UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------X Case No. 7:23-cv-04832

People of the State of New York, by LETITIA JAMES, Attorney General of the State of New York,

Plaintiff,

-against-

RED ROSE RESCUE, CHRISTOPHER MOSCINSKI, MATTHEW CONNOLLY, WILLIAM GOODMAN, LAURA GIES, JOHN HINSHAW, AND JOHN AND JANE DOES, the last two named being fictitious names, the real names of such persons being currently unknown but who are active in Red Rose Rescue or act in concert with the above-named individuals or organization to engage in, or who will engage in, the conduct complained of herein,

Defendants.

----------X

MEMORANDUM OF LAW IN SUPPORT OF ORDER TO SHOW CAUSE FOR A PRELIMINARY INJUNCTION

LETITIA JAMES
New York State Attorney General
28 Liberty St., 20th Floor
New York, New York 10005
(212) 416-8250

By: /s/ Sandra Pullman
Sandra Pullman
Senior Counsel, Civil Rights Bureau
Julia Toce
Assistant Attorney General
Heather McKay
Assistant Attorney General
Galen Sherwin
Special Counsel for Reproductive Justice
Travis England
Deputy Bureau Chief, Civil Rights

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Constitutions

Federal Statutes

State Statutes

Rules

Plaintiff, the People of the State of New York, by Letitia James, Attorney General of the State of New York ("OAG"), respectfully submits this Memorandum of Law in support of Plaintiff's proposed order to show cause for a preliminary injunction. Plaintiff seeks to put a stop to the ongoing, illegal conduct of Defendants, whereby they join others under the name "Red Rose Rescue" to interfere with access to reproductive health care by invading clinics and disrupting their operations. The individual Defendants and other Red Rose Rescue members have been convicted multiple times across the country for this criminal misconduct. Their actions also violate the Freedom of Access to Clinic Entrances Act ("FACE"), 18 U.S.C. § 248(a)(l), and the New York State Clinic Access Act ("NY Clinic Access Act"), N.Y. Civ. Rights Law § 79-m.

In light of Defendants' repeated pattern of illegality and stated intent to continue trespassing inside private clinics—rather than peacefully exercising their First Amendment rights on the public sidewalk—Plaintiff respectfully asks this Court to enjoin the individual Defendants and organizational Defendant Red Rose Rescue, and all those who work in concert with them, from knowingly approaching within thirty feet of any reproductive health facility in New York.

PRELIMINARY STATEMENT

Defendant Red Rose Rescue is an anti-abortion group whose members trespass into private medical facilities that perform abortions and refuse all requests to leave. Criminal trespass is not incidental to the group's organized activism, but rather is the core mission of their group. As they explain, "During a Red Rose Rescue, a team of pro-lifers enter the actual places" where abortions are performed and "will not leave" but "must be taken away." Ex. A (*Mission Statement*, Red Rose Rescue, https://www.redroserescue.com/about) (hereinafter "Mission Statement").

The group's code of conduct anticipates that its members will be arrested for these invasions and provides that members will not plead guilty if and when placed on trial; they will

avoid pleading "no contest"; and they will not pay fines or do community service, nor agree with the conditions of probation. *Id.* The Director of Red Rose Rescue, Monica Miller, has distinguished the group's activities from those of sidewalk counselors who vow not to break the law. Ex. B (*A Defense of Red Rose Rescue against Accusations by Lauren Muzkya of Sidewalk Advocates of Life*, Red Rose Rescue, https://www.redroserescue.com/defense-of-rrr) (hereinafter "A Defense of Red Rose Rescue"). Other anti-abortion activists have contrasted their tactics with Red Rose's, noting that, in Westchester, "[m]embers of the Red Rose Rescue group forced their way into a reproductive health care facility in order to stage a sit-in demonstration, blocked access to the facility's entrance, and physically occupied the facility's waiting room for a number of hours, refusing to leave in an attempt to prevent individuals from obtaining reproductive health care services." *Hulinsky v. Cnty. of Westchester*, No. 22-CV-06950 (PMH), 2023 WL 3052267, at *5 (S.D.N.Y. Apr. 24, 2023).

Director Monica Miller has explained that the purpose of the invasions is to physically stop abortions by occupying clinics: "We've done over thirty Red Rose Rescues since Sept of 2017…And our experience is, that as long as there is a pro-life presence in the abortion clinic, the abortions are halted." Ex. C (Priests For Life, *What would you do to stop an abortion? How Far would you go?*, Youtube (August 12, 2021), What would you do to stop an abortion? How Far would you go? - YouTube at 10:00) (hereinafter "Priests For Life").

The individually-named Defendants are active members of Red Rose Rescue who have been repeatedly arrested in connection with their invasions of clinics: Christopher Moscinski claims to have been arrested over thirty times, Ex. D (Spiritual Strength Catholic, *Fr. Fidelis on the Front Line Against Abortion* YOUTUBE, (August 12, 2021), https://www.youtube.com/watch?app=desktop&v=SsXyeR6eXro at 10:10). Matthew Connolly

has been arrested at least ten times, Compl. ¶¶ 45, 63, 73, 74, 76, 78, 86; 89; William Goodman has been arrested at least a dozen times, *id.* ¶¶ 45, 47, 63, 69, 71-74, 76-79, 81, 83, 85, 86; Laura Gies has been arrested at least four times, *id.* ¶¶ 33, 35, 63, 84, 86, 89; and John Hinshaw has been arrested at least three times. *Id*. ¶¶ 28, 31, 33, 63, 83, 87. Defendants have been convicted of trespass for the two invasions they conducted in New York, and Defendant Moscinski was convicted of a criminal violation of the FACE Act for his obstruction of the clinic in Hempstead, New York. Yet the group's leadership has declared that "Rescues will continue" as long as abortions occur. Ex. E (Red Rose Rescue, FACEBOOK (May 2, 2022). Red Rose Rescue | Facebook) (hereinafter "Facebook Page"). Defendant Gies told the press last month that she remains "undeterred" from participating in clinic invasions, even after serving time in jail. Ex. F (Jean Mondoro, *Red Rose Rescuer shares how imprisonment doesn't deter her commitment to sidewalk counseling*, Lifesite news, June 13, 2023. Red Rose Rescuer shares how imprisonment doesn't deter her commitment to sidewalk counseling - LifeSite (lifesitenews.com)) (hereinafter "Lifesite News").

