

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

JOSEPH A. ARIETTA; )  
DONALD EARL CUMMINGS; )  
SANDRA L. GODSHALK; )  
MARY J. HOMA; ) Civil Action  
EDWARD S. KUCHAR; ) No. 04-CV-05306  
KATHLEEN R. KUHNS; )  
KATHLEEN R. MONDOK; )  
JOSEPH F. O'HARA; )  
PHILLIP T. PONGRACZ; )  
KAREN PONGRACZ; )  
THOMAS L. PORTLAND; )  
KATHLEEN TEAY; and )  
MARY ANN YORINA, )

Plaintiffs )

v. )

CITY OF ALLENTOWN; )  
JOSEPH BLACKBURN, Individually )  
and in his Official Capacity )  
as Police Chief of the )  
City of Allentown; )  
RONALD S. MANESCU, Individually )  
and in his Official Capacity )  
as Assistant Police Chief )  
of the City of Allentown; )  
FRANK PETERS, Individually )  
and in his Official Capacity )  
as a Supervisory Officer )  
of the Allentown Police )  
Department; and )  
ROY AFFLERBACH, Individually )  
and in his Official Capacity )  
as Mayor of the City of )  
Allentown, )

Defendants )

and )

ALLENTOWN WOMEN'S CENTER, )

Movant )

APPEARANCES:

DENIS V. BRENNAN, ESQUIRE  
CHRISTOPHER A. FERRARA, ESQUIRE  
On behalf of Plaintiffs

ROBERT E. GOLDMAN, ESQUIRE  
THOMAS C. ANEWALT, ESQUIRE  
On behalf of Defendants

ELIZABETH S. CAMPBELL, ESQUIRE  
SUSAN FRIETSCHER, ESQUIRE  
On behalf of Movant Allentown Women's Center

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O P I N I O N

JAMES KNOLL GARDNER,  
United States District Judge

This matter is before the Court on the Motion to Intervene filed April 4, 2007 by movant Allentown Women's Center.<sup>1</sup> After oral argument on April 18, 2007, I took the matter under advisement. For the reasons expressed below, I deny the Motion to Intervene and dismiss the accompanying Complaint in Intervention.

SUMMARY OF DECISION

In its Motion to Intervene and accompanying Complaint in Intervention, movant Allentown Women's Center ("Women's Center") seeks to set aside or renegotiate a settlement agreement

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<sup>1</sup> On April 16, 2007, Plaintiffs' Memorandum of Law in Opposition to Non-Party Allentown Women's Center's Motion to Intervene and Defendants' Opposition to the Motion to Intervene of Allentown Women's Center were filed in opposition to movant Allentown Women's Center's Motion to Intervene.

reached by the original parties in this action. The Women's Center claims that its interests will be adversely affected by the terms of the settlement agreement. It seeks to intervene as of right or, alternatively, by permission pursuant to Rule 24(a)(2) or 24(b)(2) of the Federal Rules of Civil Procedure.

The underlying lawsuit is a civil action brought by thirteen plaintiff abortion protestors against defendants City of Allentown, and its Mayor, Police Chief, Assistant Police Chief and Supervisory Officer of the Police Department. The lawsuit seeks equitable relief and money damages for alleged civil rights violations by defendants based upon the actions of Allentown Police Officers in issuing summonses charging plaintiffs with loitering, trespassing and protesting without permits as a result of their protest activities outside the Women's Center clinic. The protest activities take place on Keats Street in Allentown, Pennsylvania, between the Women's Center clinic and its parking lot.

The original litigation relating to plaintiffs' protest activities commenced over three years prior to the filing date of the motion to intervene. The parties' settlement agreement was reached on the eve of trial.

As a threshold matter, I determined that the motion to intervene was not timely filed. A prospective intervenor's motion must be timely whether the intervention sought is as of right or by permission. Fed.R.Civ.P. 24.

In this case, the Women's Center waited more than three

years before seeking intervention. The discovery period had nearly expired, and the case had reached a critical stage before the Women's Center filed its motion. I found that intervention by the Center would be extremely prejudicial to the existing parties because it would dramatically enlarge the scope of this action by interjecting new legal and factual issues, after years of litigation.

