ALASKA LEGISLATURE COMMITTEE FILES, 2003-2004 8672
11034 HOUSE STATE AFFAIRS

Public Opinion Message

Anchorage Legislative Information Office (LIO)
716 W 4th Avenue · Anchorage, AK 99501 · Phone: 269-0111 Fax: 269-0229

This form must be completely filled out. You may phone, fax, or deliver your POM to any LIO.

From: *Please PRINT the information below. This form must be signed by the sender.*

Mr. / Ms. / Mrs.	First name	M.I.	Last name	Jr. / Sr. / III
	DONALD	L	MORELAND	

Group affiliation (if applicable)	N/A
Daytime telephone number	748-4759
Mailing address	P.O. Box 671473 Chugiak AK
Zip code	99567
Residence (street) address if different from mailing address	23809 SKi RD Peters Creek AK
Zip code	99567
Email address	None
Signature	
Date	04/07/03

To: *Put a √ in the appropriate box(es).*

Committees

H	S	
		Community & Regional Affairs (cra)
		Finance (fin)
		Health, Ed., & Social Services (hes)
		Judiciary (jud)
		Labor & Commerce (l&c)
		Resources (res)
		Rules (rls)
X		State Affairs (sta)
		Transportation (tra)
		Other:
		Other:

Caucuses

- [ ] Anchorage (age)
- [ ] Bush (bus)
- [ ] Fairbanks/Interior (int)
- [ ] Matsu (mat)
- [ ] Majority (mjr)
- [ ] Minority (mnr)

House members

- [ ] Anderson (ade)
- [√] Berkowitz (ber)
- [ ] Chenault (che)
- [ ] Cissna (cis)
- [ ] Coghill (cog)
- [ ] Crawford (crf)
- [ ] Croft (cro)
- [√] Dahlstrom (dal)
- [ ] Fate (fht)
- [ ] Foster (fos)
- [ ] Gara (gar)
- [ ] Gatto (gat)
- [√] Gruenberg (gm)
- [ ] Guttenberg (gtt)
- [ ] Harris (har)
- [ ] Hawker (haw)
- [ ] Heinze (hez)
- [√] Holm (hol)
- [ ] Joule (jou)
- [ ] Kapsner (kap)
- [ ] Kerttula (ker)
- [ ] Kohring (koh)
- [ ] Kookesh (kos)
- [ ] Kott (kot)
- [√] Lynn (lyn)
- [ ] Masek (mas)
- [ ] McGuire (mcg)
- [ ] Meyer (mey)
- [ ] Morgan (mor)
- [ ] Moses (mos)
- [ ] Ogg (ogg)
- [ ] Rokeberg (rok)
- [ ] Samuels (sal)
- [√] Seaton (san)
- [√] Stoltze (stz)
- [√] Weyhrauch (weh)
- [ ] Whitaker (whi)
- [ ] Williams (wil)
- [ ] Wilson (wls)
- [ ] Wolf (wol)

Senate members

- [ ] Bunde (bun)
- [ ] Cowdery (coy)
- [ ] Davis (dab)
- [ ] Dyson (dys)
- [ ] Ellis (ell)
- [ ] Elton (elt)
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- [ ] B. Stevens (ste)
- [ ] G. Stevens (stv)
- [ ] Taylor (tay)
- [ ] Therriault (thr)
- [ ] Wagoner (wag)
- [ ] Wilken (wlk)

Subject: *Fill out the boxes below OR enter a Subject.*

HB or SB	Bill number	and check one:		OR	enter a general Subject (LIO staff may modify):
HB	134	X	Support		
			Oppose		
			Amend		

Message: *Your PRINTED message cannot exceed 50 words or contain any vulgar language.*

I	commend	Representative	STOLTZE	For
His	comments	Sense	Approach	in
Addressing	The	STATE'S	Prison	over Population
Issue	in	His	Bill	HB 134
Private	Prisons	are	bad	For
Public	safety,	They	should	be
run	By	The	Government.	

Public Opinion Message

Anchorage Legislative Information Office (LIO)
716 W 4th Avenue · Anchorage, AK 99501 · Phone: 269-0111 Fax: 269-0229

This form must be completely filled out. You may phone, fax, or deliver your POM to any LIO.

From: *Please PRINT the information below. This form must be signed by the sender.*

Mr. / Ms. / Mrs.	First name	M.I.	Last name	Jr. / Sr. / III
Mrs	Julie	L.	Ashton	

Group affiliation (if applicable)	Daytime telephone number: 743-4331.
Mailing address: 7071 Miranda Drive., Anchorage, AK.	Zip code: 99507.
Residence (street) address if different from mailing address: same	Zip code
Email address	Signature: Julie L. Ashton — Date: 4/8/03.

To: *Put a √ in the appropriate box(es).*

Committees

H	S	
		Community & Regional Affairs (cra)
		Finance (fin)
		Health, Ed., & Social Services (hes)
		Judiciary (jud)
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		Resources (res)
		Rules (rls)
X		State Affairs (sta)
		Transportation (tra)
		Other:
		Other:

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	Minority (mnr)

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	Anderson (ade)
X	Berkowitz (ber)
	Chenault (che)
	Cissna (cis)
	Coghill (cog)
	Crawford (crf)
	Croft (cro)
X	Dahlstrom (dal)
	Fate (fht)
	Foster (fos)
	Gara (gar)
	Gatto (gat)
X	Gruenberg (grn)
	Guttenberg (gtt)
	Harris (har)
	Hawker (haw)
	Heinze (hez)
X	Holm (hol)
	Joule (jou)
	Kapsner (kap)
	Kerttula (ker)
	Kohring (koh)
	Kookesh (kos)
	Kott (kot)
X	Lynn (lyn)
	Masek (mas)
	McGuire (mcg)
	Meyer (mey)
	Morgan (mor)
	Moses (mos)
	Ogg (ogg)
	Rokeberg (rok)
	Samuels (sal)
X	Seaton (san)
X	Stoltze (stz)
X	Weyhrauch (weh)
	Whitaker (whi)
	Williams (wil)
	Wilson (wls)
	Wolf (wol)

Senate members

	Bunde (bun)
	Cowdery (coy)
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	Hoffman (hof)
	Lincoln (lin)
	Ogan (oga)
	Olson (ols)
	Seekins (sek)
	B. Stevens (ste)
	G. Stevens (stv)
	Taylor (tay)
	Therriault (thr)
	Wagoner (wag)
	Wilken (wlk)

Subject: *Fill out the boxes below OR enter a Subject.*

HS or SB	Bill number				
HB	134	*and check one:*	X	Support	
				Oppose	*OR* *enter a general Subject*
				Amend	*(LIO staff may modify):*

Message: *Your PRINTED message cannot exceed 50 words or contain any vulgar language.*

I	Commend	Representative	Stoltze	for
his	Common	Sense	approach	in
addressing	the	State's	prison	overpopulation
issue	in	his	HB134	
Private	prisons	are	bad	for
public	Safety.	They	Should	be
run	by	The	government	

Public Opinion Message

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From: *Please PRINT the information below. This form must be signed by the sender.*

Mr. / Ms. / Mrs.	First name	M.I.	Last name	Jr. / Sr. / III
MR	James	S	Ashton	JR

Group affiliation (if applicable)	Daytime telephone number: 276-7211
Mailing address: 7021 Miranda Drive Anch AK.	Zip code: 99705
Residence (street) address if different from mailing address: SAME	Zip code
Email address	Signature: J S Ashton Jr. Date: 4/8/23