Indeed, when criminally prosecuted for invasion after invasion, Defendants serve time and then resume their unlawful activity. Last month, Defendant Moscinski was sentenced to the statutory maximum of six months under the FACE Act. On June 30, Defendant Moscinski was sentenced to 90 days, and Defendant Gies to 45 days, for trespass and obstruction in Manhasset. Yet Defendants have made clear that they will continue invading clinics; it is part of Red Rose Rescue's stated mission. The imminent release in mid-August of Defendant Gies, who is "undeterred" by her prison sentence, Ex. F (Lifesite News), lends strong support to this motion.

Defendants have made clear their intention to continue to invade clinics throughout the state. Plaintiff therefore asks for statewide relief to prohibit any members of their group from

getting close enough to do so. Patients and staff should not have to wait for hours while Defendants occupy private medical facilities and halt all provision of health care. The requested injunction will enable staff to invoke protection from law enforcement the moment these serial lawbreakers appear on their doorstep, and well before they have entered the clinic and shut down operations.

FACTUAL BACKGROUND

Defendants have interfered with the provision of reproductive health care and attempted to shut down clinics in New York on three occasions in the last year and a half.

1. *The Invasion of All Women's Care in Manhasset, New York*

On April 24, 2021, Defendants Moscinski, Gies, and Hinshaw, as a part of Red Rose Rescue, invaded All Women's Care in Manhasset, New York, at around 8am. Ex. G (Transcript of Record, *The People of the State of New York v. Matthew Connolly, Christopher Moscinski, Laura Gies, and John Hinshaw*, (Nassau County District Court, Feb. 6-10, 2023) (NR-011530-21NA)) (hereinafter "Manhasset Trial Transcript") 375:12-18. In the spring of 2021, the clinic had precautions in place to screen patients for Covid before allowing them into the waiting room, and it did not permit relatives or companions to accompany patients inside. *Id.* at 220:16-221:7; 224:22-25. The clinic sees patients by appointment only. *Id.*

In order to access the clinic, a female member of Red Rose Rescue made a fake appointment at All Women's Care. *Id.* at 366:7-368:9. She then allowed Defendant Moscinski to enter the clinic, which he did in plain clothes, carrying a black duffel bag. *Id.* at 368:10-369:5. Defendant Moscinski pulled a robe out of the bag and proceeded to change into it. *Id.* at 368:25-369:5. He has admitted that he entered in street clothes because the staff would not have allowed him in if they saw him wearing his robe. *Id.* at 368:10-20.

Defendants Moscinski, Gies, and Hinshaw continued to occupy the waiting room, rendering it unusable by patients, and refused repeated requests from staff to leave. *Id.* at 369:23-371:3. The staff had to instruct patients to wait in their cars. *Id.* at 253:12-17. Defendants refused repeated requests by the police to leave. *Id.* at 371:4-373:7. Upon being told that they would be arrested, Defendants Moscinski, Henshaw, and Gies went limp and dropped to the floor, and the police had to carry them out. *Id.* at 371:4-373:7. Defendant Gies lay on the floor, screaming, "I am not leaving." *Id.* at 249:1-24.

Defendant Gies admitted that her goal was to stay inside the clinic as long as she could in order to stop abortions from being performed that day. *Id.* at 355:8-22. Defendant Moscinski admitted that he refused to leave unless the medical staff would leave the building. *Id.* at 371:11-372:20. Defendant Hinshaw admitted that he refused to leave unless the police would stop the staff from performing abortions. *Id.* at 382:17-383:7. Their invasion of the clinic disrupted the provision of reproductive health services for approximately two hours. *Id.* at 225:11-12.

Defendants Moscinski, Gies, and Hinshaw were convicted of trespassing and second degree obstructing governmental administration. *Id.* at 484:10-491:4. On April 17, 2023, Defendant Hinshaw was sentenced to thirty days for obstruction and fifteen days for trespassing, with three years of probation. On that date, Defendants Moscinski and Gies were in jail for trespassing at a clinic in Michigan and so were not sentenced. On June 30, 2023, Defendant Moscinski was sentenced to 90 days, and Defendant Gies was sentenced to 45 days. Defendant Gies will be released no later than mid-August of 2023.

2. *The Invasion of All Women's Health and Medical Services in White Plains, New York*

Eight months after their invasion in Manhasset, on November 27, 2021, Defendants Moscinski, Goodman, and Connolly, along with several other members of Red Rose Rescue,

invaded All Women's Health and Medical Services in White Plains. Ex. H (Transcript of Record, *The People of the State of New York v. Matthew Connolly, William Goodman, and Christopher Moscinski* (City Court of White Plains, Mar. 16, 2022)(CR-07557-21)) (hereinafter "Goodman Testimony") 137:16-138:25; Ex. I (Considine Decl. ¶ 11.). Two female members of Red Rose Rescue misrepresented themselves as patients, then held the door open for their fellow members to rush in. *Id.* at 137:16-138:25; Ex. I (Considine Decl. ¶ 16.). The Red Rose Rescue members then refused to leave the private clinic when staff instructed them to, stating that they would not leave unless the clinic stopped performing abortions. Ex. H (Goodman Testimony) 156:5-157:11. At trial, their attorney conceded that they did not counsel a single woman who was there for an abortion. *Id*. at 141:16-142:17, 146:11-147:9.

Defendants Moscinski, Goodman, and Connolly remained inside for two hours and refused repeated requests from staff and police that they leave. *Id.* at 155:6-10; Compl. ¶ 40; Ex. I (Considine Decl. ¶ 18.). Defendants Moscinski and Goodman disrupted the clinic's operations and patient services by occupying the waiting room, rendering it unusable, forcing patients to wait in the hallways. Ex. I (Considine Decl. ¶ 17.). Defendant Connolly propped open a door, which was typically locked, and created an obstacle by kneeling in front of it and eventually lying down on the floor. *Id.* at 18. No patients could see their doctor until Defendants were finally removed. *Id.* at ¶ 20.