I also found that the Women's Center could not show a justifiable reason for its delay because it had significant advance notice that it should intervene in order to fully advocate its positions. The Center played an integral part in the underlying action through its participation in the discovery process and multiple discussions with defense counsel. By its own admission, the Allentown Women's Center continually monitored the developments of the litigation.

Defendants told the Women's Center early and often that they would not adopt all the positions for which the Center advocated. The Women's Center had clear notice that its interests diverged from those of defendants. Thus, the Center's motion was untimely.

I next concluded that the Women's Center could not intervene as of right. The Center has not shown that it has a sufficient interest in the litigation, that it has any interest which would be impaired by the existing parties' settlement agreement, or that its interests had not been adequately

represented by defendants. The Center's interests lie in the freedom of use and access to Keats Street. These are generalized interests and cannot be said to be owned by the Allentown Women's Center.

I further determined that the settlement agreement will neither impair the purported interests of the Women's Center through any significant stare decisis effect, nor will it affect any of the Center's contractual rights. The Women's Center's interests, which it claims are protected by the Freedom of Access to Clinic Entrances Act ("FACE"), 18 U.S.C. § 248, and the due process clause of the Fourteenth Amendment to the United States Constitution, are not impaired by the creation of a corridor which provides a safe passageway for employees, patients and other visitors to the Allentown Women's Center.

Next, although defendants' positions did not always correspond to the positions advanced by the Women's Center, I found that the Center's interests were adequately represented by defendants in this litigation. The Women's Center did not show that the governmental entity, charged with implementing national policy and protecting the rights of all its citizens, was deficiently representing any of the Center's protected interests. There is no evidence that defendants did not present a diligent defense, nor of collusion between the existing parties.

Finally, I concluded that the Women's Center could not permissively intervene at this juncture. I found that the motion was untimely, prejudicial to the existing parties, would cause

undue delay and lacked legal and factual commonalities with the underlying dispute. Also, I noted that the Center could achieve the same result it seeks through intervention (the protection of its purported interests) by initiating a new separate civil action.

Accordingly, I denied the Motion to Intervene by the Allentown Women's Center and dismissed the accompanying Complaint in Intervention.

#### JURISDICTION AND VENUE

Jurisdiction is based upon federal question jurisdiction pursuant to 28 U.S.C. § 1331. This court has supplemental jurisdiction over the pendent state law claims pursuant to 28 U.S.C. § 1367. Venue is proper pursuant to 28 U.S.C. § 1391(b) because the events giving rise to plaintiffs' claims allegedly occurred in the City of Allentown, Lehigh County, Pennsylvania, which is located in this judicial district.

#### PROCEDURAL HISTORY

The long history of this highly contentious litigation, as reflected in the record papers and docket entries, is detailed here only in part. On January 20, 2004, eight of the plaintiffs commenced a civil rights action against the City of Allentown and three of the current individual defendants, among others, pursuant to 42 U.S.C. § 1983. This first case was captioned Civil Action Number 04-CV-00226 ("Arietta I").

The lawsuit related to law enforcement activity focused on plaintiffs' anti-abortion protest activities on Keats Street at the site of the Allentown Women's Center's clinic. Arietta I specifically related to the City of Allentown's enforcement of its permit ordinance against plaintiffs.

The Allentown Women's Center is a healthcare clinic that provides reproductive health and reproductive services, including performing abortions, to its patients in the City of Allentown, Pennsylvania. The Center is bound on the south by Union Boulevard, on the north by Keats Street, on the west by Nelson Street and on the east by Plymouth Street. The Women's Center possesses usage rights to an adjacent parking lot on the opposing north side of Keats Street.

The Women's Center was not a party to Arietta I. However, an attorneys' group known as the Women's Law Project entered its appearance on behalf of the Center and monitored the progression of Arietta I through the court's electronic docketing system (PACER) and discussions with defense counsel.