To: *Put a √ in the appropriate box(es).*

Committees

H	or S	
		Community & Regional Affairs (cra)
		Finance (fin)
		Health, Ed., & Social Services (hes)
		Judiciary (jud)
		Labor & Commerce (l&c)
		Resources (res)
		Rules (rls)
X		State Affairs (sta)
		Transportation (tra)
		Other:
		Other:

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	Foster (fos)
	Gara (gar)
	Gatto (gat)
X	Gruenberg (grn)
	Guttenberg (gtt)
	Harris (har)
	Hawker (haw)
	Heinze (hez)
X	Holm (hol)
	Joule (jou)
	Kapsner (kap)
	Kerttula (ker)
	Kohring (koh)
	Kookesh (kos)
	Kott (kot)
X	Lynn (lyn)
	Masek (mas)
	McGuire (mcg)
	Meyer (mey)
	Morgan (mor)
	Moses (mos)
	Ogg (ogg)
	Rokeberg (rok)
	Samuels (sal)
X	Seaton (san)
X	Stoltze (stz)
X	Weyhrauch (weh)
	Whitaker (whi)
	Williams (wil)
	Wilson (wls)
	Wolf (wol)

Senate members

	Bunde (bun)
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	Ogan (oga)
	Olson (ols)
	Seekins (sek)
	B. Stevens (ste)
	G. Stevens (stv)
	Taylor (tay)
	Therriault (thr)
	Wagoner (wag)
	Wilken (wlk)

Subject: *Fill out the boxes below OR enter a Subject.*

HB or SB	Bill number
HB	134

and check one:

X	Support
	Oppose
	Amend

OR enter a general Subject (LIO staff may modify):

Message: *Your PRINTED message cannot exceed 50 words or contain any vulgar language.*

Please	do	the	right	Thing
and	Support	HB134.	Private	Prisons
are	a	bad	idea	and
bad	for	Alaska.	Every	time
The	public	has	been	allowed
To	Vote	on	The	issue
We	have	Said	NO	To
private	prisons.	Please	respect	our
Opinion.	Thank	You		

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From: *Please PRINT the information below. This form must be signed by the sender.*

Mr. / Ms. / Mrs.	First name	M.I.	Last name	Jr. / Sr. / III
	Tracy	L.	Newbill	

Group affiliation (if applicable)	Daytime telephone number: 248-3172
Mailing address: PO Box 233843	Zip code: 99523
Residence (street) address if different from mailing address: 6900 Cranberry #2	Zip code: 99502
Email address: trae3_rg@yahoo.com	Signature: Tracy Newbill	Date: 4/8/03

To: *Put a √ in the appropriate box(es).*

Committees

H	S	
		Community & Regional Affairs (cra)
		Finance (fin)
		Health, Ed., & Social Services (hes)
		Judiciary (jud)
		Labor & Commerce (l&c)
		Resources (res)
		Rules (rls)
X		State Affairs (sta)
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		Other:
		Other:

Caucuses

	Anchorage (age)
	Bush (bus)
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House members

	Anderson (ade)		Kerttula (ker)
√	Berkowitz (ber)		Kohring (koh)
	Chenault (che)		Kookesh (kos)
	Cissna (cis)		Kott (kot)
	Coghill (cog)	√	Lynn (lyn)
	Crawford (crf)		Masek (mas)
	Croft (cro)		McGuire (mcg)
√	Dahlstrom (dal)		Meyer (mey)
	Fata (fht)		Morgan (mor)
	Foster (fos)		Moses (mos)
	Gara (gar)		Ogg (ogg)
	Gatto (gat)		Rokeberg (rok)
√	Gruenberg (grn)		Samuels (sal)
	Guttenberg (gtt)	√	Seaton (san)
	Harris (har)	√	Stoltze (stz)
	Hawker (haw)	√	Weyhrauch (weh)
	Heinze (hez)		Whitaker (whi)
√	Holm (hol)		Williams (wil)
	Joule (jou)		Wilson (wls)
	Kapsner (kap)		Wolf (wol)

Senate members

	Bunde (bun)
	Cowdery (coy)
	Davis (dab)
	Dyson (dys)
	Ellis (ell)
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	Guess (gue)
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	B. Stevens (ste)
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	Taylor (tay)
	Therriault (thr)
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Subject: *Fill out the boxes below OR enter a Subject.*

HB or SB	Bill number				
HB	134	*and check one:*	X	Support	
				Oppose	*OR* *enter a general Subject*
				Amend	*(LIO staff may modify):*

Message: *Your PRINTED message cannot exceed 50 words or contain any vulgar language.*

Representative	Stoltze	is	on	The
right	Track.	HB 134	spreads	The
Jobs	Related	To	New	Prison
Place	out	Amongst	The	communities
of	Alaska.	It	Allows	Prisoners
To	be	closer	To	Their
Families	which	will	Facilitate	Their
Rehabilitation	I	support	This	legislation
I	encourage	you To	support	HB 134

Public Opinion Message (Put Prison in Adak)

Anchorage Legislative Information Office (LIO)
716 W 4th Avenue · Anchorage, AK 99501 · Phone: 269-0111 Fax: 269-0229

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From: *Please PRINT the information below. This form must be signed by the sender.*

Mr. / Ms. / Mrs.	First name	M.I.	Last name	Jr. / Sr. / III
	Gary	C	McDonald	

Group affiliation (if applicable)	Daytime telephone number
Mailing address: 7505 Glenn Hwy Sp110	Zip code
Residence (street) address if different from mailing address: Anchorage AK	Zip code: 99504
Email address	Signature: Gary C McDonald — Date

To: *Put a √ in the appropriate box(es).*

Committees

H	S	
		Community & Regional Affairs (cra)
		Finance (fin)
		Health, Ed., & Social Services (hes)
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X		State Affairs (sta)
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- [ ] Anchorage (age)
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House members

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√	Berkowitz (ber)		Kohring (koh)
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	Guttenberg (gtt)	√	Seaton (san)
	Harris (har)	√	Stoltze (stz)
	Hawker (haw)	√	Weyhrauch (weh)
	Heinze (hez)		Whitaker (whi)
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	Kapsner (kap)		Wolf (wol)

Senate members

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Subject: *Fill out the boxes below OR enter a Subject.*

HB or SB	Bill number
HB	134

and check one:

- [X] Support
- [ ] Oppose
- [ ] Amend

OR enter a general Subject (LIO staff may modify):

Message: *Your PRINTED message cannot exceed 50 words or contain any vulgar language.*

House	Bill 134	Provides	exactly	what
The	State	needs.	IT	Reinforces
The	State's	commitment	To	Rehabilitation
of	criminals	your	support	For
HB 134	is	necessary	and	I
would	deeply	Appreciate	IT.	