The police arrived, and Defendants Moscinski, Goodman, and Connolly were arrested for trespassing; Defendants then collapsed on the floor, refused to move, and had to be carried out of the clinic by the police. Ex. J (Transcript of Record, *The People of New York v. Matthew Connolly, William Goodman, and Christopher Moscinski* (City Court of White Plains, Aug 2, 2022)(CR-07557-21)) (hereinafter "Sentencing Transcript") 29:4-11; Ex. I (Considine Decl. ¶ 19.).

On August 2, 2022, Defendants Moscinski, Goodman, and Connolly were sentenced to three months in jail for criminal trespass. Ex. J (Sentencing Transcript). The sentencing judge noted that Goodman committed perjury at the trial, observing, "[T]he fact of the matter is you weren't there to help somebody who wanted the services of the clinic, and you were there to do exactly what you wanted to do, which was to commit trespass and to protest inside the clinic." Ex. *Id.* at 14:16-15:16. Despite being accused of perjuring himself, Goodman called the conviction a "badge of honor." Ex. F (Lifesite News).

Red Rose Rescue's stated mission is to trespass inside clinics in order to interfere with access to abortion. Members of Red Rose Rescue have invaded more than two dozen clinics across the country in the last five years. Compl. ¶¶ 63-89. Defendants Moscinski, Goodman, Gies, and Connolly were involved in many of these invasions, which they call "rescues." Defendant Moscinski has said he will continue these invasions, and will not "stop at some artificial property line." Ex. K, (Kathryn Jean Lopez, *What Do We Do in the Face of Death?,* National Review, Jan. 18, 2019). The group proudly proclaims that "rescues will continue" as long as abortions occur. Ex. E (Facebook Page). A Red Rose leader told the press that the group was continuing to recruit new "rescuers," especially young people, and was planning more invasions. Ex. L (Jean Mondoro, *Five Years After the first Red Rose Rescue pro-life activists remain committed to fighting for unborn*, Lifesite News, Sept. 16, 2022) (hereinafter "Five Year Anniversary").

3. The Blockade of Planned Parenthood in Hempstead, New York

In addition to the above invasions, Defendant Moscinski barricaded a clinic in New York. Ex. M (Transcript of Court Findings, *U.S. v. Moscinski*, 22-CR-485 (SLT) (E.D.N.Y. Jan 23, 2023) (hereinafter "EDNY Transcript") 90:10-24. On July 7, 2022, Defendant Moscinski placed six industrial locks on the front gates of the Planned Parenthood clinic in Hempstead, New York. Ex.

M (EDNY Transcript) 89:20-90:5; Ex. N (Majkowski Decl. ¶ 5.). The locks blocked both the driveway into the parking lot and the pedestrian gates, so staff and patients could not enter. *Id.* When the police arrived, they were unable to remove the locks with bolt cutters. Ex. N (Majkowski Decl. ¶ 7.). The fire department had to be called in. *Id.* at ¶ 7. The first saw they tried did not work, and they ultimately used a battery-operated saw to cut and remove the locks. *Id.* at ¶ 8. After the gates were opened, Defendant Moscinski laid down in the driveway and refused to allow cars to enter. *Id.* at ¶ 9. When the police arrested him, he went limp, and as police officers carried him out, Moscinski stated, "At least I slowed them down some—I slowed them down a little bit today." *Id.* at ¶ 13.

Moscinski freely admitted to this conduct and explained that "the main motivation was to keep that Planned Parenthood closed for as long as possible." Ex. O (EWTN, Franciscan Friar Arrested After "Lock and Block" Rescue at Abortion Facility, YOUTUBE (Jul. 16, 2022), Franciscan Friar Arrested After "Lock and Block" Rescue at Abortion Facility - YouTube at :45). He was found guilty of violating FACE, Ex. M (EDNY Transcript) 91:16-93:6, and was sentenced to the statutory maximum of six months.

4. Red Rose Rescue's Continuous Pattern of Clinic Invasions and Blockades

The below timeline of the last few years demonstrates that the Defendants have been actively interfering with clinics and/or serving time in jail for their clinic invasions nearly nonstop. (The entries in italics refer to incidents outside of New York.) As noted above, Defendants Moscinski and Gies are currently serving jail time, but Defendant Gies will be released next month.

- **April 24, 2021** — **Moscinski, Gies, Hinshaw, RRR invade All Women's Care in Manhasset NY;**
- *June 4, 2021* — *Moscinski, Gies, and other RRR members invade Northeast Ohio Women's Center in Cuyahoga Falls, OH; charged with trespassing;*

- *June 5, 2021* — *Goodman and other RRR members invade Planned Parenthood in Bedford Heights, OH; members arrested and charged with trespass;*

- *August 27, 2021* — *Connolly, Goodman, Gies, and four other RRR members invade Planned Parenthood in Philadelphia, PA; SWAT team responds;*

  Moscinski, Hinshaw, and other RRR members invade Planned Parenthood in West Chester, PA; all members arrested;

- *November 16, 2021* — *Six RRR members invade Alexandria Women's Health Clinic in Alexandria VA; all arrested and sentenced to jail for trespass;*

- **November 27, 2021** — **Moscinski, Goodman, Connolly, RRR invade All Women's Health and Medical Services in White Plains, NY;**

- March 15-17, 2022 — Jury tries and finds Moscinski, Goodman, Connolly guilty of criminal trespass in White Plains invasion;

- *April 23, 2022* — *Moscinski, Connolly, Gies along with seven other RRR members invade Northland Family Planning in Southfield, MI; multiple members arrested;*

- **July 7, 2022** — **Moscinski blocks access to Planned Parenthood in Hempstead, NY;**

- August 2, 2022 — Moscinski, Goodman, Connolly each sentenced to three months for White Plains invasion;

- January 23, 2023 — Moscinski tried and convicted of FACE Act violation in EDNY for Hempstead blockade;

- February 6-10, 2023 — Jury tries and finds Hinshaw, Moscinski, Gies guilty of obstructing governmental administration and trespass in Manhasset NY invasion;

- *March 30, 2023* — *Moscinski and Connolly sentenced to 90 days for Southfield, MI invasion; Gies sentenced to 60 days;*

- April 17, 2023 — Hinshaw sentenced to 30 days for Manhasset, NY invasion; Moscinski and Gies in jail in Michigan for another invasion and can not attend;

- June 27, 2023 — Moscinski sentenced in EDNY to six months, the statutory

maximum, for criminal FACE Act violation in Hempstead;

- June 30, 2023 — Moscinski sentenced to 90 days and Gies sentenced to 45 days for Manhasset, NY invasion.