On August 9, 2004 Senior Judge James McGirr Kelly, my former colleague, issued an Order in Arietta I. That Order permitted plaintiffs to "engage in their protest activity on Keats Street so long as they conduct their protest activities along the public walkways of Keats Street, in a lawful manner that does not obstruct traffic on Keats Street, or the entrances to the AWC and the AWC parking lot." Although there were no sidewalks on Keats Street, no party to the Arietta I litigation

sought to clarify the meaning of "public walkways" within the context of Senior Judge Kelly's Order, and no appeal was taken from the court's Order.

The Women's Center did not seek to intervene in Arietta I and, accordingly, sought neither reconsideration nor appeal of the court's August 9, 2004 Order. The Center requested that the City of Allentown appeal Judge Kelly's Order, and were advised by the City that it would not appeal.<sup>2</sup>

On November 15, 2004, the current thirteen plaintiffs commenced the within action against the City of Allentown, and its Mayor, Police Chief, Assistance Police Chief and Supervisory Officer of the Police Department. This lawsuit alleged various violations of plaintiffs' civil rights arising out of their protest activities on Keats Street. The case was captioned Civil Action Number 04-CV-05306 ("Arietta II").

Plaintiffs sought compensatory damages and equitable relief for alleged constitutional deprivations by defendants related to the Allentown Police Department's arrests of

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<sup>2</sup> During oral argument on the Motion to Intervene defense counsel made the following assertions: (1) The Women's Center requested that defendant City of Allentown appeal Judge Kelly's Order dated August 9, 2004. (2) Defense counsel advised the Women's Center that defendant City of Allentown would not appeal the Order and would not take sides in the litigation. (3) Defense counsel advised the Women's Center that it should intervene in this case to fully advocate for its interests. Notes of Testimony of oral argument conducted in Allentown, Pennsylvania on April 18, 2007, styled "Transcript of Hearing before The Honorable James Knoll Gardner[,] United States District Court Judge" ("N.T.") at page 38.

Because neither counsel for movant Allentown Women's Center nor plaintiffs' counsel contested or objected to these assertions, I have considered them to be uncontested facts for purposes of this Opinion.

plaintiffs and its issuance of citations against plaintiffs. Counsel for the Women's Center again entered an appearance and continued to monitor the progression of Arietta II through the PACER system and discussions with defense counsel.

In December 2004 and January 2005, the Allentown Women's Center began advocating that defense counsel take an offensive position against the protestors in this litigation.<sup>3</sup> However, the City of Allentown advised the Women's Center that it would not take sides in the litigation and further advised the Center that it should intervene in this case to fully advocate for its interests.

On January 4, 2005 this case was reassigned from Senior Judge Kelly to me. By my Order dated January 6, 2005, I referred this case to United States Magistrate Judge Arnold C. Rapoport for the purpose of scheduling and conducting a settlement conference. However, because of the high level of acrimony between the parties, a settlement conference was not held until nearly two years later.

By Order dated May 24, 2006, I directed plaintiffs and defendants to provide proposed guidelines outlining the manner in which lawful protest could be conducted on Keats Street. Defendants' proposed guidelines were filed on June 30, 2006.

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<sup>3</sup> From the internal e-mail of the Women's Center, it appears that on or after December 20, 2004 representatives of the Center contacted the Federal Bureau of Investigation to investigate possible violations of the Freedom of Access to Clinic to Entrances Act, 18 U.S.C. § 248. See Exhibit 5 to Plaintiffs' Memorandum of Law in Opposition to Non-Party Allentown Women's Center's Motion to Intervene.

Plaintiffs' proposed guidelines were filed on July 8, 2006.

Notably, defendants' proposed guidelines contemplated the creation of a walkway and crosswalk on Keats Street and permitted protestors to follow visitors to the Women's Center along the newly created walkway. Specifically, defendants' proposed guidelines provided for the designation of a fifteen-foot crosswalk leading from the entrance of the Center to the adjacent parking lot across Keats Street.

Defendants' guidelines also provided for the designation of a three-foot wide pedestrian walkway on the north side of Keats Street (immediately adjacent to the Women's Center parking lot) along which plaintiffs would be able to lawfully protest. Finally, under defendants' proposed guidelines, no more than two protestors could step outside the walkway and walk alongside the crosswalk as a visitor to the Women's Center crossed Keats Street from the parking lot to enter the Center or exited from the Center to enter the parking lot.