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From: *Please PRINT the information below. This form must be signed by the sender.*

Mr. / Ms. / Mrs.	First name	M.I.	Last name	Jr. / Sr. / III
Mr.	Jerry	L.	Dancer	—

Group affiliation (if applicable): Local 71 - Public Employees.	Daytime telephone number: 258-0969
Mailing address: 514 nd Bragaw #2	Zip code: 99508
Residence (street) address if different from mailing address: —	Zip code:
Email address: —	Signature: Jerry Dancer. Date: 4/9/03

To: *Put a √ in the appropriate box(es).*

Committees

H	S	
		Community & Regional Affairs (cra)
		Finance (fin)
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Subject: *Fill out the boxes below OR enter a Subject.*

HB or SB	Bill number	and check one:		OR	enter a general Subject (LIO staff may modify):
HB	134	X	Support		
			Oppose		
			Amend		

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The	Fate	of	Many	People
Serving	Time	In	Prison	is
in	your	Hands	Please	do
The	Humanitarian	Thing	and	support
HB 134	Do	not	Let	Profits
For	outside	interests	override	what
is	The	Decent	Thing	To
Do.				

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From: *Please PRINT the information below. This form must be signed by the sender.*

Mr. / Ms. / Mrs.	First name	M.I.	Last name	Jr. / Sr. / II
	Mona		Cunningham	

Group affiliation (if applicable)	Daytime telephone number 269-4286
Mailing address PO Box 201054	Zip code 99520
Residence (street) address if different from mailing address	Zip code
Email address	Signature Mona Cunningham — Date 4/9/03

To: *Put a √ in the appropriate box(es).*

Committees

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HB or SB	Bill number	and check one:		OR	
HB	134	[X]	Support		
		[ ]	Oppose		enter a general Subject
		[ ]	Amend		(LIO staff may modify):

Message: *Your PRINTED message cannot exceed 50 words or contain any vulgar language.*

				5
				10
				15
				20
				25
				30
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Public Opinion Message

Anchorage Legislative Information Office (LIO)
716 W 4th Avenue · Anchorage, AK 99501 · Phone: 269-0111 Fax: 269-0229

This form must be completely filled out. You may phone, fax, or deliver your POM to any LIO.

From: *Please PRINT the information below. This form must be signed by the sender.*

(Mr.) / Ms. / Mrs.	First name	M.I.	Last name	Jr. / Sr. / III
	Richard	R	FRANCO	

Group affiliation (if applicable): Local 71	Daytime telephone number: 269-4291
Mailing address: P.O. Box 875233 Wasilla AK.	Zip code: 99687
Residence (street) address if different from mailing address: 5060 Clayton St. Wasilla AK.	Zip code: 99687
Email address:	Signature: R. Franco — Date: 4/9/03

To: *Put a √ in the appropriate box(es).*

Committees

H	S	
		Community & Regional Affairs (cra)
		Finance (fin)
		Health, Ed., & Social Services (hes)
		Judiciary (jud)
		Labor & Commerce (l&c)
		Resources (res)
		Rules (rls)
X		State Affairs (sta)
		Transportation (tra)
		Other:
		Other:

Caucuses

	Anchorage (age)
	Bush (bus)
	Fairbanks/Interior (int)
	Matsu (mat)
	Majority (mjr)
	Minority (mnr)

House members

	Anderson (ade)
✓	Berkowitz (ber)
	Chenault (che)
	Cissna (cis)
	Coghill (cog)
	Crawford (crf)
	Croft (cro)
✓	Dahlstrom (dal)
	Fate (fht)
	Foster (fos)
✓	Gara (gar)
	Gatto (gat)
✓	Gruenberg (grn)
	Guttenberg (gtt)
	Harris (har)
	Hawker (haw)
	Heinze (hez)
✓	Holm (hol)
	Joule (jou)
	Kapsner (kap)
	Kerttula (ker)
	Kohring (koh)
	Kookesh (kos)
	Kott (kot)
✓	Lynn (lyn)
	Masek (mas)
	McGuire (mcg)
	Meyer (mey)
	Morgan (mor)
	Moses (mos)
	Ogg (ogg)
	Rokeberg (rok)
	Samuels (sal)
✓	Seaton (san)
✓	Stoltze (stz)
✓	Weyhrauch (weh)
	Whitaker (whi)
	Williams (wil)
	Wilson (wls)
	Wolf (wol)

Senate members

Bunde (bun)
Cowdery (coy)
Davis (dab)
Dyson (dys)
Ellis (ell)
Elton (elt)
French (fre)
Green (gre)
Guess (gue)
Hoffman (hof)
Lincoln (lin)
Ogan (oga)
Olson (ols)
Seekins (sek)
B. Stevens (ste)
G. Stevens (stv)
Taylor (tay)
Therriault (thr)
Wagoner (wag)
Wilken (wlk)

Subject: *Fill out the boxes below OR enter a Subject.*

HB or SB	Bill number				
HB	134	*and check one:*	X	Support	
				Oppose	*OR* *enter a general Subject*
				Amend	*(LIO staff may modify):*

Message: *Your PRINTED message cannot exceed 50 words or contain any vulgar language.*

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HB

140

HOUSE COMMITTEE REPORT

(7)

Date Referred to Committee: February 28, 2003 **FURTHER REFERRALS:**

Date of Committee Action: March 4, 2003

The STATE AFFAIRS Committee considered: **HB 140**

HOUSE BILL NO. 140 **BENEFITS FOR CERTAIN RIP PARTICIPANTS**

"An Act relating to benefits for retired teachers or employees who participated in retirement incentive programs and are subsequently reemployed as a commissioner; and providing for an effective date."

Recommends it be replaced with [ ] HCS *or* [ ] CS *for* _____ (_____)
For Senate Bills with new title: [ ] Technical Title [ ] New Title: HCR_____ **[ ] Same Title [ ] New Title**

[ ] attach amendments
[ ] add new referral to _____Committee
[ ] Letter of Intent_____Committee

List of Abbrev for Depts.:
ADM
CED
COR
CRT
EED
DEC
DFG
GOV
HSS
LEG
LAW
LWF
MVA
DNR
DPS
REV
DOT
UA

NEW FISCAL NOTES *Assigned by Chief Clerk's Office

List by Dept(s):	*FN#	Fiscal	Indet.	Zero
ADM				✓

PREVIOUS FISCAL NOTES

List by Dept(s):	FN#	Fiscal	Indet.	Zero

Signing with recommendations	Printed Last Name	DP	DNP	NR	AM
Paul Seaton	SEATON	✓			
	Gruenberg	✓			
	HOLM	✓			
	Dahlstrom	✓			
	LYNN	✓			
Chair:	Weyhrauch	✓			
Chair:					

HB 140

FRANK H. MURKOWSKI
GOVERNOR

GOVERNOR@GOV.STATE.AK.US

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JUNEAU, ALASKA 99811-0001
(907) 465-3500
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STATE OF ALASKA
OFFICE OF THE GOVERNOR
JUNEAU

February 27, 2003

The Honorable Pete Kott
Speaker of the House
Alaska State Legislature
State Capitol, Room 208
Juneau, AK 99801-1182

Dear Speaker Kott:

Under the authority of art. III, sec. 18, of the Alaska Constitution, I am transmitting a bill relating to reemployment of certain members of the Teachers' Retirement System of Alaska (TRS) and the Public Employees' Retirement System (PERS) who have retired under a retirement incentive plan (RIP).

The objective of this bill is to allow a person who retired under a RIP to return to state service as a commissioner without being penalized.

It is in the best interest of the people of Alaska to ensure that administrative departments of state government be managed by competent, skilled, knowledgeable, and experienced persons. Choosing to serve Alaska as the head of a state agency, in many cases, requires an individual to make sacrifices they may never have anticipated. This bill would remove one of the major disincentives, and give the Governor greater flexibility in filling out his cabinet.