APPLICABLE LAWS

FACE and the NY Clinic Access Act are identical in their wording, and courts' analyses regarding FACE are equally applicable to the NY Clinic Access Act. *See New York ex rel. Spitzer v. Cain*, 418 F. Supp. 2d 457, 482 (S.D.N.Y. 2006). In order to demonstrate a violation of FACE and the NY Clinic Access Act, Plaintiff must show that: (1) Defendants engaged in acts of "force," "threat of force," or "physical obstruction," (2) with the intent to "injure," "intimidate," or "interfere" with (or attempt to injure, intimidate, or interfere with) a person, (3) because that person has sought or provided, or is seeking to obtain or provide, reproductive health services or in order to discourage or intimidate such a person from obtaining or providing reproductive health services. 18 U.S.C. § 248(a)(l); N.Y. Penal Law § 240.70(l)(a)-(b).

ARGUMENT

A party requesting a preliminary injunction must show "(1) irreparable harm; (2) either (a) a likelihood of success on the merits, or (b) sufficiently serious questions going to the merits of its claims to make them fair ground for litigation, plus a balance of the hardships tipping decidedly in favor of the moving party; and (3) that a preliminary injunction is in the public interest."[1] *New*

[1] This standard was set forth by the U.S. Supreme Court in *Winter v. NRDC, Inc.*, 555 U.S. 7, 20 (2008), yet it has not been uniformly applied. Some courts have continued to use the pre-*Winter* ("traditional") standard, which does not include the third prong addressing public interest. *See NM v. Hebrew Acad. Long Beach*, 155 F. Supp. 3d 247, 256 (E.D.N.Y. 2016); *Devos, Ltd. v. Record*, No. 15-cv-6916, 2015 U.S. Dist. LEXIS 172929, at *20 (E.D.N.Y. Dec. 24, 2015); *Oliva v. Brookwood Coram I, LLC*, No. CV 14-cv-2513, 2015 U.S. Dist. LEXIS 179084, at *12-13 (E.D.N.Y. Nov. 30, 2015); *SymQuest Grp., Inc. v. Canon U.S.A., Inc*., No. 15-cv-4200, 2015 U.S. Dist. LEXIS 114898, at *12 (E.D.N.Y. Aug. 7, 2015). In the Second Circuit, a litigant seeking a preliminary injunction can either use the pre-or post-*Winter* standard. *Vringo, Inc. v. ZTE Corp.*, No. 14-cv-4988, 2015 U.S. Dist. LEXIS 71919, at *12 (S.D.N.Y. June 3, 2015). Here, we address the public interest prong, yet such a showing may not be necessary.

York v. Actavis PLC, 787 F.3d 638, 650 (2d Cir. 2015) (quoting *Oneida Nation of New York v. Cuomo*, 645 F.3d 154, 164 (2d Cir. 2011) (internal quotation marks omitted)).

Finally, the injunctive relief requested imposes no greater burden than necessary on Defendants' First Amendment rights, particularly as the First Amendment does not protect Defendants' conduct inside clinics, where they are unlawfully trespassing on private property.

I. PLAINTIFF IS LIKELY TO SUCCEED ON THE MERITS OF THE CLAIMS

Defendants' admitted conduct and stated motives demonstrate that they have violated federal and state clinic access laws on multiple occasions. Plaintiff is therefore likely to succeed on the merits of its claims. The OAG easily meets all three prongs of the laws.

At the outset, Defendant Moscinski has been found guilty of a criminal violation of FACE. "[A] criminal conviction, whether by jury verdict or guilty plea, constitutes estoppel in favor of [the government] in a subsequent civil proceeding as to those matters determined by the judgment in the criminal case." *S.E.C. v. Freeman*, 290 F. Supp. 2d 401, 404 (S.D.N.Y. 2003) (citing *United States v. Podell*, 572 F.2d 31, 35 (2d Cir.1978) (citations omitted)). Collateral estoppel will apply where (1) "the issues in both proceedings are identical, (2) the issue in the prior proceeding was actually litigated and actually decided, (3) there was full and fair opportunity to litigate in the prior proceeding, and (4) the issue previously litigated was necessary to support a valid and final judgment on the merits." *NLRB v. Thalbo Corp.*, 171 F.3d 102, 109 (2d Cir. 1999).

Here, the issues are identical—whether Defendant Moscinski violated the FACE Act—and they were litigated and decided at trial. Therefore, collateral estoppel should apply.

1. Defendants Have Engaged in Physical Obstruction

Defendants have engaged in physical obstruction by invading clinics in New York.

FACE and the NY Clinic Access Act define physical obstruction as either "rendering impassable ingress to or egress from a facility" or "rendering passage to or from such a facility...unreasonably difficult or hazardous." 18 U.S.C. § 248(e)(4); N.Y. Penal Law § 240.70(3)(d). It is well-established that a plaintiff need not show that a clinic was shut down, that people could not enter for a period of time, nor that anyone actually was denied medical services, in order to establish a violation of FACE or the NY Clinic Access Act. *See New York v. Kraeger*, 160 F. Supp. 2d 360, 373 (N.D.N.Y. 2001) (citing *United States v. Gregg*, 32 F. Supp. 2d 151, 156 (D.N.J. 1998) (citations omitted), *aff'd*, 226 F.3d 253 (3d Cir. 2000)).

Courts have found FACE Act violations where, as here, protesters refused to disperse in response to demands from law enforcement. In *United States v. Roach*, the court found that Defendants who attempted to invade a clinic, stood in entryways, then fell to the ground and had to be carried away by police had violated FACE by creating a physical obstruction. 947 F. Supp. 872 (E.D. Pa. 1996). The court noted, "[n]either physical injury to patients or staff nor actual entry into the clinic by the protesters is required for conduct to fall within the definition of 'physical obstruction.'" *Id.* at 876. Similarly, in *United States v. Mahoney*, the appellate court upheld a FACE Act violation where the defendant "entered the cordoned-off area in part so that he would be arrested with the other demonstrators," necessitating fourteen police officers to take him and the other defendants into custody. 247 F.3d 279, 284 (D.C. Cir. 2001). The court noted that, in refusing instructions from the police to leave or face arrest, the defendant "contributed to the disruption and to the interference with those trying to enter or leave the clinic." *Id.*

Of course, physical obstruction can occur inside a clinic, rather than solely at its entrances or exits. For example, in *U.S. v. Gregg*, the defendants violated FACE when they blocked access by "placing themselves inside the clinic building on the second floor landing in front of the clinic's

patient waiting room entrance and office area." 32 F. Supp. 2d at 153. The court specifically found a physical obstruction when "the defendants entered the premises and lay prone on the stairway and hallway." *Id*. at 156.