Judicial efforts to resolve this litigation continued on November 21, 2006 when Judge Rapoport and I held separate settlement conferences by telephone. On December 1, 2006, defendants filed a Settlement Conference Summary, and on December 7, 2006 plaintiffs filed a Settlement Conference Summary. In their respective memoranda, the parties referred to their proposed guidelines for lawful protest on Keats Street which previously had been filed of record.

Magistrate Judge Rapoport held a settlement conference

on December 18, 2006 and a final settlement conference on March 26, 2007. At the March 26, 2007 settlement conference, a settlement was reached that resolved in principle the dispute between plaintiffs and defendants. Subsequent to this settlement conference, the parties agreed to specific settlement terms which were embodied in a proposed Consent Judgment and Settlement Agreement General Release.<sup>4</sup>

The terms of the parties' settlement agreement include the following:

2. The Plaintiffs claims for injunctive relief are settled on the following terms:
  - a. The City of Allentown shall designate by painted line and roadside marker, on the north side of Keats Street, at its own expense, a street level pedestrian walkway, not less than 48" wide, which shall run the length of Keats Street.
  - b. This walkway shall be a specific public walkway on Keats Street for the members of the general public, including plaintiffs.
  - c. As qualified by paragraph 2(i) below, Plaintiffs agree that their protest activity will take place within the walkway while they are on Keats Street.
  - d. Plaintiffs agree that should the

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<sup>4</sup> See Exhibit 7 ("Consent Judgment") to Plaintiffs' Memorandum of Law in Opposition to Non-Party Allentown Women's Center's Motion to Intervene and Exhibit A ("Settlement Agreement General Release") to Defendants' Response to the Motion to Intervene of Allentown Women's Center. By separate Order of this date, I have approved the parties' proposed Consent Judgment.

presence of vehicular traffic necessitate the vehicle's use of the walkway as the vehicle passes, plaintiffs will move themselves toward the north side of Keats Street so as to not impede the flow of traffic while the vehicle passes.

- e. Plaintiffs shall be permitted to utilize said walkway for their pro-life advocacy, either while walking or standing still.
- f. The mere presence of Plaintiffs on said walkway for the purpose of engaging in such advocacy, whether walking or standing still, shall not constitute obstruction of the walkway or of pedestrian traffic.
- g. Upon completion of the walkway, there will be a seven-foot (7') crosswalk, which will extend from seven feet (7') within the private parking lot, through the parking lot gate on the northern side of Keats Street, and then across Keats Street to the southernmost edge of the public roadway in front of the entrance to Allentown Women's Center (AWC), as shown in the attached (not to scale) drawing.
- h. Plaintiffs may stand or walk along the walkway within the crosswalk past the parking lot gate in either direction during their pro-life advocacy. However, if a patient, staffer, volunteer, or other person affiliated with Allentown Women's Center elects to enter and use the crosswalk and is in the process of going to or from AWC, any Plaintiff present shall withdraw from the crosswalk until said person(s) have entered AWC or the parking lot, as the case may be.
- i. When AWC-related persons are using

the crosswalk, Plaintiffs may walk back and forth across Keats Street on either or both sides of the crosswalk, to engage in pro-life advocacy, until the AWC-related persons have entered AWC or the parking lot, as the case may be. Non-consensual physical contact is prohibited between Plaintiffs and clinic employees, patients or visitors.

Although the Allentown Women's Center is not a party in the within action (Arietta II), it has been deeply involved in the proceedings. The Center's Executive Director, Jennifer Boulanger, was subpoenaed by plaintiffs and testified at the preliminary injunction hearing on March 3, 2006 and April 18, 2006. Ms. Boulanger was also deposed by plaintiffs on two occasions, on October 10, 2005 and May 10, 2006.

In 2005, plaintiffs subpoenaed records and security videotapes from the Women's Center. The Center objected to the subpoena and plaintiffs filed a motion to compel production. After briefing and oral argument, Magistrate Judge Rapoport subsequently entered a protective Order which permitted limited discovery of Women's Center records and videotapes.