Under existing law, if a TRS or PERS member who took normal retirement and retired under a RIP is re-employed in the TRS or PERS system, the member forfeits the incentive credit and becomes indebted to the TRS or PERS. This bill would allow a TRS or PERS member in this situation who is re-employed as a commissioner to accept the position without being subject to the reemployment indebtedness.

Under existing law, a retired member of the TRS or PERS who took normal retirement and is re-employed in a TRS or PERS position may elect to continue receiving the member's retirement benefits during the period of employment. A member who retired under a RIP, however, may not make the election to continue receiving TRS or PERS retirement benefits. This bill would allow a TRS or PERS member in this situation who is subsequently re-employed as a commissioner to elect to continue receiving retirement benefit payments during the period of reemployment.

Finally, under existing law, the option to elect to continue receiving TRS or PERS benefits during the period of reemployment is repealed as of July 1, 2005. This bill repeals that option for individuals subject to the bill, *i.e.*, TRS or PERS members who retired under a RIP and are subsequently re-employed as a commissioner.

I urge your prompt and favorable action on this measure.

Sincerely,

Frank H. Murkowski

FISCAL NOTE

STATE OF ALASKA
2003 LEGISLATIVE SESSION

Fiscal Note Number: 1
Bill Version: HB 140
(H) Publish Date: 2/28/03

Revision Date/Time (Note if correction):
Dept. Affected: Administration

Title: An Act relating to reemployment of RIP retirees as Commissioner....
BRU: Centralized Admin Services
Component: Retirement & Benefits

Sponsor: Rules
Requester: Governor
Component No.: 64

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 bill amends the Teachers' Retirement System (TRS) and Public Employees' Retirement System (PERS) statutes to allow a person who participated in a TRS or PERS sponsored retirement incentive program (RIP) to become a commissioner (1) without losing the incentive credit provided under the applicable RIP and without any related RIP reemployment indebtedness, and (2) continue receiving their retirement benefit by waiving accrual of an additional retirement benefit during the period of reemployment as commissioner.

This legislation will have no actuarial impact to the TRS or PERS since the full actuarial cost of the Retirement Incentive Program was paid by the employer and the employee at retirement.

Prepared by: Guy Bell
Phone 465-2292
Division: Retirement & Benefits
Date/Time: February 27, 2003

Approved by: Mike Miller, Commissioner
Date: February 27, 2003
Agency: Department of Administration

(Revised 9/2002 OMB)

HB

141

Alaska State Legislature

House of Representatives

Alaska State Capitol
Juneau, Alaska 99801-1182
1-907-465-3438 (phone)
1-888-478-3438 (toll free)
1-907-465-4565 (fax)

Interim Address
716 West Fourth Avenue
Anchorage, Alaska 99501-2133
(phone) 1-907-269-0100
(fax) 1-907-269-0105

Representative Harry Crawford
District 21

Memorandum

TO: Representative Bruce Weyhrach
Chair House State Affairs Committee

FROM: Representative Harry T. Crawford

DATE: February 28th, 2003

RE: House Bill 141

I respectfully request that House Bill 141 be scheduled for hearing in the House State Affairs Committee at your earliest possible convenience. I have attached a sponsor statement, and background information.

E-mail: Representative_Harry_Crawford@legis.state.ak.us

Alaska State Legislature

House of Representatives

Alaska State Capitol
Juneau, Alaska 99801-1182
1-907-465-3438 (phone)
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716 West Fourth Avenue
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(phone) 1-907-269-0100
(fax) 1-907-269-0105

Representative Harry Crawford
District 21

SPONSOR STATEMENT: HOUSE BILL 141

The Permanent Fund Protection Act of 2003

There has been concern as of late that there may not be sufficient funds in the Earnings Reserve Account of the Permanent Fund to pay out dividends in October 2003.

The Permanent Fund Dividend gives the Alaskan economy a much-needed boost. Since Alaska has a near stagnant economy, this direct infusion of funds allows the economy to stay afloat. A year without the dividend would be the equivalent to a $1 billion hit to an already flat-line economy.

This bill would allow for a dividend to be paid in full while still allowing the Permanent Fund principle to remain intact and untouched. It is a question that the legislature need decide, whether the dividend is sufficiently valuable to protect in the coming year.

E-mail: Representative_Harry_Crawford@legis.state.ak.us

ALASKA AP

Alaskans can expect $1,200 dividend if market holds up

By ALLEN BAKER, Associated Press Writer

ANCHORAGE(December 31, 6:05 p.m. AST) - If Wall Street doesn't take a downturn in the next six months, eligible Alaskans will get a full permanent fund dividend of roughly $1,200 this coming fall.

But the margin in the nearly $23 billion permanent fund right now is razor-thin - just $35 million, or less than less than two-tenths of one percent. And stock market fluctuations can change the value of the fund by $200 million in a day.

Just three months ago, the fund actually held less than the untouchable principal amount. That would have precluded any dividend at all.

The fund balance dropped under $22 billion then, well below the estimated $22.21 billion that is needed for principal on the coming June 30, when the dividend is calculated.

But as of Monday, the fund had recovered to a value of $22.96 billion.

That's enough to subtract the $715 million projected dividend amount and still not dip into principal, which is barred by the state constitution.

It's not enough for inflation-proofing. But that's done after the dividend payment is made.

And there are still six months of income to add to the fund.

"About $500 million will flow in as cash income from bond interest, stock dividends, and cash from real estate investments," says Robert Bartholomew, chief operating officer for the Alaska Permanent Fund Corp.

On top of that, the fund is now receiving about $30 million a month in oil revenue, the flow that started the fund in the first place. That will add roughly another $200 million to the fund by June 30.

Still, stock market volatility can be more than a match for that hefty income stream. A 10 percent decline in the value of the fund's $11.1 billion in domestic and international stocks would lop $1.1 billion off the fund balance, enough to counterbalance that $700 million in income and cut the dividend by more than half.

"You can't predict the market," Bartholomew says. "There's uncertainty out there. What if we go to war?"

Another wrinkle in the law on the permanent fund says only half of the earnings reserve can be used for dividends. So that fund needs to hold $1.43 billion by June 30 for a full dividend. At this point, Bartholomew says, fund managers expect the reserve will hold the needed amount plus about a cushion of nearly $300 million on June 30.

But that's another projection, and it's subject to market swings, as well as investment moves by managers of the fund's billions.

As for the dividend itself, it's likely to continue dropping in future years, after reaching a high of $1,963.86 in 2000. Last year's dividend was $1,540.76.

The fund pays out an average of the income over the last five years, and the big years, when the fund had gains in the neighborhood of $2.5 billion, are dropping out of the equation, replaced by years when the market has been in decline. In stark contrast, the fund cleared $250 million in the fiscal year that ended last June 30. Fund managers are projecting income of $590 million for the current fiscal year, according to Bartholomew.

While Alaskans still face uncertainty about the 2003 dividend, Bartholomew notes, "the thing that would make it all simpler is a big market rally."

ALASKA AP

Lawyers may determine dividend's fate

By ALLEN BAKER, Associated Press Writer

ANCHORAGE(February 27, 4:00 p.m. AST) - The principal of the Alaska Permanent Fund can't be touched, even to pay dividends, under the Alaska Constitution.

But just how you define "principal" could determine whether this year's dividends will be slashed, or maybe not paid at all.