Here, just as in *Gregg*, Defendants physically obstructed All Women's Health and Medical Center by occupying the waiting room and rendering it unusable, while one of them used his body to block an entrance. Ex. I (Considine Decl. ¶ 19.). Indeed, physical obstruction is precisely the point of the clinic invasions; Red Rose leaders have made clear that they try to halt abortions from proceeding by physically occupying the facilities. Ex. C (Priests For Life at 10:00) ("[O]ur experience is, that as long as there is a pro-life presence in the abortion clinic, the abortions are halted."). Like the protesters in *Roach,* they refuse instructions by police to leave and impede the provision of reproductive health services by going limp and forcing officers to carry them away. And as in *Mahoney,* Defendants contribute to the disruption of care and interfere with patients' access to the clinic by forcing police to arrest and remove them. Ex. I (Considine Decl. ¶ 20.).

Finally, the statutory text also prohibits "attempts" to intimidate or interfere with patients or providers by means of physical obstruction. 18 U.S.C. § 248(a)(1). Courts have accordingly found physical obstruction even where no patients tried to access the specific passageway blocked. *Mahoney,* 247 F.3d at 284 (blocking an emergency exit not typically used was still an attempt to make passage unreasonably difficult); *United States v. Dugan*, 450 F. App'x 20, 22 (2d Cir. 2011) (finding physical obstruction even when "nobody sought to enter the clinic during the time [defendant] was in front of the main door").

Defendants have described their invasions as attempts to prevent abortions by physically occupying clinics where they are performed. Ex. C (Priests For Life at 10:00). Defendant Gies has admitted that her goal in Manhasset was to use her physical presence to stop abortions from

being performed. Ex. G (Manhasset Trial Transcript 345:24-25) ("As long as I was there I was hoping that there would be less abortion or no abortion"). Defendant Moscinski locked the Hempstead clinic and then laid his body across the driveway in order to keep it closed for as long as possible. Ex. G (Manhasset Trial Transcript). Defendants have clearly attempted to interfere with the provision of reproductive health care.

2. Defendants Possess the Requisite Intent and Motives Under Federal and State Law

The second and third elements of FACE and the NY Clinic Access Act, which address a defendant's intent and motives, can be considered together: namely, whether Defendants' obstruction, use of force, and threats of force are intentional, and whether Defendants engage in this conduct "because" the persons to whom it is directed are obtaining and providing reproductive health services or in order to discourage or intimidate such a person from obtaining or providing reproductive health services. *See* 18 U.S.C. § 248(a)(l); N.Y. Penal Law § 240.70(l)(a)-(b).

As the Second Circuit held in *United States v. Dugan*, these elements do not refer to the defendants' ultimate purpose; if defendants mean to engage in the acts, and the logical and natural intended result of those acts is to physically obstruct patients and staff, then the intent and motive elements are satisfied. 450 F. App'x at 22; *see also United States v. Weslin*, 156 F.3d 292, 298 (2d Cir. 1999) ("No matter what their ultimate purpose in blockading the clinic may have been, the defendants do not deny—nor could they plausibly deny—that they meant to block the entrances to the…clinic…and that they did so because they wished to prevent the clinic from performing abortions."). Further, courts have found the requisite intent when defendants "refused to leave or move away from the clinic's entrance areas when repeatedly asked to do so . . . ." *United States v. Gregg*, 32 F. Supp. 2d at 157.

Again, Defendants' conduct plainly meets this standard. Defendants act with the express purpose of discouraging the rendering or receipt of any reproductive health-care service; specifically, Defendants interfere with patients because they seek reproductive health care and interfere with providers because they seek to provide such care. As Red Rose Rescue Director Monica Miller has explained, the group invades facilities in order to stop the provision of abortions. Ex. C (Priests For Life). As recounted above, Defendants admitted that their motive in invading All Women's Care was to stop abortions from being performed. Ex. G (Manhasset Trial Transcript) 355:8-22; 371:11-372:20; 382:17-383:7.

II. PLAINTIFF DEMONSTRATES IRREPARABLE HARM

Absent injunctive relief, the People of New York will suffer irreparable harm. First, under federal and state clinic access laws, irreparable harm is presumed. Next, Defendants' interference with access to reproductive health care does cause irreparable harm. Finally, Defendants have expressed their intention to continue invading clinics, giving rise to a likelihood of future harm.

1. Irreparable Harm Is Presumed under FACE and the NY Clinic Access Act

It is well-established that "when a statute authorizes the government to seek preliminary injunctive relief but does not specifically require proof of irreparable harm," irreparable harm is presumed and need not be proven. *See City of New York v. Golden Feather Smoke Shop, Inc.*, 597 F.3d 115, 121 (2d Cir. 2010); *United States v. Narco Freedom, Inc.*, 95 F. Supp. 3d 747, 754 (S.D.N.Y. 2015). FACE and the NY Clinic Access Act expressly authorize the Attorney General to seek an injunction to prevent violations of those statutes. 18 U.S.C. § 248(c)(3); N.Y. Civ. Rights Law § 79-m.[2] Courts have held that once plaintiffs demonstrate a likelihood that FACE violations have occurred, irreparable harm is presumed. *See Roach*, 947 F. Supp. at 877 (holding that once

[2] The NY Clinic Access Act is codified in two parts: the Penal Law defines the prohibited conduct, N.Y. Penal Law §§ 240.70-240.71, and the Civil Rights Law authorizes the OAG to seek an injunction, N.Y. Civ. Rights Law§ 79-m.

government demonstrated likelihood of success on FACE claim, irreparable injury would be presumed); *see generally United States v. William Savran & Assoc.*, 755 F. Supp. 1165, 1179 (E.D.N.Y. 1991).