Plaintiffs objected to the Order and appealed to this Court. After initial and responsive briefs were filed, I denied plaintiffs objections in their entirety and upheld Magistrate Judge Rapoport's decision. Plaintiffs moved twice for reconsideration, and I denied both motions after considering briefs from the parties, and from the Women's Center. Thus, the Center's participation has been integral throughout these

proceedings.

MOTION TO INTERVENE

On April 5, 2007, the Allentown Women's Center filed a Motion to Intervene as a matter of right under Federal Rule of Civil Procedure 24(a), or in the alternative, permissibly under Federal Rule of Civil Procedure 24(b). In its motion, the Women's Center avers that the terms of the parties' proposed settlement will be detrimental to the Center because it will permit the patients and employees of the Women's Center to be unlawfully harassed, and it will cause unlawful interference with access to the Center's clinic.

Movant contends that its motion seeks to protect its rights, the rights of its employees and the rights of its patients under the Freedom of Access to Clinic Entrances Act ("FACE"), 18 U.S.C. § 248, and the due process clause of the Fourteen Amendment to the United States Constitution. U.S. Const. amend. XIV, § 1. The Women's Center also avers that it did not seek to intervene in this litigation earlier because it had no reason to believe that its interests in the safety and security of its employees and patients were not well protected by defendants.

The Women's Center acknowledges that it did not know all of the specific terms of the parties' settlement at the time the Center's intervention motion was filed. The terms were not yet disclosed to the public when the motion was filed.

The intervention motion avers that the Center first learned of the parties' agreement on March 26, 2006 when it received electronic notification through the PACER system indicating that a settlement had been reached by the parties. The motion further avers that upon further investigation, including discussions with defense counsel, the Women's Center became aware of some of the specific terms of the proposed settlement.

The terms of the proposed settlement agreement to which the Women's Center objects in its motion to intervene are as follows:

- (a) Construction of a three-foot-wide sidewalk along Keats Street on which protestors may gather, narrowing the fourteen-foot-wide alley to only eleven feet across, too narrow to accommodate emergency vehicles safely;
- (b) Designation of a seven-foot-wide crosswalk from AWC's door to its parking lot, on either side of which protestors may amass, creating a narrow and intimidating gauntlet through which patients must pass;
- (c) No buffer or safety zone protecting access to AWC's entrance; and
- (d) Rules governing protest activity at AWC that fail to ensure unobstructed access to and from the medical facility.

Motion to Intervene, at page 3.

#### COMPLAINT IN INTERVENTION

The Allentown Women's Center Motion to Intervene included a proposed Complaint in Intervention. The two-count complaint asserts a claim in Count I for violations of FACE, and

a claim in Count II pursuant to 42 U.S.C. § 1983 for violations of the due process clause of the Fourteenth Amendment to the United States Constitution. U.S. Const. amend. XIV, § 1.

The Complaint in Intervention seeks a declaratory judgment that: (1) Allentown Women's Center employees, agents, escorts, patients, visitors and guests are entitled to free and unobstructed ingress and egress from the Women's Center, Keats Street, and the Center's parking lot; (2) protest activity at the Women's Center may not be conducted in any manner that (a) obstructs access to and from the Center or (b) renders access to and from the Center unreasonably dangerous, difficult or hazardous, or (c) subjects the Center's employees, agents, escorts, patients, visitors, or guests to unsafe conditions, unlawful harassment or intimidation, unwanted touching or threats.

The Complaint in Intervention also seeks permanent injunctive relief recognizing and ensuring that the rights of the Women's Center and the rights of its patients to provide and receive abortion care and other reproductive health services shall not be infringed by the conduct of other parties. Finally, the Complaint seeks attorney's fees, costs, and expenses pursuant to FACE.

#### DISCUSSION

Under Rule 24 of the Federal Rules of Civil Procedure, intervention in the district courts may be either as of right or

permissive. Specifically, Rule 24 provides:

- (a) Intervention of Right.** Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.
- (b) Permissive Intervention.** Upon timely application, anyone may be permitted to intervene in an action: (1) when a statute of the United States confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common. When a party to an action relies for ground of claim or defense upon any statute or executive order administered by a federal or state governmental officer or agency or upon any regulation, order, requirement, or agreement issued or made pursuant to the statute or executive order, the officer or agency upon timely application may be permitted to intervene in the action. In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

The Allentown Women's Center seeks to intervene under either Rule 24(a)(2) or 24(b)(2).