So the audit committee of the Alaska Permanent Fund Corp. wants an opinion from the state attorney general on the issue.

Using the permanent fund's current definition, there's only $283 million in the fund that could be used for dividends, based on Wednesday's market calculation. That would mean a dividend of about $470 for each Alaskan.

The actual determination doesn't come until June 30.

Between now and then, the stock market could erase the dividend entirely or push it back to around $1,140. In the roller-coaster world of high finance, the fund's value can rise or fall by $100 million or more in a single day.

The fund's protected principal has been defined over the years as the amount collected from oil revenues, plus legislative appropriations and inflation-proofing. Amounts beyond that can be used for dividends, or appropriated by the Legislature, though the latter has never been done.

By the time June 30 rolls around, the protected principal by that definition will be a little over $22.2 billion. The market value of the fund on Wednesday was just under $22.4 billion. The difference is the $283 million available for a dividend.

But that's under the current definition.

The permanent fund corporation has assumed that it can't pull money out of the fund for dividends if that would push the market value below the protected principal amount.

But can the corporation's board ignore the market value and simply pay out money that's been earned from dividends, interest and the like? By June 30, there most likely will be enough money in the earnings account to pay the higher dividend.

"The question is, 'Do we have an accurate definition of principal?'" says Robert Bartholomew, chief operating officer for the fund corporation.

That's the basic question the audit committee wants the state's lawyers to answer. The audit committee, three of the fund board's seven members, can only make a recommendation. It's up to the full board to decide whether to ask for the attorney general to consider the question. That could come next month.

"We believe the issue needs to be clarified," Permanent Fund executive director Bob Storer told the Anchorage Daily News. "It's important that ambiguity be eliminated."

Attorney General Gregg Renkes, who is a fund board member but not a member of the audit committee, said Wednesday his office would write an opinion if asked.

"It's our obligation," he told the Daily News.

Article Last Updated: Wednesday, February 26, 2003 - 3:00:08 AM AKST

Threat to dividend prompts debate on permanent fund profits

WHEN THE CALCULATIONS are made this summer to decide how much money from the earnings of the Alaska Permanent Fund will be available for dividends, there may be a big problem. To put it simply, if the value of the Permanent Fund on June 30 is what it is today, expect the dividend next fall to be less than half of what it was last year.

If the stock market declines over the next four months, the dividend could be zero.

As of Monday, the earnings reserve from which dividends are paid contained about $400 million, which would put the next dividend in the $700 per person range.

Last year, the fund paid $926 million for dividends or more than $1,500 per person. The earnings reserve also supplied $602 million for inflation proofing.

There would be no money for inflation proofing the principal if the fund ends the fiscal year close to its current value.

In one sense, this discussion of what will happen June 30 is premature because the market value of the $22 billion fund changes every day, with swings of $300 million up or down possible in a day.

In another sense, the discussion is long overdue. The laws the fund operates under worked well for the great bull market of the 1990s, but they appear inadequate for the great bear market that began in 2000.

In the latest fund quarterly report, Eric Wohlforth, chair of the fund and Robert Storer, executive director of the fund, repeated the possible bad news that first arose as an issue last fall.

"Recent market conditions warn us that the potential does exist that there could be a reduced payout or even no payout," they said. "The ramifications of having reduced or no funds available for distribution warrant a careful review of the payout policies and statutes."

For one thing, the fund managers want Alaskans to review the definition of the earnings reserve, the account that supplies money for dividends and inflation proofing.

In 1997, the permanent fund adapted the new rules established by the accounting profession and determined that the earnings reserve should consist of the realized and unrealized earnings or losses. This was to give the most accurate picture of the fund's performance.

Unrealized profits and losses are those that occur in the trading value of stocks, bonds and other holdings. If a stock is bought for $10 and its value drops to $5, the owner has an unrealized loss of $5. The loss on paper becomes a realized loss when the owner sells the stock.

During the bull market, the realized and unrealized earnings of the permanent fund kept building and building. Over the past three years, however, the unrealized losses to the permanent fund have been in the billions.

So even with the fund earning about $70 million a month from bonds and real estate, those realized profits are offset by paper losses. Adding to the confusion is the state law that provides that realized earnings are to be the basis for determining payouts.

This conflict is between the rules of the accounting profession and a state law that came about at a time when fund investments were thought to fit clearly into "principal" and

"income." The law didn't cover changes in market value for assets after they were purchased.

Because the 2003 dividend is in doubt, look for an intense debate over whether a change in the definition of the earnings reserve is warranted. This is likely to be a major issue in the coming months for the Legislature, the Murkowski administration and the permanent fund board.

If the fund no longer plugs unrealized losses into its formula, there would be enough in the earnings reserve to pay for dividends with the current value of the fund, but the principal of the fund would be smaller.

A change of that type would misrepresent the performance of the fund and run counter to the accepted national accounting standard followed by the fund since 1997.

The permanent fund is supposed to represent a balance between the needs of the present and the needs of the future. Acting as if the huge unrealized losses don't exist would tip that balance to the detriment of the future.

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THE WAY THE COOKIE CRUMBLES: Here's a matter that may be even harder to digest.

The Girl Scouts say the 133,920 boxes of Thin Mints, Samoas, Tagalongs and other cookies they were expecting here March 1 have been delayed until March 8 because of weather problems with Lower 48 trucking.

This means the Scouts won't be selling them in the malls this weekend.

The Girl Scout office is looking for other booth sale opportunities where girls can sell cookies at businesses or special events later in the month. Call Karen Taylor at 456-4782.

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SAFEWAY OPENED its new pharmacy in the University Center Mall Tuesday.

n n n

THE FIFTH ANNUAL Jewish Film Festival, with six independent films you won't see elsewhere, takes place Saturday and Sunday evening at the Alaska Coffee House on Geist Road. For details call, 474-6439.

If you have items to submit to Dermot Cole's column contact him at cole@newsminer.com, write to him in care of the Daily News-Miner at Box 70710, Fairbanks, AK 99707 or call 459-7530.

RETURN TO TOP

From aksuperstation.com

CAPITOL IDEAS

ALTERNATE ANGLES ON THE PERMANENT FUND

By Bill McAllister
Mar 3, 2003, 14:59:00

It's as if the Murkowski-Ulmer campaign was just released on video and DVD.

When it comes to the permanent fund, suddenly the details of the gubernatorial face-off from four to six months ago are back before us.

So it was that John Manly, Gov. Murkowski's press secretary, today passed out to reporters copies of an Associated Press story from Oct. 9. In it, Murkowski's campaign manager, now Attorney General Gregg Renkes, says that the endowment approach to the fund "has a lot of merit as a mechanism for protecting the long-term integrity of the fund."

Manly seemed to be implying that this proves something -- namely, that no one should have been surprised last week when House Speaker Pete Kott said the administration was considering a constitutional amendment that would tap permanent fund money for an "educational endowment" (that in fact wouldn't endow schools with any more money than they're currently getting).

But the AP story doesn't quote the Murkowski campaign as saying that the proposed distribution from the permanent fund would be used for government. In the collective memory of the Capitol press corps, candidate Murkowski never made such a statement. Rather, he often said the opposite.