2. Defendants Are Causing Irreparable Harm

Even without the presumption of harm, courts repeatedly have held that irreparable harm is caused by the type of unlawful activity in which Defendants engage. In *Cain*, the court found that violations of FACE caused irreparable harm by impeding access to health care: "Women denied access [to medical facilities] cannot be compensated by money damages; injunctive relief alone can assure them the clinics' availability. . . The irreparable harm flowing from defendants' activities – including the medical risks and the denial of constitutionally guaranteed rights – is real and threatens to continue."[3] 418 F. Supp. 2d at 473 (quoting *New York State NOW v. Terry*, 886 F.2d 1339, 1362 (2d Cir. 1989) (internal citations omitted)). Other courts have reached the same conclusion, finding irreparable harm where patients encountered interference in accessing reproductive health clinics. *See, e.g.*, *United States v. Burke*, 15 F. Supp. 2d 1090, 1095 n.6 (D. Kan. 1998); *U.S. v. Lindgren*, 883 F. Supp. 1321,1331-32 (D.N.D. 1995).

3. Defendants Will Continue to Cause Harm

Courts have found that buffer zones around clinics are appropriate when Defendants are likely to continue to violate FACE. In *United States v. Roach,* preliminary injunctive relief was deemed appropriate because, "based on the history of these Defendants, there is no assurance that it will not happen again." 947 F. Supp at 877 (citations omitted).

[3] Although the Supreme Court recently reversed its longstanding recognition of a constitutional right to abortion at the federal level, New York State law still guarantees a fundamental right to abortion. *See* N.Y. Pub. Health Law §§ 2599-aa, 2599-bb.

Here, Defendants have both demonstrated and explicitly stated their intent to continue their unlawful conduct. Red Rose Rescue exists solely for its members to trespass at clinics and refuse to leave, and they anticipate they will be arrested for breaking the law. Ex. A (Mission Statement). Members have been arrested for invading clinics over two dozen times in the last five years, and the named Defendants have been arrested and convicted multiple times. Compl. ¶¶ 63-89.

Despite these numerous arrests, as recently as last fall, a Red Rose leader told the press that the group was recruiting new "rescuers" and was planning more invasions. Ex. L (Five Year Anniversary). Last month, Defendant Gies, upon emerging from a months-long jail sentence for an invasion, stated that she was "undeterred" from participating in future clinic invasions. Ex. F (Lifesite News). The founder of the organization has distinguished its members from other protesters who do not break the law. Ex. B (A Defense of Red Rose Rescue). Other anti-abortion groups have explicitly contrasted their activities with those of Red Rose Rescue and its members who "blocked access to the facility's entrance, and physically occupied the facility's waiting room for a number of hours, refusing to leave in an attempt to prevent individuals from obtaining reproductive health care services." *Hulinsky*, 2023 WL 3052267, at *5. Further, the group claims that "rescues will continue" as long as abortions occur. Ex. E (Facebook Page). Unless enjoined, Defendants' conduct will continue to inflict irreparable harm in New York.

III. PLAINTIFF DEMONSTRATES THAT INJUNCTIVE RELIEF WOULD PROMOTE THE PUBLIC INTEREST

In deciding whether to grant a preliminary injunction, courts may consider the public consequences of the requested injunctive relief. *Winter v. NRDC, Inc.*, 555 U.S. at 24 .

Congress has determined that FACE serves the public interest "by ensuring that individuals who seek to provide or obtain reproductive health services can do so free from unlawful interference." *Roach*, 947 F. Supp. at 877; *U.S. v. McMillan*, 946 F. Supp. 1254, 1269 (S.D. Miss.

1995). Courts have accordingly found that granting injunctive relief to prevent FACE violations promotes the public interest. *Burke*, 15 F. Supp. 2d at 1095-96; *Roach*, 947 F. Supp. at 877; *McMillan I*, 946 F. Supp. at 1269; *Lindgren*, 883 F. Supp. at 1327-28, 1332.

IV. THE REQUESTED RELIEF IS NARROWLY TAILORED TO ADDRESS DEFENDANTS' VIOLATIONS OF LAW

It is well established that buffer zones are appropriate and lawful to address FACE Act violations. Numerous courts have found buffer zones to be both necessary and constitutional. *See Schenck v, Pro-Choice Network Western N.Y*, 519 U.S. 357, 380-85 (1997); *Madsen v. Women's Health Center, Inc.*, 512 U.S. 753, 768-71 (1994); *New York v. Operation Rescue National*, 273 F.3d 184, 208 (2d Cir. 2001); *Cain*, 418 F. Supp. 2d at 486-87; *Kraeger*, 160 F. Supp. 2d at 378-79; *United States v. Scott*, No. 3:95-CV-1216, 1998 U.S. Dist. LEXIS 6716, at *6 (D. Conn. Mar. 16, 1998), *aff'd*, 187 F.3d 282 (2d Cir. 1999); *McMillan I*, 946 F. Supp. at 1270. To avoid violating the First Amendment, a buffer zone must be: (1) content neutral, and (2) narrowly tailored so as to "burden no more speech than necessary to serve a significant government interest." *Madsen*, 512 U.S. at 765.

1. The Buffer Zone is Content Neutral

Here, the proposed buffer zone is content neutral because it is not a regulation of speech, but "[r]ather, it is a regulation of the places where some speech may occur," *Hill v. Colorado*, 530 U.S. 703, 719 (2000), and because its restrictions are justified "'without reference to the content of the regulated speech,'" *Madsen*, 512 U.S. at 763 (quotations omitted); *Schenck*, 519 U.S. at 374 n.6 (granting injunction not because of content but because of prior unlawful conduct).

