TBOR2 amendments. After consideration of all written comments from the public and the changes made in the Tax and Trade Relief Extension Act of 1998, P.L. 105-277, 112 Stat. 2681 ("the 1998 Act"), the Service issued final regulations, which became effective on June 8, 1999. (See Announcement 99-62, Internal Revenue Bulletin 1999-25).

This article discusses the new public disclosure rules as explained in the final regulations. This article also provides a brief summary of the public disclosure law prior to TBOR2, background to TBOR2, and the 1998 Act.

2. Brief Summary of the Disclosure Law Prior to Taxpayer Bill of Rights 2 and the Tax and Trade Relief Extension Act of 1998

IRC 6104(d) and IRC 6104(e) governed the disclosure of exemption applications and annual information returns by all tax-exempt organizations described in sections 501(c) or (d). IRC 6104(e) dealt with the disclosure of these documents by tax-exempt organizations except for the annual information returns of private foundations. IRC 6104(d) specifically dealt with the disclosure of this item. These two provisions required that all tax-exempt organizations described in IRC 501(c) or 501(d) allow public inspection of their exemption applications, any letter or other document issued by the Service concerning such applications, and annual information returns. The covered documents are subject to public inspection at the tax-exempt organization's principal office (and certain regional or district offices). Certain returns filed by tax-exempt organizations are not subject to public inspection.

For a detailed discussion, see the 1997 CPE, Publicity and Disclosure of Form 990, at pp. 5-15, ("1997 CPE"), and Notice 88-120, 1988-2 C.B. 454.

3. Changes to the Disclosure Law Under the Taxpayer Bill of Rights 2 and the Tax and Trade Relief Extension Act of 1998

TBOR2, enacted in 1996, amended IRC 6104(e) by expanding the disclosure requirements. (The changes made by TBOR2 and the proposed regulations issued thereunder were discussed in detail in the 1999 CPE, The Proposed Regulations on the Disclosure Requirements for Annual Information Returns and Applications for Exemption, at pp. 243-259). Thereafter, Congress enacted the 1998 Act which extends all the disclosure requirements that apply to public charities and other tax-exempt organizations to private foundations. In addition, the 1998 Act repeals IRC 6104(d) and redesignates the amended IRC 6104(e) as new IRC 6104(d) (hereinafter referred to as "amended IRC 6104(d)").

The final regulations issued under the amended IRC 6104(d) became effective on June 8, 1999, and apply to all tax-exempt organizations other than private foundations. The Service plans to extend the new disclosure regulations to apply to private foundations. During the meantime, tax-exempt private foundations must continue to comply with the disclosure requirements of IRC 6104(d), Regs. 301.6104(d)-1 and IRC 6104(e) as in effect prior to the 1998 Act.

4. The Final Regulations - Overview

The final regulations address five major areas:

- the documents that a tax-exempt organization must disclose in response to a request for information;
- the manner of disclosing these documents;
- the manner of providing copies and conditions that may be placed on in-person or written requests for copies of the documents; and the amount, form, and time of payment of any fees a tax-exempt organization may charge for the copies;
- how an organization can make its application for tax exemption and annual information returns "widely available"; and

- the standards that apply in determining whether a tax-exempt organization is the subject of a harassment campaign and on the procedures for obtaining relief.

5. Documents Subject to Disclosure

Regs. 301.6104(d)-3(b)(3) and (4) describe the documents that all tax-exempt organizations other than private foundations must disclose. These documents include applications for tax exemption and annual information returns.

A. Exemption Applications

An exemption application includes any prescribed application forms (Forms 1023, Application for Recognition of Exemption Under Section 501(c)(3) of the Internal Revenue Code ("Form 1023"), 1024, Application for Recognition of Exemption under Section 501(a) ("Form 1024"), or letter applications). See Regs. 301.6104(d)-3(b)(3)(i). It also includes the following:

- all documents and statements the Service requires an applicant to file with the form;

- any statement or other supporting document submitted by an organization in support of its application (for example, a legal brief supporting an application, or a response to questions from the Service during the application process); and

- any letter or other document issued by the Service concerning the exemption application (such as a favorable determination letter or a list of questions from the Service about the application).

If no form is prescribed for an organization's exemption application, the application for tax exemption includes the following:

- the application letter and copy of the articles of incorporation, declaration of trust, or other similar instrument that sets forth the permitted powers or activities of the organization;

- the organization's bylaws or other code of regulations;

- statements describing the character of the organization, the purpose for which it was organized, and its actual activities;

- the organization's latest financial statements showing assets, liabilities, receipts and disbursements;

- statements showing the sources of the organization's income and receipts and their disposition; and

- any other statements or documents the Service required the organization to file with, or that the organization submitted in support of, the application letter. See Regs. 301.6104(d)-3(b)(3)(ii)(A)-(F).

B. Disclosure Exceptions Relating to Exemption Applications

An exemption application does not include any application for tax exemption filed by an organization that has not yet been recognized, on the basis of the application, by the Service as exempt from taxation for any taxable year. Also it does not include any application for tax exemption filed before July 15, 1987, if the organization filing the application did not have a copy of the application on July 15, 1987. Finally, it does not include any material, including the material listed in Regs. 301.6104(a)-1(i) and information that the Service would be required to withhold from public inspection, that is not available for public inspection under IRC 6104. See Regs. 301.6104(d)-3(b)(3)(iii)(A)-(C).

C. Annual Information Returns

An annual information return includes an exact copy of any return filed with the Service by a tax-exempt organization pursuant to IRC 6033. Examples of an information return include Forms 990, Return of Organization Exempt From Income Tax ("Form 990") and 990-EZ, Short Form Return of Organization Exempt From Income Tax ("Form 990-EZ"). It also includes any amended return filed with the Service after the date the original return is filed.

The copy must include all information furnished to the Service on the Form 990 (or any version thereof) and Form 1065, U.S. Partnership Return of Income, as well as all schedules, attachments and supporting documents. Examples of schedules, attachments and supporting documents include Schedule A of Form 990 (containing supplementary information on IRC 501(c)(3) organizations), Part V of Form 990, and Parts I and II of Schedule A of Form 990 (showing compensation paid to specific persons). However, an organization is not required to

disclose the name or address of any contributor to the organization. See Regs. 301.6104(d)-3(b)(4)(i).

D. Disclosure Exceptions Relating to the Annual Information Return

An information return does not include Schedule A of Form 990-BL, Information and Initial Excise Tax Return for Black Lung Benefit Trusts and Certain Related Persons; Form 990-T, Exempt Organization Business Income Tax Return; Form 1120-POL, U.S. Income Tax Return For Certain Political Organizations; or the return of a private foundation (Form 990-PF, Return of Private Foundation and Form 4720, Return of Certain Excise Taxes on Charities and Other Persons Under Chapters 41 and 42 of the Internal Revenue Code). See Regs. 301.6104(d)-3(b)(4)(ii). Also Schedules K-1 that are filed by religious and apostolic organizations described in IRC 501(d) are specifically excluded from disclosure. See IRC 6104(d)(3)(A).

A tax-exempt organization does not have to allow public inspection of any return after the expiration of 3 years from the date the return is required to be filed (including any extension of time that has been granted for filing such return) or the date the return is actually filed, whichever is later. If an organization has filed an amended return, however, the amended return must be made available for inspection and copying for a period of 3 years beginning on the date it is filed with the Service. See Regs. 301.6104(d)-3(b)(4)(iii).

E. Request for Parts of Exemption Application or Annual Information Returns

A tax-exempt organization must comply with a request for all or part of its annual information returns or application for exemption. A request for a copy of less than the entire application or return must specifically identify the requested part(s) or schedule(s). See Regs. 301.6104(d)-3(d)(2)(ii)(B).

6. Manner of Disclosure for In-Person Requests for Public Inspection

A tax-exempt organization must make the applicable documents available for public inspection at its principal, regional, or district offices during regular business hours. See IRC 6104(d)(1)(A) and Regs. 301.6104(d)-3(d)(1)(i). During the inspection, the tax-exempt organization may have an employee present in the room. The inspecting individual is allowed to take notes freely and may make photocopy of the documents for a reasonable fee. If he provides his own photocopying equipment, the organization must allow him to photocopy the documents without charge. See Regs. 301.6104(d)-3(c)(1).