With this abrupt shift, Murkowski has managed to partially absolve Fran Ulmer of the low point of her campaign:

Then-U.S. Sen. Murkowski came on "Capital Focus" in September. He said a few different times that no new revenue measures were required to bridge the fiscal gap. When I asked about the percent-of-market-value concept that would turn the fund into an endowment and eliminate the distinction between principal and earnings, Murkowski said he hadn't decided on that yet. He then went into a *non sequitur* about the original purpose of the permanent fund as a rainy day fund, and said, "It's raining outside."

Ulmer seized on that sound bite and cut a TV ad saying Murkowski intended to crash into the permanent fund. The bite was surgically removed from his lengthy quote, the very next sentence of which had Murkowski acknowledging the importance of dividends to rural residents. It was an ethically dubious use of an out-of-context quote, and I said so on the next broadcast of "Capital Focus."

With regard to that one interview, Ulmer's TV ad was a misrepresentation. Murkowski clearly meant to leave the impression that he wasn't interested in using permanent fund money for government. Ulmer seemed to feel that it was excusable to imply otherwise because, in her heart, she knew what he really was up to.

Amazingly, the governor is now on the verge of validating Ulmer's gut instincts.

During the campaign, Murkowski was repeatedly asked about his fiscal stance and how it was possible to balance the budget without new sources of revenue. At no time -- at least at no time that I've seen documented, as someone who followed the campaign closely -- did he say he would ask voters to approve a constitutional amendment freeing up permanent fund money for government. He did say that the permanent fund shouldn't be altered without a vote of the people, but he didn't say that he favored having the vote.

His newly unveiled willingness to consider the use of permanent fund money for government is a deleted scene that he is restoring to the "director's cut" of the campaign. I can't wait to see what some of the other "bonus features" are.

Actually, it seems everybody's got something provocative to say about the permanent fund lately.

Speaker Kott said today that the dividend is "one of the worst things we got ourselves into." House Finance Co-Chairman John Harris emphasized that the dividend is not an entitlement, however much Alaskans might think so. Republicans apparently used to say those kinds of things all the time in private, but now they do it with microphones. Whether it's politically courageous or crazy is a judgment call.

Kott and Harris were reacting to the bill by Democratic Reps. Eric Croft and Harry Crawford to ensure dividends this year at the level of the statutory formula, even if there's not enough money in the permanent fund's earnings reserve account on the critical date of June 30. The Croft-ford bill would take the necessary money from the Constitutional Budget Reserve, thus using government to finance the permanent fund.

Both sides might have overlooked what a Republican concept this is. Instead of government holding on to money that eventually would be used to support bureaucracy, you would give it to the people directly and let them decide how to spend it.

adn.com
Anchorage Daily News

Speaker calls dividend one of Alaska's worst mistakes

By CATHY BROWN, Associated Press Writer
(Published: March 3, 2003)

JUNEAU (AP) - House Speaker Pete Kott said Monday that creating the permanent fund dividend program was one of the worst mistakes Alaska ever made.

The Eagle River Republican does not propose eliminating the dividend because he said it's become an important part of the economy.

But he said the Alaska Permanent Fund, the state's oil-wealth savings account, needs to shift from being a "sacred cow" to become a "cash cow for the state."

Kott and leaders of the House Finance Committee discussed proposals dealing with the permanent fund and the budget during a news conference Monday.

The comments come at a time when Republican Gov. Frank Murkowski is considering introducing a proposal to use income from the fund to pay for government. It's also a time when the fund's losses in the stock market for the first time threaten the state's ability to pay dividends to residents.

"Many Alaskans believe this is an entitlement. I don't," Kott said. "I think the permanent fund dividend was one of the worst things we got ourselves into a number of years ago.

"But having said that, since we're there, I think it's important to recognize that the dividend has played an important part in the economy of Alaska, and to just cut that off would be, I think, totally an embarrassment to this Legislature and to the state," Kott said.

Alaskans receive dividends every year based on an average of the last five years' income from the $22.5 billion permanent fund. Last year's dividend was around $1,500 per person.

Kott and Finance Co-Chairmen John Harris, R-Valdez, and Bill Williams, R-Saxman, were asked about a bill introduced Friday by Rep. Harry Crawford D-Anchorage.

Crawford proposes using some of the $1.9 billion Constitutional Budget Reserve, a state savings account, to pay dividends should the permanent fund losses continue.

Dividends are supposed to be paid from the earnings reserve account of the permanent fund, but because of declines in the stock market, there may not be enough money in that account to fully fund the dividend this year.

The constitutional budget reserve was created by voters in 1990 and has been used in most years since to make up for state budget shortfalls. At the state's current rate of spending, the budget reserve account is expected to be empty by June 2005.

Crawford said he knows using money from the fund to pay dividends this year would hasten the

day the budget reserve runs dry.

But he said Alaska's economy will suffer a double hit this year if dividends can't be paid, and if Murkowski makes deep cuts in the budget. Murkowski is scheduled to reveal his budget Wednesday.

"It will absolutely devastate the economy if there's no permanent fund dividends," Crawford said. "I don't intend to sit around here and let the economy tank by just saying we lived well in the good times and we're going to live real bad in the bad times."

The Republican majority leaders voiced little support for Crawford's plan.

"What would the constituents out there think? 'We're just trying to change the formula for our political behind,'" Williams said. "I don't think we should. We should stick to what the formula says."

There are many other important needs the state does not have enough money for, such as education, public safety and transportation, Williams said.

Kott said the Crawford proposal is a "novel approach" that deserves a look. But he said Alaskans need to recognize that the permanent fund will go up and down with the market, and how much is available for dividends each year is not up to the Legislature.

"We'll have those $1,500 dividends and we'll have those $200 dividends," Kott said. "That fluctuation is built into the system right now and there may be a point where there is no dividend."

The House Republican leaders expressed more interest in an idea being considered by the Republican governor. Murkowski is considering a constitutional amendment that asks voters to change the method of determining annual payouts from the permanent fund. The proposal may also include a provision to replace state funds spent on education with permanent fund earnings.

Murkowski's spokesman John Manly said the proposal is being considered and the governor may outline it further during his budget address to the Legislature Wednesday.

The concept - without the provision for spending part of the money on education - was recommended by the permanent fund board two years ago.

The board's proposal assumed the fund will grow by an average of 8 percent a year. It called for using 5 percent of the fund's market value each year for dividends or other spending. That would leave the remaining 3 percent of growth for inflation proofing.

Proponents say that proposal would provide for a less volatile income stream than the current method of determining dividends.

"I'm beginning to lean more in that direction," Harris said.

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Anchorage Daily News

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Opinion

(Published: March 5, 2003)

Permanent Fund value

Make it a cash cow, not a sacred cow, says House Speaker

More and more, legislators are talking sensibly about the Alaska Permanent Fund. The fund and its yearly dividend payment are not an entitlement, said House Speaker Pete Kott on Monday. But they're important to Alaska's economy and shouldn't be just cut off.

Anything that puts $1 billion a year, in round terms, into the economy is important to all of us. State Rep. Harry Crawford recognizes that in proposing the Constitutional Budget Reserve be used to dampen the decline in dividends if markets continue to batter fund earnings. His notion also anticipates the negative economic impact of huge state budget cuts likely to be proposed by Gov. Murkowski.

Both legislators -- Kott a Republican, Crawford a Democrat -- recognize that state dollars play a huge role in Alaska's economy and that state decisions will have serious consequences, not only for individual pocketbooks today, but also for economic prospects tomorrow. The question is: How do we spread the burdens fairly? And how do we get over the free-lunch mentality of the Prudhoe Bay era?