2. The Buffer Zone Is Narrowly Tailored

The proposed buffer zone burdens no more speech than necessary because it restricts Defendants' access to only as much public space as is needed to promote the government's interest

in protecting access to reproductive health services and ensuring public safety and order. *Madsen*, 512 U.S. at 767-68; *see also McCullen v. Coakley*, 573 U.S. 464, 486 (2014) (finding that such injunctions need not be the least restrictive or intrusive means of serving the governmental interest); *Schenck*, 519 U.S. at 376 (ensuring public safety is a significant governmental interest). The Supreme Court has held "that the combination of these governmental interests is quite sufficient to justify an appropriately tailored injunction to protect them." *Madsen*, 512 U.S. at 768.

i. The Size of the Buffer Zone is Appropriate

There is no formulaic size for a buffer zone; rather, courts exercise their discretion to craft a zone that eliminates the threat to governmental interests posed by the defendants' conduct while protecting defendants' First Amendment rights. *See Schenck*, 519 U.S. at 381 (deferring to district court's assessment of number of feet necessary to keep clinic entrances clear); *Madsen*, 512 U.S. at 769-70 (same). Thus, courts have upheld, over First Amendment challenges, buffer zones of up to 100 feet: *Bruni v. City of Pittsburgh*, 941 F.3d 73 (3d Cir. 2019), *cert denied*, 141 S. Ct. 578 (2021) (15-feet); *Reilly v. Harrisburg*, 790 F. App'x 468 (3d Cir. 2019), *cert denied*, *Reilly v. City of Harrisburg, Pennsylvania*, 141 S. Ct. 185 (2020) (20-feet); *Murray v. Lawson*, 138 N.J. 206, 234 (1994) (100 feet); *Planned Parenthood of Shasta-Diablo, Inc. v. Williams*, 10 Cal. 4th 1009, 1021 (1995) (sixty feet); *Schenck*, 519 U.S. at 367, 380-8 (fifteen feet); *New York v. Operation Rescue National*, 273 F.3d at 190 (fifteen feet).

Further, buffer zones established by injunctions that are applicable only to specific defendants or organizations are also favored because they "focus[] on the precise individuals and the precise conduct causing a particular problem." *McCullen*, 573 U.S. at 492. And stricter burdens on a defendant's speech are "more than justified" when the defendant has a "record of abusive conduct." *United States v. Scott*, 187 F.3d 282, 289 (2d Cir. 1999). In *Scott*, the Second

Circuit upheld the district court's expansion of a buffer zone from 14 feet to 28 feet because the defendant was a "serial violator of injunctions" whose "continued refusal" to abide by the court's previous injunction justified the larger buffer zone. *Id.*

Here, Defendants have both a history of violating the law and court orders, and a stated intention to continue to do so. Other courts have already placed far more stringent restrictions on these specific Defendants for these very same acts in other states.[4] Ex. P (Judgement of Sentence, *The People of TWP of West Bloomfield v. Matthew Connolly*, 17WB02961A (Mich. 48th Dist.Ct., February 21, 2018)). A fixed buffer zone of thirty feet is therefore appropriate to ensure that clinics can avail themselves of protection by law enforcement and continue to operate if and when Defendants refuse to comply with this Court's order. Ex. I (Considine Decl. ¶ 24.).

ii. The Proposed Injunction is Appropriately Extended Across the State

Next, injunctive relief that extends beyond a single reproductive health facility is appropriate where defendants' unlawful activities are "not geographically circumscribed, nor are they independent of one another." *New York v. Operation Rescue National*, 69 F. Supp. 2d 408, 412 (W.D.N.Y. 1999). Courts have accordingly issued geographically broad injunctions when defendants' "consistent, repetitious, and flagrant," violations of law occurred at multiple reproductive health facilities and were likely to continue affecting multiple facilities. *See United States v. Dinwiddie*, 76 F.3d 913, 929 (8th Cir. 1996) (upholding 500-foot nationwide injunction because defendant's history of unlawful conduct indicated a likelihood that it would continue).

[4] In 2018, a Michigan court ordered a 500-foot nationwide buffer zone as a parole condition for Defendants Connolly and Goodman and other Red Rose Rescue members following a clinic invasion. Notably, Defendant Goodman violated that injunction and was sentenced to 45 days in jail. This March, Defendants Moscinski, Connolly, and Gies opted to serve time in jail in Michigan in lieu of abiding by a 500-foot nationwide buffer zone as a condition of parole after a clinic invasion. Defendants Moscinski and Connolly were then sentenced to 90 days, and Defendant Gies to 60 days.

In *Operation Rescue National*, the Second Circuit upheld an injunction that kept the defendants 15 feet away from all reproductive health facilities in the Western District of New York. 273 F.3d at 190. There, defendants had engaged in blockades of facilities throughout the Western District and had announced a week of protests scheduled to take place throughout the region. The Second Circuit accordingly upheld district-wide injunctive relief. *Id.* at 190.

Similarly, in *People v. Terry*, the Second Circuit upheld a preliminary injunction that enjoined the defendants from "trespassing on, blocking, or obstructing [ ] ingress into or egress from any facility at which abortions are performed in New York City and in all locations within the Southern District of New York." 45 F.3d 17, 19 (2d Cir. 1995).

In upholding a nationwide injunction against a defendant who repeatedly blocked access to clinics, the Eighth Circuit observed that, if the injunction did not extend nationwide, the defendant "could easily frustrate the purpose and spirit of the permanent injunction simply by . . . engaging in similar activity at another reproductive health facility." *Dinwiddie*, 76 F.3d at 929.

Here, the Defendants have invaded clinics throughout New York, and they have participated in numerous clinic invasions across the country. A statewide injunction will ensure that Defendants do not simply engage in the same activity at another clinic in the state.

An injunction that extends to all reproductive health facilities across New York State is also necessary to preserve judicial resources. An injunction that is limited to a smaller geographic region would prove ineffective in eliminating Defendants' unlawful conduct and would require separate courts to address legal actions against the same defendants. *See United States v. Zenon*, 711 F.2d 476, 478 (1st Cir. 1983) ("A court has power to enjoin a trespass . . . if there are repeated instances of trespassing, and a single injunction might forestall a 'multiplicity' of legal actions.").