A. Tax-Exempt Organization That Has No Permanent Offices, or No Office Hours or Limited Hours

A tax-exempt organization that does not maintain a permanent office must permit public inspection of the requested documents within a reasonable amount of time after receiving a request for inspection (normally not more than 2 weeks). It must permit public inspection to occur at a reasonable location of its choice and at a reasonable time of day. Alternatively, the tax-exempt organization may mail a copy of the requested documents to the requester within two weeks of receiving the request. It may charge the requester for copying and actual postage costs only if the requester consents to the charge. See Regs. 301.6104(d)-3(c)(2).

A tax-exempt organization that has a permanent office, but has no office hours or has very limited hours during certain times of the year, must respond to requests made during those periods when office hours are limited or not available as though it were an organization without a permanent office. See Regs. 301.6104(d)-3(c)(2).

7. In-Person Requests for Copies of Documents

While the tax-exempt organization must make its documents available for public inspection without charge, if the individual requests copies of the documents, it may charge a reasonable fee for such service. A fee is reasonable if it is no more than the per-page copying charge stated in Regs. 601.702(f)(5)(iv)(B), which is the amount charged by the Service for providing copies. (Currently, that amount is $1.00 for the first page and .15 for each subsequent page; see Announcement 99-62, Internal Revenue Bulletin 1999-25). The tax-exempt organization may require the individual making the request to pay the fee before providing copies of the documents. See Regs. 301.6104(d)-3(d)(3)(i).

The tax-exempt organization must respond to questions from any individual concerning the fees it charges for providing documents. For example, if an individual is requesting certain documents from a tax-exempt organization, it must inform that individual of the charge for copying such documents. See Regs. 301.6104(d)-3(d)(3)(iv).

The tax-exempt organization must accept payment in cash or money order. It may accept credit cards, personal checks or other forms of payment in lieu of the aforementioned. See Regs. 301.6104(d)-3(d)(3)(ii)(A).

A. Cannot Comply Due to Unusual Circumstances

Absent unusual circumstances, an in-person request for copies of the covered documents must be fulfilled on the day the request is made. If the tax-exempt organization cannot provide the requested documents on the same business day due to unusual circumstance, then it must provide the documents no later than the next business day following the day that the unusual circumstances cease to exist or the fifth business day after the date of the request, whichever occurs first. Unusual circumstances include, but are not limited to, the following:

- Receipt of a volume of requests that exceeds the tax-exempt organization's capacity to make copies;
- The requests are made shortly before the end of regular business hours, and they require an extensive amount of copying of the documents;
- The requests are made on a day when the tax-exempt organization's managerial staff capable of fulfilling the requests is conducting special duties, such as student registration or attending an off-site meeting, rather than its regular administrative duties. See Regs. 301.6104(d)-3(d)(1)(ii).

B. Agent Used To Handle In-Person Requests For Copies of Documents

A tax-exempt organization may retain a local agent, within reasonable proximity of the applicable principal, regional or district office, to process in-person requests for copies of its documents. An agent must provide the copies within the time and under the conditions that apply to the tax-exempt organization itself. See Regs. 301.6104(d)-3(d)(1)(iii). For example, when an individual makes an in-person requests to have copies of the documents, the tax-exempt organization must immediately provide him the name, address, and telephone number of its local agent. Thereafter, the tax-exempt organization in not required to respond to him further.

C. Failure to Comply

Should the tax-exempt organization or its agent fail to provide the documents as required under IRC 6104(d), the responsible person of the tax-exempt organization may be liable for penalties pursuant to three provisions, IRC 6652(c)(1)(C) and (D), failure to allow public inspection of annual returns and exemption applications, and IRC 6685, willful failure to allow public inspection of annual returns and exemption applications. See Regs. 301.6104(d)-3(d)(1)(iii) and (f)(3), and Announcement 99-62, Internal Revenue Bulletin 1999-25.

8. Written Requests for Copies of Documents

A tax-exempt organization must honor a written request for a copy of the documents that the organization is required to provide under amended IRC 6104(d) if the request

- is addressed to, and delivered by mail, electronic mail, facsimile, a private delivery service (as defined in IRC 7502(f)) to the principal, regional or district office of the organization; and

- sets forth the address to which the copy of the documents should be sent. 301.6104(d)-3(d)(2)(i).

The tax-exempt organization must provide the copies within 30 days from the date it receives the request. If it requires payment for the requested documents in advance, it must provide the documents 30 days from the date it receives the payment.

A. Date of Receipt and Delivery of Requested Documents

In the absence of contrary evidence, a mailed request or payment for documents is considered to be received by the tax-exempt organization seven days after the date of the postmark. Requests transmitted to the organization by electronic mail or facsimile are considered received the day the request is successfully transmitted. Copies are considered provided on the date of the postmark or private delivery mark (or if sent by certified or registered mail, the date of registration or the date of the postmark on the sender's receipt).

If an individual making a request consents, a tax-exempt organization may provide a copy of the requested document by electronic mail. In such case, the material is provided on the date the organization successfully transmits the electronic mail. See Regs. 301.6104(d)-3(d)(2)(ii)(A).

B. Reasonable Fee Charged For Providing Copies of the Requested Documents

The same rules pertaining to in-person requests also govern the amount of the fee a tax-exempt organization may charge respond to requests for copies in writing. See section 7 above. See Regs. 301.6104(d)-3(d)(3)(i). However, in addition to money order, it must accept certified check, and either personal check or credit card. See Regs. 301.6104(d)-3(d)(3)(ii)(B).

If the tax-exempt organization does not require prepayment and a requester does not enclose payment with a request, it must obtain consent from that requester before providing

copies for which the fee charged for copying and postage exceeds $20. See Reg. 301.6104(d)-3(d)(3)(iii).

C. Agent Used to Handle Written Requests for Copies of Documents

As with in-person requests (see sub-section 7B above), a tax-exempt organization may retain an agent to process written requests for copies of its documents. The agent must provide the copies within the time and conditions that apply to the tax-exempt organization itself.

If the tax-exempt organization itself receives the request, and then forwards it to the agent, the deadline for response is the day the tax-exempt organization received the request, not when the agent received the request. Where the tax-exempt organization transfers a written request to its agent, it is not required to respond to the individual further. Should its agent fails to provide the copies to the individual as provided by IRC 6104(d), the responsible person for the tax-exempt organization maybe liable to penalties pursuant to the three provisions described in sub-section 7B above.

9. Manner of Disclosure by Regional and District Offices

A tax-exempt organization's regional or district office must satisfy the same rules as the principal office concerning the disclosure of its exemption application and annual information returns. However, the regional or local office need not make the annual information return available for inspection or to provide copies until thirty days after the date the return is required to be filed (including any extension) or is actually filed, whichever is later. See Regs. 301.6104(d)-3(e).

A. Definition of a Regional and District Office

A regional or district office is any office of a tax-exempt organization, other than its principal office, that has the following characteristics:

- Paid part-time or full-time employees;
- Whose aggregate number of paid hours are normally at least 120. See Regs. 301.6104(d)-3(b)(5)(i).

The above not withstanding, a site is not considered a regional or district office if:

- The only services provided at the site further exempt purposes (such as day care, health care or scientific or medical research); and
- The site does not serve as an office for management staff, other than managers involved solely in managing the exempt function activities at the site. See Regs. 301.6104(d)-3(b)(5)(ii).

10. Disclosure Requirements of a Tax-Exempt Organization's Local or Subordinate Organizations

A. Exemption Applications

If a local or subordinate organization ("subordinate") is covered by a group exemption letter, it must make available for public inspection and furnish in response to requests for copies the following:

- the exemption application submitted to the Service by its parent or central organization ("parent") to obtain the group exemption letter; and

- any additional documents submitted to bring the subordinate organization under the group exemption letter. See Regs. 301.6104(d)-3(f)(1).