Alaskans who expect to keep getting public services for nothing are living in a dream world. Last year each Alaskan received more than $5,000 in state services and benefits, including the dividend, while contributing virtually nothing. Ultimately, that's a self-destructive policy, no matter how much we may enjoy it.

In the big picture it's untenable for any state -- even with the North Slope on hand to pay for things -- to both run 20 percent in the red and keep handing out a free lunch to everyone. That's what Alaska is doing now.

Gov. Murkowski's answer this week will be to eat a lot less lunch but keep it free. He's also said to be considering ways to let the Permanent Fund -- which is a financial asset belonging to all of us collectively, not an entitlement to be handed out individually -- help pay for lunch too. The endowment approach long favored by the Permanent Fund trustees (and former Gov. Tony Knowles) is a start.

Now Rep. Kott has offered a line worth remembering: The Permanent Fund needs to be changed from a "sacred cow" to a "cash cow." As long as he doesn't make it another excuse for the free lunch, he's on the right track.

More miles

Fairbanks Daily News-Miner

Dividend a mistake, Kott says

By CATHY BROWN

Tuesday, March 04, 2003- Associated Press Writer

JUNEAU--House Speaker Pete Kott said Monday that creating the permanent fund dividend program was one of the worst mistakes Alaska ever made.

The Eagle River Republican does not propose eliminating the dividend because he said it's become an important part of the economy.

But he said the Alaska Permanent Fund, the state's oil-wealth savings account, needs to shift from being a "sacred cow" to become a "cash cow for the state."

Kott and leaders of the House Finance Committee discussed proposals dealing with the permanent fund and the budget during a news conference Monday.

The comments come at a time when Republican Gov. Frank Murkowski is considering introducing a proposal to use income from the fund to pay for government. It's also a time when the fund's losses in the stock market for the first time threaten the state's ability to pay dividends to residents.

"Many Alaskans believe this is an entitlement. I don't," Kott said. "I think the permanent fund dividend was one of the worst things we got ourselves into a number of years ago.

"But having said that, since we're there, I think it's important to recognize that the dividend has played an important part in the economy of Alaska, and to just cut that off would be, I think, totally an embarrassment to this Legislature and to the state," Kott said.

Alaskans receive dividends every year based on an average of the last five years' income from the $22.5 billion permanent fund. Last year's dividend was around $1,500 per person.

Kott and Finance Co-Chairmen John Harris, R-Valdez, and Bill Williams, R-Saxman, were asked about a bill introduced Friday by Rep. Harry Crawford, D-Anchorage.

Crawford proposes using some of the $1.9 billion Constitutional Budget Reserve, a state savings account, to pay dividends should the permanent fund losses continue.

Dividends are supposed to be paid from the earnings reserve account of the permanent fund, but because of declines in the stock market, there may not be enough money in that account to fully fund the dividend this year.

The constitutional budget reserve was created by voters in 1990 and has been used in most years since to make up for state budget shortfalls. At the state's current rate of spending, the budget reserve account is expected to be empty by June 2005.

Crawford said he knows using money from the fund to pay dividends this year would hasten the day the budget reserve runs dry.

But he said Alaska's economy will suffer a double hit this year if dividends can't be paid, and if Murkowski makes deep cuts in the budget. Murkowski is scheduled to reveal his budget Wednesday.

"It will absolutely devastate the economy if there's no permanent fund dividends," Crawford said. "I don't intend to sit around here and let the economy tank by just saying we lived well in the good times and we're going to live real bad in the bad times."

The Republican majority leaders voiced little support for Crawford's plan.

"What would the constituents out there think? 'We're just trying to change the formula for our political behind,'" Williams said. "I don't think we should. We should stick to what the formula says."

There are many other important needs the state does not have enough money for, such as education, public safety and transportation, Williams said.

Kott said the Crawford proposal is a "novel approach" that deserves a look. But he said Alaskans need to recognize that the permanent fund will go up and down with the market, and how much is available for dividends each year is not up to the

Legislature.

"We'll have those $1,500 dividends and we'll have those $200 dividends," Kott said. "That fluctuation is built into the system right now and there may be a point where there is no dividend."

The House Republican leaders expressed more interest in an idea being considered by the Republican governor. Murkowski is considering a constitutional amendment that asks voters to change the method of determining annual payouts from the permanent fund. The proposal may also include a provision to replace state funds spent on education with permanent fund earnings.

Murkowski's spokesman John Manly said the proposal is being considered and the governor may outline it further during his budget address to the Legislature Wednesday.

The concept--without the provision for spending part of the money on education--was recommended by the permanent fund board two years ago.

The board's proposal assumed the fund will grow by an average of 8 percent a year. It called for using 5 percent of the fund's market value each year for dividends or other spending. That would leave the remaining 3 percent of growth for inflation proofing.

Proponents say that proposal would provide for a less volatile income stream than the current method of determining dividends.

"I'm beginning to lean more in that direction," Harris said.

Fairbanks Daily News-Miner

Bill would tap reserve for dividends

By TOM MORAN

Saturday, March 01, 2003- News-Miner Juneau Bureau

Rep. Harry Crawford, D-Anchorage, has introduced an appropriations bill that would guarantee a full permanent fund dividend this year by using money from the state's budget reserve.

"As it is right now the dividend is in danger, and we're just trying to head that off," Crawford said. "The dividend has become such an integral part of our state's economy that we have to be able to guarantee a dividend."

A terrible year in the stock market has left the permanent's fund's earnings reserve account too low to pay full dividends, which are calculated through an average of the past five years' earnings of the fund. As of Thursday there was $320 million in the reserve, enough to pay a dividend of around $540 to each Alaskan.

The actual dividend amount isn't calculated until June 30. The volatile stock market could erase the dividend entirely by that date or bounce back and push the value back up to around $1,100, well short of last year's $1,540 checks.

If the stock market doesn't rebound, Crawford's bill would appropriate whatever money is needed to fully fund the dividend through its usual statutory formula from the state's Constitutional Budget Reserve.

If the dividends were calculated today that would involve an appropriation of around $364 million from the reserve, which has a balance of $1.93 billion.

The CBR has been used repeatedly throughout the last decade to pay for state government and is expected to be empty in a few years. While Crawford said the appropriation could hasten the CBR's demise, he said the state needs to face up to the day when it has to find other revenue to pay for government.

At this point, he argued, the effect of the dividend is too important to lose, especially as Gov. Frank Murkowski's upcoming budget is widely rumored to contain major cuts.

"I was here in the mid-'80s when there was a double hit to the economy because of huge cutbacks in government and layoffs in a lot of companies, and I don't want to be a part of cutting back government and cutting dividends at the same time," he said. "That'd just be like a double whammy on the state's economy."

The bill, which is co-sponsored by Rep. Eric Croft, D-Anchorage, would authorize a onetime appropriation to deal with the 2003 dividends. Crawford said he sees the ultimate solution to dividend volatility as a system like the percent of market value proposal under consideration by Murkowski, which would set the dividend based on the year-end value of the entire fund rather than its earnings.

"I believe that until we come up with a better way to guarantee folks a dividend, then we should continue along with our present calculations or formula to pay out the dividend," he said. "To do that we're going to have to use money from the Constitutional Budget Reserve."