A statewide injunction that extends to all reproductive health facilities across New York State further preserves law enforcement resources. Establishing a buffer zone statewide will allow officers to instruct Defendants to remain a safe distance away and arrest them outside of a clinic if they refuse, rather than spending hours attempting to remove them from the facility. It will further allow clinics to continue providing services without needing to shut down until Defendants are removed. *See United States v. Gregg*, 32 F. Supp. 2d at 159–60 (noting that a buffer zone aids police in enforcing an injunction because it can give law enforcement officers a "definite, objective 'bright line' by which to measure compliance."); Ex. I (Considine Decl. ¶ 24.).

iii. The Proposed Injunction Appropriately Includes Unnamed Individuals Affiliated with Red Rose Rescue

Similarly, the requested injunction appropriately includes unnamed individuals acting in concert with Defendants. The Supreme Court has explicitly authorized injunctions that prohibit unnamed individuals from acting in concert with defendant anti-abortion protesters and rejected a contention "that the 'in concert' provision of the injunction impermissibly limits their freedom of association guaranteed by the First Amendment." *Madsen*, 512 U.S. at 775–76 (citing *Citizens Against Rent Control/Coalition for Fair Housing v. Berkeley*, 454 U.S. 290 (1981)). The Court noted, "[P]etitioners are not enjoined from associating with others or from joining with them to express a particular viewpoint. The freedom of association protected by the First Amendment does not extend to joining with others for the purpose of depriving third parties of their lawful rights."

Further, the proposed injunction accords with the guarantee of due process. Federal Rule of Civil Procedure 65(d) provides that an injunction is binding upon the "parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise." Fed. R. Civ. P. 65(d)(2). The Second Circuit has explained that this rule is particularly appropriate

in the context of anti-abortion protests: "[I]t is absurd to suggest that plaintiffs are forced to do the impossible: foretell which individuals will subsequently act in concert with defendants in violation of an injunctive order of the Court and serve them within 120 days of filing the complaint." *New York State Nat. Org. for Women v. Terry*, 961 F.2d at 397, *cert. granted, judgment vacated sub nom. Pearson v. Planned Parenthood Margaret Sanger Clinic (Manhattan)*, 507 U.S. 901 (1993), *judgment reinstated*, 996 F.2d 1351 (2d Cir. 1993) (citations omitted). Here, members of Red Rose Rescue other than the named Defendants have been involved, often repeatedly, in unlawful clinic invasions and blockades at issue in this case. *See, e.g.*, Ex. I (Considine Decl. ¶ 16.) (describing participation of Red Rose Rescue members Whipple and Bell). All Red Rose Rescue members and those who act in concert with them to obstruct access to reproductive health care are therefore appropriately bound by the proposed injunction.

iv. Defendants Do Not Have a First Amendment Right to Trespass at Clinics

Finally, the proposed injunction is narrowly tailored because the conduct that Defendants have committed and have stated that they intend to continue is patently unlawful and not subject to First Amendment protection. While First Amendment protection is broad, it does not extend to illegal conduct. Even assuming that the conduct Defendants have engaged in is expressive in nature, conduct that "interferes with the personal liberty and property rights of others" does not enjoy protection under the First Amendment. *United States v. Wilson*, 154 F.3d 658, 663 (7th Cir. 1998) (citing *United States v. Soderna*, 82 F.3d 1370, 1375 (7th Cir. 1996)). The Supreme Court has established that physical assault, violence, blockades, and physical obstructions all fall outside of the purview of the First Amendment. *See Wisconsin v. Mitchell*, 508 U.S. 476, 484 (1993) (physical assault is not expressive conduct protected by the First Amendment); *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 916 (1982) ("The First Amendment does not protect

violence"); *Cameron v. Johnson*, 390 U.S. 611, 617 (1968) (government may punish physical obstruction). Therefore, the First Amendment does not interfere with the government's ability to stop illegal activities that implicate the personal liberty and private property rights of others.

Specifically, expressions on private property are not covered by the First Amendment and instead constitute a trespass. "The constitutional guarantee of free expression does not apply to private property." *State v. Scholberg*, 395 N.W.2d 454, 458 (Minn. Ct. App. 1986) (citing *Hudgens v. National Labor Relations Board*, 424 U.S. 507, 513 (1976)). The Southern District of New York has confirmed that individuals do not have First Amendment rights on the private property of health facilities and may be lawfully arrested for trespass by refusing to leave. *Kalfus v. New York & Presbyterian Hosp.*, 706 F. Supp. 2d 458, 471 (S.D.N.Y. 2010), *aff'd*, 476 F. App'x 877 (2d Cir. 2012) (finding that a journalist was given a lawful order to vacate a private hospital, and police had probable cause to arrest him for trespass). In upholding that ruling, the Second Circuit explained that there was "no support either for Kalfus' contention that free speech and press protections extend to *private* property, such as the hospital steps here at issue." *Kalfus v. New York & Presbyterian Hosp.*, 476 F. App'x 877, 880 (2d Cir. 2012) (emphasis in original).

Here, Defendants' repeated and coordinated clinic invasions have consistently been found to constitute unlawful trespass; they have been arrested and convicted for such crimes on numerous occasions throughout the country. Indeed, New York courts have deemed that entering onto the premises of an abortion clinic and refusing to leave the premises after being asked to do so supports a finding of trespass. *See People v. Bauer*, 614 N.Y.S.2d 871, 872 (Waterton City Ct. 1994) (finding a trespass when defendant remained on premises of clinic after being asked to leave); *Long Island Gynecological Servs., P.C. v. Murphy*, 748 N.Y.S.2d 776, 776 (2002) (same). Courts outside New York have also made similar findings. *See Hoffart v. State*, 686 S.W.2d 259, 261

(Tex. App. 1985), writ refused (Feb. 26, 1986) (affirming conviction for trespass when member of anti-abortion group entered a clinic waiting room "with a sign and began talking. . .").

In sum, the proposed injunction providing 30-foot buffer zones around all reproductive health care facilities in New York State is no more burdensome than necessary to protect the significant governmental interests in protecting access to reproductive health services, ensuring public safety, and protecting patients' medical privacy.

CONCLUSION

In order to address Defendants' continuing, unlawful campaign to obstruct access to reproductive health care in New York, Plaintiff respectfully requests that its proposed order to show cause for a preliminary injunction be granted.

Dated: New York, New York
July 26, 2023

LETITIA JAMES
Attorney General of the State of New York

By: /s/ Sandra Pullman
Sandra Pullman
Senior Counsel, Civil Rights Bureau
Julia Toce
Assistant Attorney General
Heather McKay
Assistant Attorney General
Galen Sherwin
Special Counsel for Reproductive Justice
Travis England
Deputy Bureau Chief
Civil Rights Bureau
Office of the New York State Attorney General
28 Liberty St., New York, NY 10005