If the parent organization provides the Service a list or directory of subordinate organizations covered by the group exemption letter, the local or subordinate need only provide the exemption application and the pages of the list or directory that specifically refer to it. See Regs. 301.6104(d)-3(f)(1).

B. Annual Information Returns

If a local or subordinate organization does not file its own annual information return because it is affiliated with a central organization that files a group return pursuant to Regs. 1.6033-2(d), it must make the central organization's annual information returns available for public inspection and provide copies thereof to requesters, as the case may be. However, if the group information return includes separate schedules for each subordinate organization, a subordinate organization may omit those schedules relating only to the other subordinate organizations. See Regs. 301.6104(d)-3(f)(2).

C. Manner of Disclosure By Subordinate Organization

A local or subordinate organization must allow inspection or provide copies of documents, upon request, within a reasonable time, not normally more than two weeks, and at a reasonable time of day. The subordinate organization may mail a copy of the applicable documents to the requester within the aforementioned time frame in lieu of inspection. It may charge the requester for copying and actual postage costs, provided the requester consents. The same rules pertaining to response to written requests for copies of documents by a tax-exempt organization also govern its local or subordinate organization (see section 8 above).

11. Making Exemption Applications and Annual Information Returns Widely Available for Public Inspection

A tax-exempt organization is not required to comply with requests for copies of its exemption application or annual information returns if it has made the requested documents "widely available." The tax-exempt organization must nevertheless continue to allow public inspection of the aforementioned documents even if it has made them widely available. See Regs. 301.6104(d)-4(a).

A. Definition of "Widely Available"

(1) Posting on the Internet

A tax-exempt organization makes its annual information returns or application for tax exemption widely available by posting them on its World Wide Web page on the Internet or by having the applicable form posted, as part of a database of similar documents of other tax-exempt organizations, on a Web page established and maintained by another entity. The final regulations do not define an "other entity" that will establish or maintain the envisioned database. The World Wide Web page must:

- clearly inform readers that the documents are available and provide instruction for downloading;

- exactly reproduce the image of the exemption application and annual information returns as they were originally filed with the Service, excluding any information not subject to public disclosure, when the documents are accessed and viewed, downloaded, viewed and printed in hard copy from the World Wide Web page;

- allow anyone with access to the Internet to access, download, view and print the document without special computer hardware or software required for that format (other than software that is readily available without charge) and without payment of a fee to the tax-exempt organization or to another entity maintaining the World Wide Web page. See Regs. 301.6104(d)-4(b)(1) and (2)(i)(A)-(C). (One format that currently meets this criteria is Portable Document Format (.pdf)); see Public Announcement 99-62, Internal Revenue Bulletin 1999-25).

In order for the documents to be "widely available" within the meaning of Regs. 301.6104(d)-4, the entity that maintains the World Wide Web page must have procedures that ensure the reliability and accuracy of the documents posted. It must take reasonable precautions to prevent alteration, destruction or accidental loss of the document when posted on the page. Should a posted document be altered, destroyed or lost, the entity must correct or replace the document. See Regs. 301.6104(d)-4(b)(2)(iii).

(2) Other Methods of Making Documents Widely Available

There are currently no other prescribed methods of making exemption applications and annual information returns widely available. The Service nevertheless may prescribe additional

methods, other than Internet posting, that a tax-exempt organization may use to make its documents widely available. See Regs. 301.6104(d)-4(c).

(3) Notice to Requesters

Where a tax-exempt organization has posted its exemption application and/or annual information on the Internet in the manner prescribed by Regs. 301.6104(d)-4(b)(2), it must notify any person requesting a copy where the documents are available, such as the address on the World Wide Web. In response to an in-person request, the tax-exempt organization must provide the notice immediately; if a written request, it must provide the notice within seven days of receiving the request. See Regs. 301.6104(d)-4(d).

B. Transition Rule for Tax-exempt Organizations That Posted Their Documents on the Internet Before the Effective Date of These Regulations

A tax-exempt organization that posted its exemption application and annual information returns on the World Wide Web page on or before April 9, 1999, in a manner consistent with regulation project REG-246250-96 (1997-2 C.B. 627)(see Regs. 601.601(d)(2)), will be treated as complying with the Internet posting requirements prescribed in Regs. 301.6104(d)-4(b)(2), as discussed above, until June 8, 2000. This transition rule is effective only if the documents can be accessed, downloaded, viewed and printed without payment of a fee to the tax-exempt organization or to the entity maintaining the World Wide Web page. See Regs. 301.6104(d)-4(b)(2)(ii).

12. Tax-Exempt Organizations Subject to Harassment Campaigns

A tax-exempt organization that is the subject of a campaign of harassment via the request of many copies of annual returns or exemption applications is not required to fulfill such requests, provided it receives a harassment determination letter from the Service. Specifically, the district director of the key district (or such person as the Commissioner may designate) in which the tax-exempt organization's principal office is located must determine that it is the subject of a harassment campaign and that compliance with the requests would not be in the public interest. See the amended IRC 6104(d)(4) and Regs. 301.6104(d)-5. There is a two part inquiry: (1) whether there is a harassment campaign; and (2) whether compliance with such requests would not be in the public interest.

A. Harassment Defined

A prerequisite for a harassment campaign is the receipt by a tax-exempt organization of a "group of requests" for its exemption application and annual information returns. The final regulations do not quantify how many or how few requests constitute a "group of requests" or specify the time period over which a "group of requests" is measured. However, the final regulations include four examples that provide considerable guidance on this matter. See Regs. 301.6104(d)-5(f).

But Regs. 301.6104(d)-5(c) specifically provides that a tax-exempt organization may disregard any request for copies of all or part of an exemption application or annual information returns beyond the first two received within any 30-day-period or the first four within any one-year-period from the same individual or the same address. The tax-exempt organization may follow this rule regardless of whether the district director has determined that it is subject to a harassment campaign.

A group of requests may constitute a harassment campaign if the relevant facts and circumstances indicate that the requests are part of a single coordinated effort to disrupt the operations of the tax-exempt organization. See Regs. 301.6104(d)-5(b). Facts and circumstances that indicate the tax-exempt organization is the subject of a campaign of harassment include the following:

- a sudden increase in the number of requests;
- an extraordinary number of requests made through form letters or similarly worded correspondence;
- evidence of a purpose to deter significantly the organization's employees or volunteers from pursuing the organization's exempt purpose;
- requests that contain language hostile to the tax-exempt organization;
- direct evidence of bad faith by organizers of the purported harassment campaign;
- evidence that the organization has already provided the requested documents to a member of the purported harassing group; and
- a demonstration by the tax-exempt organization that it routinely provides copies of its documents upon request. See Regs. 301.6104(d)-5(b).

The regulations suggest that one indicator is not determinative of a harassment campaign. See example 2 in Regs. 301.6104(d)-5(f), which highlights this.

B. Determination Procedure

A tax-exempt organization may apply for a determination that it is the subject of a harassment campaign by submitting a signed application to the district director for the Key District where its principal office is located. The application must contain the following:

- a written statement giving the organization's name, address, and employer identification number;
- the name, address and telephone number of the person to contact regarding the application; and
- description, in detail, of the facts and circumstances that the organization believes support a determination that it is subject to a harassment campaign.

The tax-exempt organization may suspend compliance with any request it reasonably believes to be part of a harassment campaign, provided that it files its application within ten business days from the day it first suspends compliance with the requests. See Regs. 301.6104(d)-5(f), example 3. The tax-exempt organization may continue the suspension until it receives a response from the Service. See Regs. 301.6104(d)-5(d).

If the district director determines that the tax-exempt organization is the subject of a harassment campaign and it is not in the public interest to comply with the requests, the organization is not required to comply with the requests for copies that it reasonably believes are part of the campaign. This determination may be subject to other terms and conditions imposed by the district director. See Regs. 301.6104(d)-5(e). A revenue procedure clarifying this procedure is being drafted at the time of this writing.