House Majority Leader John Coghill, R-North Pole, said he doesn't expect the Republican majority caucus will support the bill.

"I think generally--from the way I understand this caucus discussion we had--if the market's down, then so be it," he said. "I think there's a general agreement that, let it be what it is."

Coghill said he believes shoring up the dividend with other funds changes the payout into an entitlement.

"You're going into a totally different source of money to pay a dividend, which at that point would not be a dividend, because its not based on what a fund is producing," he said.

Coghill argued that the point of the dividend is not to guarantee a regular payout, but to give all Alaskans a share of natural resource wealth and to keep the government from diving into the fund principal.

"It's kind of a protective layer for the principal, as well as a benefit of common trust to Alaskans," he said.

"That is something that we have designed in law directly linked to the earnings of the permanent fund. If we go outside of that and try to take in money from another source of savings, then I think we have violated the very purpose of the dividend."

Crawford's bill was introduced on Friday and has been referred to the House State Affairs and Finance committees.

Reporter Tom Moran can be reached attmoran@newsminer.com or (907) 463-4893.

JuneauEmpire.com

Click here to return to the original story

Kott calls PFD one of Alaska's worst mistakes

House speaker says fund needs to become a 'cash cow for the state'

Tuesday, March 4, 2003

By CATHY BROWN
THE ASSOCIATED PRESS

House Speaker Pete Kott says creating the permanent fund dividend program was one of the worst mistakes Alaska ever made.

The Eagle River Republican said he does not propose eliminating the dividend because it has become an important part of the economy. But he said the Alaska Permanent Fund, the state's oil-wealth savings account, needs to shift from being a "sacred cow" to become a "cash cow for the state."

Kott and leaders of the House Finance Committee discussed proposals dealing with the permanent fund and the budget during a news conference Monday.

The comments came at a time when Republican Gov. Frank Murkowski is considering introducing a proposal to use income from the fund to pay for government. It's also a time when the fund's losses in the stock market for the first time threaten the state's ability to pay dividends to residents.

"Many Alaskans believe this is an entitlement. I don't," Kott said. "I think the permanent fund dividend was one of the worst things we got ourselves into a number of years ago.

"But having said that, since we're there, I think it's important to recognize that the dividend has played an important part in the economy of Alaska, and to just cut that off would be, I think, totally an embarrassment to this Legislature and to the state," Kott said.

Alaskans receive dividends every year based on an average of the past five years' income from the $22.5 billion permanent fund. Last year's dividend was around $1,500 per person.

Kott and Finance Co-Chairmen John Harris, a Valdez Republican, and Bill

Williams, a Saxman Republican, were asked about a bill introduced Friday by Rep. Harry Crawford, an Anchorage Democrat.

Crawford proposes using some of the $1.9 billion Constitutional Budget Reserve, a state savings account, to pay dividends should the permanent fund losses continue.

Dividends are supposed to be paid from the earnings reserve account of the permanent fund, but because of declines in the stock market, there may not be enough money in that account to fully fund the dividend this year.

The constitutional budget reserve was created by voters in 1990 and has been used in most years since to make up for state budget shortfalls. At the state's current rate of spending, the budget reserve account is expected to be empty by June 2005.

Crawford said he knows using money from the fund to pay dividends this year would hasten the day the budget reserve runs dry. But he said Alaska's economy will suffer a double hit this year if dividends can't be paid, and if Murkowski makes deep cuts in the budget. Murkowski is scheduled to reveal his budget Wednesday.

"It will absolutely devastate the economy if there's no permanent fund dividends," Crawford said. "I don't intend to sit around here and let the economy tank by just saying we lived well in the good times and we're going to live real bad in the bad times."

The Republican majority leaders voiced little support for Crawford's plan.

"What would the constituents out there think? 'We're just trying to change the formula for our political behind,' " Williams said. "I don't think we should. We should stick to what the formula says."

Many other important needs exist that the state cannot fully fund, such as education, public safety and transportation, Williams said.

Kott said the Crawford proposal is a "novel approach" that deserves a look. But he said Alaskans need to recognize that the permanent fund will go up and down with the market, and how much is available for dividends each year is not up to the Legislature.

"We'll have those $1,500 dividends and we'll have those $200 dividends," Kott said. "That fluctuation is built into the system right now and there may be a point where there is no dividend."

House Republican leaders expressed more interest in an idea being considered by the Republican governor. Murkowski is considering a constitutional amendment that asks voters to change the method of determining annual payouts from the permanent fund. The proposal also may include a provision to replace state funds spent on education with permanent fund earnings.

Murkowski's spokesman John Manly said the proposal is being considered and the governor may outline it further during his budget address to the Legislature on Wednesday.

The concept - without the provision for spending part of the money on education - was recommended by the permanent fund board two years ago.

The board's proposal assumed the fund will grow by an average of 8 percent a year. It called for using 5 percent of the fund's market value each year for dividends or other spending. That would leave the remaining 3 percent of growth for inflation proofing.

Proponents say that proposal would provide for a less volatile income stream than the current method of determining dividends.

"I'm beginning to lean more in that direction," Harris said.

KTVA.com

Speaker calls dividend one of Alaska's worst mistakes

Monday, March 03, 2003 - House Speaker Pete Kott says creating the permanent fund dividend was one of the worst mistakes Alaska ever made.

The Anchorage Republican made the remarks at a weekly news conference today in the Capitol.

Kott says he doesn't propose eliminating the dividend because it's become an important part of the economy.

But he says the state's oil-wealth savings account needs to shift from being a "sacred cow" to being a "cash cow for the state."

Kott and House Finance Co-chairmen Bill Williams and John Harris expressed little support for a proposal to guarantee Alaskans get dividends this year.

Representative Harry Crawford of Anchorage has proposed paying dividends this fall out of another state savings account if there's not enough money in the permanent fund's earnings reserve.

Harris says people need to understand the dividend will fluctuate with the market.

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
Phone: (907) 465-2993
Fax: (907) 465-3835
Toll Free: 1-800-463-2693

Interim:
145 Main Street Loop Road
Suite 221
Kenai, AK 99611
Phone: (907) 283-2690
Fax: (907) 283-2763

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

---

[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.

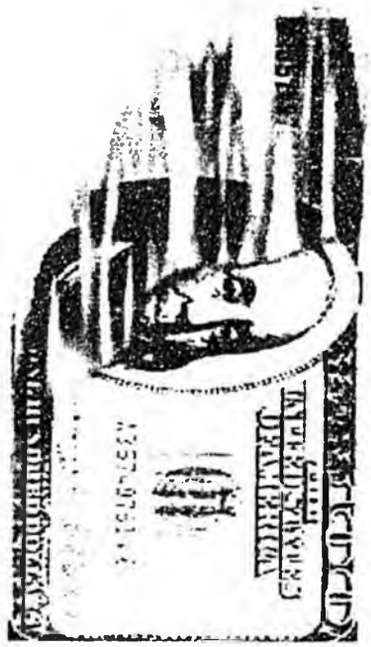
Continue introduction of new spending bills knowing there is a $1,000,000,000 budget deficit.

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.

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

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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,
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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
Karen Sweigert, M.D., Plaintiff,
v.
American Coalition of Life Activists; Advocates for Life Ministries; Michael Bray; Andrew Burnett; David A. Crane; Catherine Ramey; Dawn Marie Stover, Defendants-Appellants,
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.