C. Suspension of Penalties

Liability for penalties under IRC 6652(c)(1)(C), IRC 6652(c)(1)(D) or IRC 6685 are suspended during the consideration of a request for a harassment campaign determination. Where the district director determines that the tax-exempt organization is not the subject of a harassment campaign, the tax-exempt organization must fulfill the requests within thirty days of receiving the determination. See Regs. 301.6104(d)-5(e).

If the district director determines that the tax-exempt organization did not have a reasonable basis for requesting a determination that it is a subject of a harassment campaign or a reasonable belief that a particular request was part of the campaign, the person (as defined by IRC 6652(c)(4)(C)) remains liable for any penalties that result from not providing the copies of the requested documents in a timely fashion. See Regs. 301.6104(d)-5(e). For specific examples, see Regs. 301.6104(d)-5(f).

13. Conclusion

The final regulations (T.D. 8818) provides considerable guidance to Service personnel trying to administer the law and tax payers trying to comply with the law. Any IRC 6104(d) disclosure questions should be directed to Michael Seto at (202) 622-2253, or to Toussaint Tyson at (202) 622-8363.

HB 149

Subject: Whitepaper: Limitations on Lobbying Activities: Guidelines for 501(c)(3) Organizations
Date: Wed, 14 May 2003 16:59:43 -0800
From: Tammy Kempton <tammy_kempton@admin.state.ak.us>
Organization: Alaska Public Offices Commission
To: Chris Knight <chris_knight@legis.state.ak.us>

Chris --
I think you might find this paper more helpful then the article I was originally going to send. This one goes into some detail about the election a 501(c)(3) has to make to use the expenditure test instead of the substantial test.
Tammy

http://www.centeronline.org/knowledge/whitepaper.cfm?ID=1782&

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office, organizations can engage in a relatively significant amount of lobbying activity if carefully conceived and managed." So begins Jeffrey Tenenbaum's, Attorney with Venable Baetjer Howard & Civiletti, overview of lobbying activities as they pertain to 501(c)(3)s.

Limitatior

By: Jeffrey S. Tenenbaum Esq.
Source: Center Collection
Published: May 2002

Nonprofit organizations that qualify for federal income tax exemption under Section 501(c)(3) of the Internal Revenue Code (the "Code") have the most favorable tax status, but they also have the most restrictions on government affairs activities. To maintain their 501(c)(3) tax-exempt status, these organizations must avoid all political campaign activities and must keep lobbying within permissible limits. While there is an absolute prohibition on 501(c)(3) organizations participating or intervening in any political campaign on behalf of or in opposition to candidates for public office, 501(c)(3) organizations can engage in a relatively significant amount of lobbying activity if carefully conceived and managed.

The Lobbying Election

The definition of activities considered to constitute "lobbying," as well as the extent to which a 501(c)(3) organization may conduct such activities before incurring penalties, varies depending on whether the organization has chosen to make the "election" under Section 501(h) of the Code. Most informed 501(c)(3) organizations that lobby choose to make the election, and, consequently, are governed by a special "expenditures" test, rather than the "substantiality" test governing nonelectors.

In stark contrast to the very vague and sparse rules governing nonelectors, the expenditures test provides mathematical methods to concretely determine the extent to which an electing organization may engage in lobbying without incurring penalty taxes or losing 501(c)(3) status. Congress enacted the expenditures test and related rules (found in Sections 501(h) and 4911 of the Code) to relieve the uncertainty of the substantiality

test.

Other key advantages of "electing" are the numerous exceptions provided for what is considered lobbying, the imposition of penalty taxes for excessive lobbying instead of the immediate loss of tax exemption, a safe harbor (margin for error) for organizations that exceed the lobbying limits in a given year, an exclusion for lobbying time "donated" by volunteers (including board members), and a lower Internal Revenue Service ("IRS") audit risk.

The lobbying election is made by filing, at any time, the simple one-page Form 5768 with the IRS. Note that the lobbying election is *not* available to 501(c)(3) organizations that constitute "supporting organizations" (*i.e.*, those public charities, such as many associations' related foundations, that receive their public charity status through their support of a 501(c)(4), (c)(5), or (c)(6) organization that itself meets one of the public support tests). The following rules and definitions apply only to 501(c)(3) organizations that make the lobbying election.

Definition of Lobbying

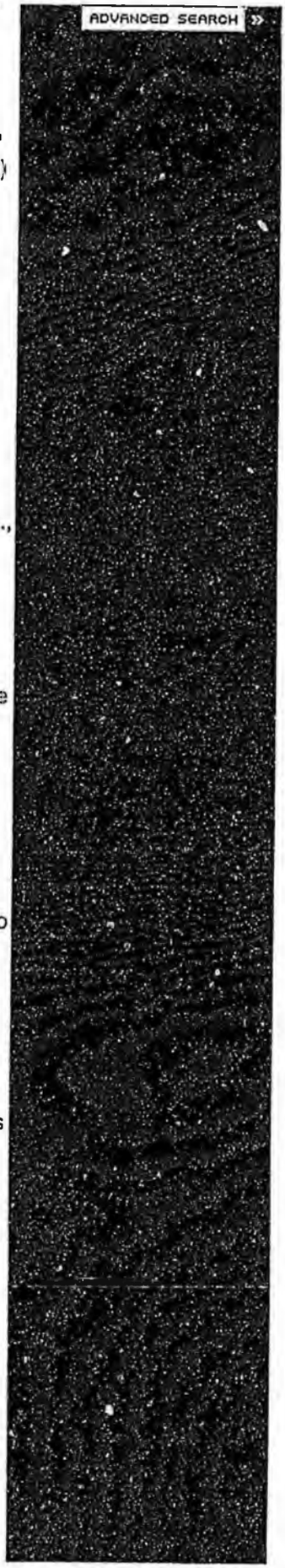
To be considered lobbying, a communication must *refer to and reflect a view* on a specific legislative proposal or legislation that has been introduced before a legislative body (federal, state or local). Actions by executive, judicial or administrative bodies (e.g., regulations) are excluded from the definition of lobbying. Lobbying may either be direct or grassroots. Grassroots lobbying is more limited than direct lobbying. Direct lobbying is any attempt to influence legislation through a communication with any member or employee of a legislative body, or with any other governmental official who may participate in the formulation of legislation, if the principal purpose is to influence legislation. The communication must refer to specific pending or proposed legislation and reflect a view on the legislation. A communication made to the general public on the subject of a public referendum, ballot initiative, or similar election will be considered direct lobbying if the communication reflects a view on the subject of the vote. Direct lobbying also includes communications by an association to its members directly encouraging them to engage in direct lobbying. When directed solely to members, a communication is not lobbying if it only indirectly encourages members to engage in lobbying.

Grassroots lobbying is defined, except with regard to a limited category of mass media communications (for which special rules apply), to include only those communications to the general public that:

1. Refer to specific pending or proposed legislation.
2. Reflect a view on that legislation.
3. Encourage the recipient to take action with respect to such legislation (this third element is often referred to as a "call to action").

It includes communications to members directly encouraging them to urge nonmembers to lobby. An organization generally engages in grassroots lobbying when, directly or through its members, it urges that the public contact legislators, or provides the public with the address, telephone number, electronic mail address, etc. of a legislator or a petition or tear-off postcard, or even merely identifies legislators who will vote on the item referred to.

For both direct and grassroots lobbying, all costs of researching, preparing, planning, drafting, reviewing, copying, publishing, and mailing a direct or grassroots lobbying communication - including amounts paid as current or deferred compensation for employees' services attributable to these activities - must be counted as lobbying expenditures. In addition, the allocable portion of administrative, overhead and other general expenses attributable to these activities also must be treated as lobbying expenditures. However, if the primary purpose for incurring an expenditure is a non-lobbying purpose (and if the "fruits" of the expenditure are, in fact, used for such a non-lobbying purpose), then no portion of the expenditure needs to be allocated to lobbying. See below for a discussion of cost allocation between lobbying and non-lobbying purposes. Also see below for a discussion of the use of non-lobbying



material in connection with a subsequent lobbying communication.

Exclusions from Definition of Lobbying
Certain activities are excluded from the definition of lobbying:

1. Lobbying does not include providing technical assistance or advice to a governmental body or committee in response to its unsolicited written request (note two caveats: (a) cannot be a request from merely an individual member of that body or committee, and (b) the response must be made available to every member of the requesting body or committee).

2. Lobbying does not include self-defense activities - communications with legislators concerning decisions which may affect the organization's existence, powers and duties, 501(c)(3) status, or tax deductibility of contributions.

3. Lobbying does not include making available the results of nonpartisan analysis, study or research, defined as a full and fair exposition of a particular subject that may advocate a view so long as the presentation of the relevant facts is sufficient to enable readers to reach independent conclusions (*e.g.*, presenting information on both sides of a legislative controversy in a balanced and objective manner) (note two caveats: (a) grassroots lobbying communications which *directly* encourage action do not qualify under this exception, and (b) in order to take advantage of this exception, distribution of studies, reports, etc. may not be limited to, or directed toward, persons interested *solely* in one side of a particular issue).

4. Lobbying does not include examining and discussing broad social, economic, and similar policy issues whose resolution would require legislation - even if such legislation is pending - so long as the organization's discussion does not address the merits of the specific legislation.

5. Lobbying does not include communicating with a government official or employee other than (a) a communication with a member or employee of a legislative body that would otherwise constitute lobbying, or (b) a communication with the principal purpose of influencing legislation.

6. Lobbying does not include communications between an organization and its members (broadly defined) about pending or proposed legislation, unless the communications directly encourage the members to attempt to influence legislation (or directly encourage the members to urge nonmembers to attempt to influence legislation). Note that this exclusion will apply so long as a majority of the communication's recipients are members.

Communications which fall into one of these six categories will not constitute "lobbying" even if they advocate a view on proposed or pending legislation.

Subsequent Use Rule
In certain narrowly defined circumstances, the subsequent *grassroots* lobbying use of "advocacy communications or research materials" (those materials that refer to and reflect a view on specific legislation, do not directly encourage grassroots lobbying, but do not otherwise satisfy the exception for nonpartisan analysis, study, or research) that originally contained no lobbying communications may cause the original expense incurred in developing the materials to be treated as a lobbying expenditure. This could occur most frequently with respect to certain nonpartisan analysis, study, or research reports that are initially created without any accompanying lobbying messages, but are later used in connection with grassroots lobbying communications. In such event, the "subsequent use" rule may convert the original expense (in its entirety) into a grassroots lobbying expenditure. However, there are two broad safe harbors in which the subsequent use rule will not apply - one relates to the primary purpose of the original materials and the other relates to the timing of the subsequent use.

Under the primary purpose safe harbor, the subsequent use rule will not apply if the

organization can demonstrate that the primary purpose of the original materials (i.e., the primary purpose for incurring the original expense) was a non-lobbying purpose. Where the organization makes a substantial distribution of the materials in their non-lobbying form either prior to or contemporaneous with the grassroots lobbying distribution, the IRS will presume a non-lobbying primary purpose. In the case of "nonpartisan analysis, study, or research," whether the distribution is substantial will depend upon the particular facts and circumstances, including normal distribution patterns of similar materials. In the case of other "advocacy communications or research materials," the non-lobbying distribution must be at least as extensive as the grassroots lobbying distribution.

Under the timing of subsequent use safe harbor, the determinative factor is the amount of time between when the organization paid the original expenses and when the subsequent use occurred. All expenses paid more than six months before the subsequent use are protected from the application of the subsequent use rule.

The subsequent use rule will not cause any communications or research materials to be considered direct lobbying communications.

Limitations on Permissible Lobbying

Under the expenditures test, an organization can quantify exactly how much lobbying it may engage in each year. A sliding scale specifies the amount an organization may expend on all lobbying activities in relation to the amount it spends on most of its other activities (*i.e.*, expenditures in furtherance of the organization's tax-exempt purposes). Under Section 4911(c)(2) of the Code, the maximum allowable annual lobbying is the sum of:

1. 20% of the first $500,000 of an organization's exempt purpose expenditures, plus
2. 15% of the second $500,000 of such expenditures, plus
3. 10% of the third $500,000 of such expenditures, plus
4. 5% of the remainder of such expenditures,

with a cap of $1 million in annual lobbying expenses.

On top of this cap, there is a further restriction that an organization may not spend more than 25% of its permitted lobbying total on grassroots lobbying.

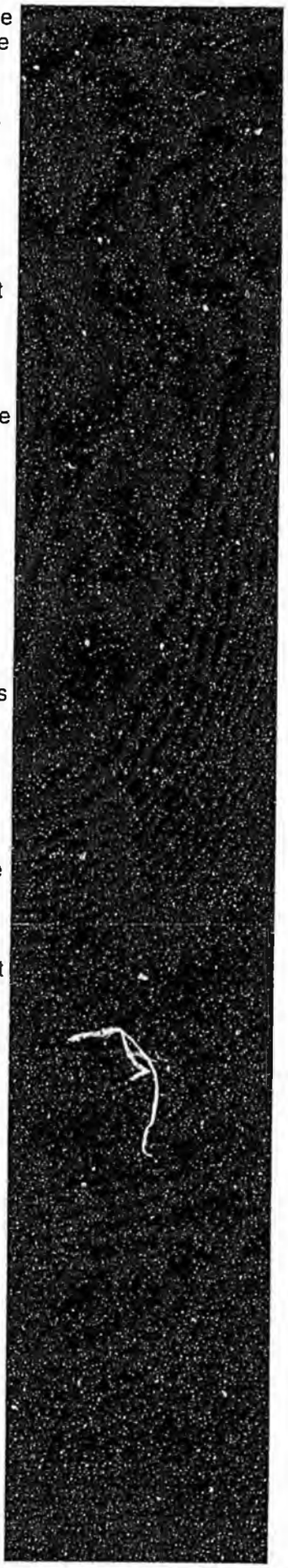
It is important to note that lobbying expenditures include, among other things, the value of the allocable portion of staff time attributable to lobbying; such salary allocations must be substantiated through the use of time records (see below).

If annual limits are exceeded, a 25% excise tax is imposed on the amount of "excess" lobbying expenditures (*i.e.*, 25% times the greater of the amount by which lobbying expenditures exceeded the allowable total limit *or* by which grassroots lobbying expenditures exceeded the allowable grassroots limit).

An organization's 501(c)(3) status will be revoked *only* if the sum of total lobbying expenditures or total grassroots lobbying expenditures over a four-year period exceeds 150% of the four-year sum of the maximum permissible amounts - a considerable safe harbor. Note that a 501(c)(3) organization that loses its tax exemption because of excessive lobbying or prohibited political campaign activities cannot then convert to a 501(c)(4) organization.

Because the extent of an organization's lobbying is measured only by expenditures (and not, for example, by time expended), lobbying efforts by members (volunteers) - including unpaid officers and directors - on behalf of an association that do not incur expense by the association are not subject to any limitation and are not counted toward the association's lobbying totals. If the association incurs expenses (*e.g.*, travel expenses) in connection with its members' lobbying efforts, only those expenses (and nothing more) will be counted toward its lobbying totals.

Affiliated organizations



The expenditures test contains methods of aggregating the lobbying expenditures of related organizations in order to prevent the creation of numerous entities to avoid the lobbying limitations. Where two or more 501(c)(3) organizations are members of an "affiliated" group and at least one of the members has made the 501(h) election, the calculations of lobbying and exempt purpose expenditures must be made by taking into account the expenditures of the entire group. If these expenditures exceed the permitted limits, each of the electing member organizations must pay a proportionate share of the penalty excise tax, with the nonelecting members (if any) treated under the substantiality test. Generally, two organizations are deemed to be "affiliated" where (1) one organization is bound by decisions of the other on legislative issues pursuant to its governing instruments (*e.g.*, Articles of Incorporation, Bylaws), or (2) the governing board of one organization includes enough representatives of the other (an "interlocking governing board") to cause or prevent action on legislative issues by the first organization. Where a number of organizations are "affiliated" (such as in the case of certain association-chapter structures), all of them are treated as one group of affiliated organizations. However, if a group of autonomous organizations controls an organization but no single organization in the controlling group alone can control that organization, the organizations are not considered an affiliated group by reason of the interlocking directorates rule.

Lobbying Records and Cost Allocation

Under Code Section 501(h), detailed disclosure as part of the annual Form 990 filing and thorough recordkeeping are required. It is the responsibility of the association to maintain documentation of its direct and grassroots lobbying expenditures. If an activity has mixed (direct and grassroots) lobbying or both lobbying and nonlobbying aspects, the association will be expected to allocate the expenditures, pursuant to the rules set forth below. (See also the discussion of the primary purpose test above.) Employee time records, financial reports, invoices from outside suppliers (*e.g.*, printing bills), postage receipts, and other documentation of expenditures should identify those spent on direct and grassroots lobbying, and should allocate expenditures for mixed lobbying (direct and grassroots) and mixed purpose (lobbying and nonlobbying) activities.

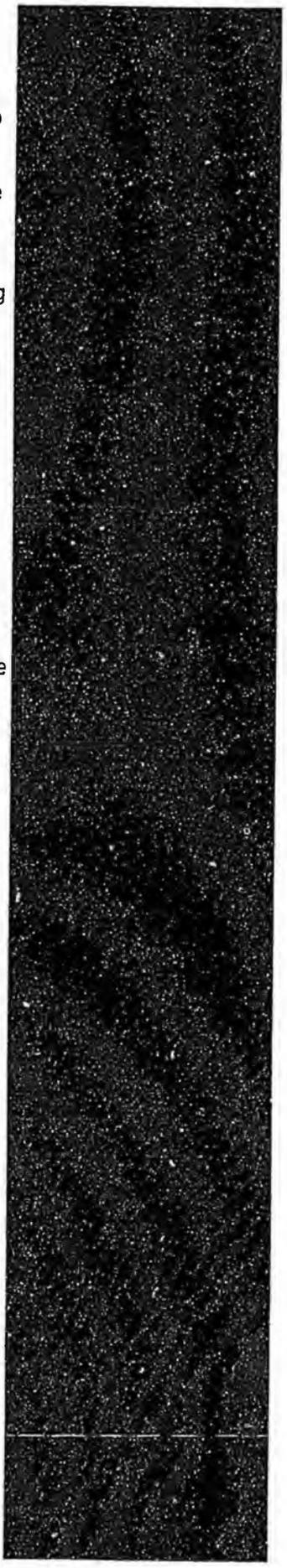
As stated above, all amounts paid or incurred for, or in connection with, direct and grassroots lobbying communications - including amounts paid or incurred as current or deferred compensation for employees' services attributable to lobbying, as well as the allocable share of overhead expenses attributable to lobbying - are included within the organization's total "lobbying expenditures."

A mixed grassroots and direct lobbying communication must be treated as a grassroots communication except to the extent that the organization demonstrates that the expenditure was incurred "primarily" for direct lobbying purposes, in which case a reasonable allocation must be made between the direct and grassroots lobbying purposes served by the communication.

For lobbying communications that also serve bona fide non-lobbying purposes, there are two alternate allocation rules. Which rule is used depends upon whether the communication is sent primarily to members or non-members. The rules are generally more favorable for member communications.

For communications that are sent primarily to bona fide members (i.e., communications sent to more members than non-members), the organization must make a reasonable allocation between the amount expended for the lobbying purpose and the amount expended for the non-lobbying purpose. Including as a lobbying expenditure only the amount expended for the specific sentence or sentences that encourage the recipient to action is not considered a reasonable allocation.

For communications that are not sent primarily to bona fide members, all costs attributable to the lobbying portion and to those parts of the communication that are on the same specific subject as the lobbying message must be included as lobbying expenditures. Whether or not a portion of a communication is on the same specific subject as the lobbying message will depend upon the surrounding facts and circumstances. In general, a portion of a communication will be on the same specific



subject as the lobbying message if that portion discusses an activity that would be directly affected by the legislation that is the subject of the lobbying message. Moreover, discussion of the background or consequences of either the legislation or of an activity directly affected by the legislation also will be considered to be on the same specific subject as the lobbying communication.

Transfers Treated as Lobbying
A transfer of money or property by a 501(c)(3) organization to an individual or entity will be treated as a lobbying expenditure if it is earmarked for that purpose. A transfer of money or property by a 501(c)(3) organization for less than fair market value to a non-501(c)(3) organization that lobbies will be treated as a lobbying expenditure unless it is a "controlled grant" or unless certain other exceptions apply. Also see below for a discussion of transfers by private foundations to 501(c)(3) public charities that lobby.

Private Foundations
501(c)(3) organizations that are private foundations are subject to excise tax on any amounts paid or incurred (i) in an attempt to influence legislation, or (ii) in an attempt to influence the outcome of any public election or to carry on certain voter registration drives. The definition of lobbying, and the exceptions thereto, are similar to the definitions and exceptions described above. As long as a private foundation does not earmark a grant for lobbying, it may make a general purpose grant to a 501(c)(3) public charity that lobbies without incurring penalty tax liability. A private foundation also may make a grant to support a specific public charity project that includes lobbying, so long as the grant is not earmarked for lobbying and so long as it is not larger than the amount budgeted by the grantee for the nonlobbying portion of the project.

Conclusion
Associations exempt from tax under Section 501(c)(3) must keep lobbying activities within specified limits. Grassroots lobbying is limited more than direct lobbying. To avoid incurring liability for excise taxes or loss of tax-exempt status, care should be taken to ensure compliance with the expenditures test under Section 501(h) and to enable such associations to take advantage of the opportunities provided by these rules.

Due to the numerous exceptions to the definition of lobbying for 501(c)(3) organizations, properly planned and structured, it is frequently possible for 501(c)(3) organizations to conduct all desired government affairs activities within the confines of the 501(c)(3) structure. This option should be thoroughly explored before any structural organizational changes are made, such as the establishment of an affiliated entity (*e.g.*, as a 501(c)(4) organization) to conduct lobbying activities.

Jeffrey S. Tenenbaum Esq., Partner
Venable, Baetjer, Howard & Civiletti
Can be reached at: jstenenbaum@venable.com
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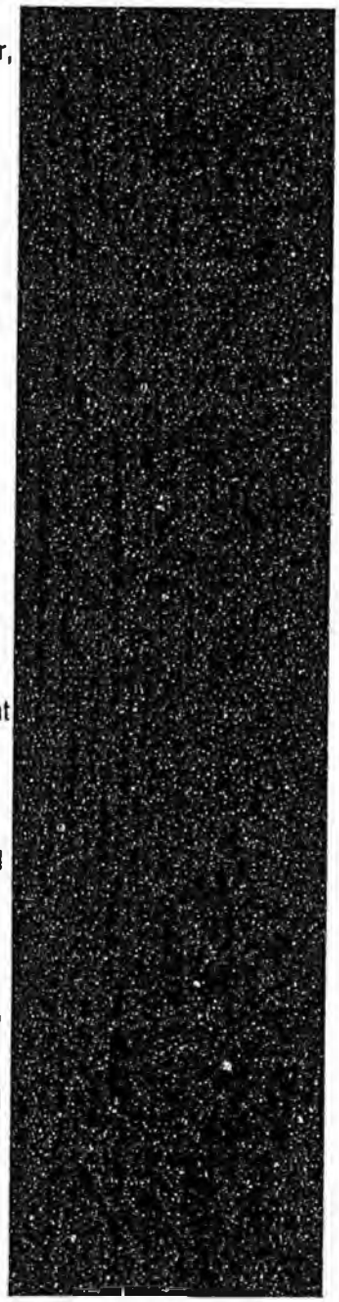

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Tammy Kempton <Tammy_Kempton@admin.state.ak.us>
Juneau Office Administrator
APOC
Admin

AARP Alaska

APR 16 2003

Honorable Bruce Weyhrauch, Chair
House State Affairs Committee
Alaska Capital, Room 102
Juneau, AK 99801-1182

April 16, 2003

RE: HB 149 (Wolf) –Oppose

Dear Chair Weyhrauch:

On behalf of the AARP members in Alaska, we encourage you and your colleagues on the House State Affairs Committee to oppose HB 149, authored by Representative Kelly Wolf.

Although AARP would not be covered by the bill as it is currently written (AARP is a 501 (c)(4) corporation because we are a lobbying organization and we do pay taxes), we are concerned that HB 149 would dampen the ability of non-profit organizations to respond in a timely manner to proposed legislation, pronouncements from the Governor, etc. For example, the Governor surprised us when he announced that he would recommend that the Legislature eliminate the Longevity Bonus for 18,000 older Alaskans. The next morning AARP began to muster our members through direct mail. We easily would have gone over the $500 limit within 24 hours.

If HB 149 had been in effect, we would have had to post a public announcement in the newspaper 14 days before we planned to spend $500 in a lobbying effort. From past experience, we know that non-profits often must decide to purchase a newspaper ad or buy radio time (usually costing over $500) and the ad often runs within 48 hours. HB 149 would eliminate the opportunity for non-profits to participate in the legislative process in a timely manner. It would also force non-profits to spend an inordinate amount of money on public notices in newspapers.

In addition, HB 149 would probably violate the United States Constitution and would be ruled as such in a lawsuit. As a former President of the Alaska Bar Association, it would be helpful if you could offer some counsel on this issue.

Non-profits like AARP that use either a staff lobbyist or a contract lobbyist submit monthly and quarterly reports to APOC. This information is available to anyone who wishes to view it. All our lobbying expenditures are available for scrutiny to the public, the media, and the legislative and executive branch.

3601 C Street, Suite 1420 | Anchorage, AK 99503 | 907-341-2277 | 907-341-2270 fax | 1-877-434-7598 TTY
James G. Parkel, President | William D. Novelli, Executive Director and CEO | www.aarp.org

We do not know the original intent of Representative Wolf when he introduced this bill. We do know that this bill should not go forward.

AARP recommends a "NAY" vote on HB 149.

Should you have any questions about our position, please feel free to contact Marie Darlin (907.586.3637), Coordinator of the AARP Capital City Task Force; Patrick Luby (907.762.3314), AARP Legislative Representative; or me (907.245.5259).

Thank you for your consideration.

Sincerely,

Marguerite Stetson

Marguerite Stetson
AARP Alaska
Executive Council Member for Advocacy
3009 Northwood Street
Anchorage, AK 99517-1871
907.245.5259 voice
907.245.5279 fax
ffmas@aurora.uaf.edu

cc: Vice-Chair Jim Holm
Representative Nancy Dahlstrom
Representative Bob Lynn
Representative Paul Seaton
Representative Ethan Berkowitz
Representative Max Gruenberg
Marie Darlin
Patrick Luby

Subject: [Fwd: I am against HB 149]
Date: Tue, 06 May 2003 20:47:42 -0800
From: Bruce Weyhrauch <Representative_Bruce_Weyhrauch@Legis.state.ak.us>
Organization: Alaska State Legislature
To: Ginny Austerman <Ginny_Austerman@legis.state.ak.us>

committee file please

Subject: I am against HB 149
Date: Tue, 6 May 2003 22:50:31 EDT
From: AneidaAlexander@aol.com
To: Representative_Ethan_Berkowitz@legis.state.ak.us, Representative_Eric_Croft@legis.state.ak.us, Representative_Bruce_Weyhrauch@legis.state.ak.us
CC: Representative_Nancy_Dahlstrom@legis.state.ak.us, Representative_Paul_Seaton@legis.state.ak.us, Representative_Jim_Holm@legis.state.ak.us, Representative_Bob_Lynn@legis.state.ak.us, Representative_Max_Gruenberg@legis.state.ak.us, Senator_Hollis_French@legis.state.ak.us

I would like for you to know that I am against HB 149.

I see no reason to make these demands of nonprofit groups. I am a member and a ruling elder of First Presbyterian Anchorage. If I understand this bill correctly, the church session (governing body) could not publish an ad for or against pending legislation in the newspaper, even in our own newsletter, without burdensome reporting requirements. We couldn't fly one of our elders or pastors to Juneau to speak to various legislators. What in the world could we do that would require this kind of Big Brother over-sight? By our nature - nonprofits - we can't gain monetarily so for the life of me, I can't understand this bill. Quite frankly, I can only see this as backhanded Christian bashing. Are we that darn scary? If you are that scared of us, wait 'til you meet our God!

Lest you think that I'm just one of those foaming-at-the-mouth Bible thumpers, I also belong to a number of service and social organizations that this bill, if passed, would impact.

I have passed this information on to all of the members of these groups, urging them to write to their representatives and to encourage their friends and associates to do the same.

Thank you for your time.

Sincerely,
Aneida Alexander
3321 Monticello Ct.
Anchorage AK 99503
562-7854

Subject: [Fwd: HB 149]
Date: Tue, 06 May 2003 20:46:36 -0800
From: Bruce Weyhrauch <Representative_Bruce_Weyhrauch@Legis.state.ak.us>
Organization: Alaska State Legislature
To: Ginny Austerman <Ginny_Austerman@legis.state.ak.us>

file for committee

Subject: HB 149
Date: Tue, 6 May 2003 19:23:02 -0800
From: "Taber" <taber@bbbsfairbanks.org>
To: "Representative Bruce Weyhrauch" <Representative_Bruce_Weyhrauch@legis.state.ak.us>

Hello Representative Weyhrauch-

I am writing to you in your capacity as Chair of the House State Affairs Committee to ask you to take no action on HB 149 or its proposed CS, regarding non-profit lobbying, after it is heard again in your committee on May 7th. We at Arctic Alliance for People (a network of human service providers and non-profits serving the Interior) believe it is an ill-conceived and unnecessary piece of legislation that doesn't warrant further consideration and time on the part of the committee.

Non-profits communicate valuable information to decision-makers about the impact of proposed legislation on their clients - often citizens who would have difficulty communicating on their own. That important communication would be seriously hampered by this bill. The IRS, I believe, is plenty scary enough when it comes to lobbying limitations - and APOC regulations already cover paid lobbyists and significant lobbying in terms of public disclosure. Let's not legislate unnecessary inequities in a state that prides itself on "equal treatment" of its citizens.

Thanks for your time and attention.

Taber Rehbaum
Legislative Committee Chair
Arctic Alliance for People
Fairbanks, Alaska

HCW 5/16/03

Senate Bill 149
Timber First! in Alaska's Forests

Alaska Conservation Voters
Alaskans Building a Better Future

810 N St, Ste 203, Anchorage Alaska 99501 / Ph. 907.258.6171 / Fax 907.258.6177
PO Box 22151, Juneau Alaska 99802 / Ph. 907.463.3366 / Fax 907.463.3312 / www.acvoters.org

To: Representatives
From: Matt Davidson
Date: May 16, 2003

SB 149 makes dramatic changes to the management and purposes of Alaska's designated state forests and forested lands. Under SB 149 logging will be given a priority over all other forest resources and users. SB 149 ignores the importance of fishing, tourism, community uses, wildlife, and recreation in an unnecessary attempt to boost logging on state lands.

SB 149 is ill conceived and puts our forest resources at risk. Please oppose SB 149.

1. **Makes logging the primary purpose for state forests.** Under SB 149 only other uses that are *compatible* with logging will be considered as part of forest planning. The current "multiple use" management is the correct way for the state to manage our resources.
2. **Limits information about other uses before the creation of new state forests.** Under SB 149 the Governor will not be required to consult with the Department of Fish and Game or other agencies before recommending the creation of new state forests. Under SB 149 the proposed new *million-acre state forest* will be logging first, regardless of valuable fisheries, tourism, watershed, subsistence, or cultural resources.
3. **Disregards other resources in individual Forest Land Use Plans:** Limits consideration of site-specific impacts on fisheries, wildlife, and tourism in individual logging plans. Instead the bill proposes considering logging impacts the general "area plans." These plans are not written to make recommendations to protect watersheds, fish and wildlife habitat from potential logging. The bill doesn't recommend timely changes to these plans to consider these uses.
4. **Limits the ability of the state to protect fish habitat:** Unless the Commissioner makes a finding of "compelling state interest," logging buffers cannot be increased about the minimum to safeguard salmon habitat. "Compelling state interest" not defined anywhere in Statute making it unlikely buffers would ever be expanded beyond the minimum.
5. **Special value-added manufacturing timber sale areas expanded to include lands not compatible with substantial logging.** We strongly support increasing local processing of Alaska's timber, however, expanding the lands eligible for the "high value added" program violates the public understanding of the uses of these lands during the development of the regional area plans. Many important "community use" areas should not be eligible for any widespread logging.
6. **Pulping of timber is added to the "high value-added list for special contracts.** Pulping of Alaska's forests is not the highest use of these resources. The 40-year pulp mill era in Southeast Alaska drove many small local mills out of business and had dramatic impacts on fish and wildlife habitat.

Stand up for sound and balanced planning on our forested lands and oppose SB 149.

Alaskans building a better future.

United Way of Anchorage

May 13, 2003

TO: Representative Bruce Weyhrauch, Chair
House State Affairs Committee

FROM: Fred Jenkins, Executive Vice President

SUBJECT: Written Testimony CS for HB 149 (STA) Work Draft dated 5/12

Typically United Way of Anchorage does not involve itself in legislation, but when we see a bill that adversely impacts the nonprofit sector as a whole, we step forward. My reading tells me this is the type of bill that would adversely impact the nonprofit sector. I urge you not to move this bill forward.

Lobbying is a legal activity for nonprofits and they report this activity on their annual IRS Form 990 tax returns. That information is a matter of public record.

This bill has several features which are questionable:

The requirement for publication in a newspaper of two written notices 15 days before or after is a costly measure that will drain already scarce resources from nonprofit service provision. It is also an onerous and unnecessary requirement for an activity that is the right of every nonprofit and citizen to pursue under law.

The $1,000 minimum expense that triggers the requirement for notice is likely to mandate notice for any lobbying effort and would likely restrict many nonprofits from the activity since the cost for notices would quickly become prohibitive.

It is unclear how a budget of $1,000,000 triggers this requirement and whether it is fair to exempt organizations with a smaller budget from the requirement.

The bill sets forth requirements that likely are unreasonable limits to nonprofits' rights to free speech and expression of opinion. If the legislation is passed, legal challenges are likely and will add further costs to the State and nonprofit sector.

Budget cuts in this session are already restricting nonprofits' ability to deliver needed services in their communities. This legislation unnecessarily requires nonprofits to allocate additional resources to administration. This does not make good fiscal sense in our current environment. I assume there must be a fiscal note that attaches to this bill. How much will it cost for the State to administer this legislation? Is this a high priority given the scarcity of resources available?

I have forwarded copies of this testimony to the other five United Ways in Alaska who with the United Way of Anchorage collectively constitute a federation of over 200 nonprofits. If this legislation moves forward, we will also assemble a group of volunteer attorneys and professional public policy advocates to further examine the bill. It is my belief that all of these folks will actively and vigorously oppose this legislation. I respectfully urge you not to pass this legislation.

701 West 8th Ave., Suite 230
Anchorage, Alaska 99501
p 907.263.3800 f 907.263.3801 www.uway.ak.org

Subject: HB 149
Date: Wed, 14 May 2003 07:11:35 -0800
From: akcompub@arctic.net
To: Ginny_Austerman@Legis.state.ak.us, Representative_Bruce_Weyhrauch@legis.state.ak.us, Representative_Jim_Holm@legis.state.ak.us, Representative_Nancy_Dahlstrom@legis.state.ak.us, Representative_Bob_Lynn@legis.state.ak.us, Representative_Paul_Seaton@legis.state.ak.us, Representative_Ethan_Berkowitz@legis.state.ak.us, Representative_Max_Gruenberg@legis.state.ak.us

Dear Ladies and Gentlemen of the State Affairs Committee

Because of the frequent rescheduling of HB 149, I will not be able to testify in person this morning and thus wish to share through this email the concern I have for the effect this bill will have on the faith communities in the State.

Churches, Synagogues and other religious organizations are engaged in sharing a spiritual message, healing, care and comfort with their own faith communities and with the broader public in their communities. Often, it becomes valuable for the representatives of these faith communities to share with Legislators and with Regulators, information about the work these religious organizations are doing when Legislators or regulators are considering bills or regs dealing in areas which may impact or overlap with the religious activities.

For example, in my capacity as Christian Science Committee on Publication, I represent a broad and growing segment of people in Alaska who are turning to prayer for healing. Over the past several years, this office has had a very good working relationship with the Legislature and, as a result, fair and reasonable language has been added to pending legislation, particularly dealing with health care, that recognize spiritual healing.

The Legislature would have been without the benefit of the valuable input of this office or of other religious organizations that also work closely with the Legislature if, because of excessive administrative or financial burdens, their representatives were precluded from lobbying activity.

We believe existing law already adequately provides oversight of lobbying activity. HB 149, making it more restrictive for non-profits to lobby than for commercial interests, is unnecessary. On the other hand, should the Committee wish to advance this bill, we would ask that you favorably consider exempting religious organizations.

With appreciation for your careful consideration,

Richard L. Block
Christian Science Committee on Publication
360 W Benson Blvd., Suite 301
Anchorage, Alaska 99503
907 562 5183
akcompub@arctic.net

Subject: [Fwd: HB 149- this letter has also been faxed]
Date: Tue, 06 May 2003 20:47:54 -0800
From: Bruce Weyhrauch <Representative_Bruce_Weyhrauch@Legis.state.ak.us>
Organization: Alaska State Legislature
To: Ginny Austerman <Ginny_Austerman@legis.sta ak.us>

committee file please

Subject: HB 149- this letter has also been faxed
Date: Tue, 6 May 2003 17:15:19 -0800
From: "Elyse Guttenberg" <eguttenberg@fairbanksnative.org>
To: <Representative_Bruce_Weyhrauch@legis.state.ak.us>

May 6th, 2003

The Honorable Bruce Weyhrauch
House State Affairs
Alaska State Legislature

Dear Representative Weyhrauch,

I am writing to urge you to help stop HB 149 from moving out of the House State Affairs committee. This bill would effectively put an end to the ability of non-profit agencies in Alaska to speak to any bill that concern the Alaskans they serve. By requiring publication of a notice of intent to expend more than $500 on any lobbying efforts, the legislature would be putting up a road block so steep, that non-profits-and only non-profits-would be prevented from contacting their legislators.

Picture an agency in Nome where the local newspaper, The Nome Nugget comes out weekly. To meet the requirements of HB 149 this agency-lets pick one of the local non-profits, the Christian Pilots Association of Alaska-would need to contact the Nome Nugget twice, waiting as much as three weeks before they could legally be permitted to spend $500 hoping to effect legislation. Since the Christian Pilots Association is an interdenominational group dedicated to transporting pastors, missionaries and lay workers to the Eskimo villages of Northwest Alaska, they might very well want to approach their legislators in Juneau if, for instance there was item in the budget concerning runways, and the maintenance of small airports.

$500 is quickly spent on direct mail to pilots, church groups, and villages, and by the time the Pilots Association complied with the notification requirements, the bill could already have passed out of committee, of even been voted on by the House. In the meantime, the for-profit companies who have concerns of their own would have faced none of these constraints. No time frame. No $500 limit, and their lobbyists would have enjoyed full and immediate access to legislators. HB 149 would have taken the Christian Pilots Association, or the Iditarod National Historic Trail, or the non-profit Kawerak Family Services which offers help to neglected children, and placed them in a separate and special category, denying them the right to contact their legislators without prior constraints.

Again, I urge you to stop this bill without allowing it to move out of committee. It is the people of Alaska, those with the most need for the services provided by our non-profits, who have the most to lose, and the most to gain by your thoughtful actions.

[Fax: HB 149- this letter has also been faxed]

Thank you again,

Elyse Guttenberg
Director, Planning and Development
Fairbanks Native Association
201 First Avenue, Suite 220
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