The threshold inquiry concerning both intervention of right and permissive intervention is whether the motion to

intervene is timely. As the United States Supreme Court stated:

Whether intervention be claimed of right or as permissive, it is at once apparent, from the initial words of both Rule 24(a) and Rule 24(b), that the application must be 'timely.' If it is untimely, intervention must be denied. Thus, the court where the action is pending must first be satisfied as to timeliness. Although the point to which the suit has progressed is one factor in the determination of timeliness, it is not solely dispositive. Timeliness is to be determined from all the circumstances. And it is to be determined by the court in the exercise of its sound discretion; unless that discretion is abused, the court's ruling will not be disturbed on review.

National Association for the Advancement of Colored People v. New York, 413 U.S. 345, 365-366, 93 S.Ct. 2591, 2602-2603, 37 L.Ed.2d 648, 663-664 (1973). Accordingly, I first address the issue of timeliness.

#### Timeliness

The United States Court of Appeals for the Third Circuit has held that district courts are to apply a three-factor analysis regarding the timeliness of a motion to intervene. The factors are: (1) the stage of proceedings at the time the movant seeks to intervene; (2) the possible prejudice the delay may cause to the other parties; and (3) the reason for the delay. The stage of the proceedings inquiry is inherently tied to the question of the prejudice the delay in intervention may cause to the parties already involved in the litigation. Mountain Top

Condominium Association v. Dave Stabbert Master Builder, Inc.,

72 F.3d 361, 369 (3d Cir. 1995).

In applying this three-factor analysis, the length of time an applicant waits before seeking intervention is measured from the point at which the applicant knew, or should have known, of the risk to its rights. United States v. Alcan Aluminum, Inc., 25 F.3d 1174, 1182-1183 (3d Cir. 1994). Moreover, where an existing party induces the applicant to refrain from intervening or where a party takes reasonable steps to protect its interests, an application to intervene should not be denied on timeliness grounds. In re Safeguard Scientifics, 220 F.R.D. 43, 47 (E.D.Pa. 2004).

The mere passage of time does not render an application untimely. Mountain Top Condominium Association, supra. However, the prompt filing of a motion to intervene after a settlement is made public is insufficient alone to make an application timely, especially where there is evidence that the intervenor should have known the suit could have an impact on its interests for a significant period of time prior to the settlement. Heartwood, Inc. v. United States Forest Service, Inc., 316 F.3d 694, 701 (7th Cir. 2003).

A party's decision to wait to intervene until the point at which settlement was imminent strongly suggests that the party was not interested in intervening in the litigation, but in blocking a settlement between the parties. Sokaogon Chippewa Community v. Babbitt, 214 F.3d 941, 948 (7th Cir. 2000).

The Allentown Women's Center contends that it timely

moved to intervene because it moved immediately after the public disclosure of allegedly unfavorable settlement terms which impaired its interests. The Center contends that despite the age of this multi-year litigation, the application to intervene was made prior to trial and before this Court decided plaintiffs' motion for preliminary injunction.<sup>5</sup> With respect to prejudice, the Women's Center contends that no existing party will be prejudiced by the Center's participation in the settlement proceedings because it only wishes to protect its own interests.

The Allentown Women's Center avers that it moved for intervention promptly after it had notice its interests were not being protected, immediately following the disclosure of an unfavorable settlement. Thus, the Center takes the position that the reason for its delay in seeking to intervene was its reasonable belief that the governmental entity in this case (defendant City of Allentown) was sufficiently representing its interests.

The Women's Center avers that it moved to intervene expeditiously after it became clear though the public disclosure of the proposed settlement agreement that the Center's interests and the interests of defendants diverged. Finally, the Center

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<sup>5</sup> I note that plaintiffs' motion for preliminary injunction was originally consolidated with a hearing on the request for final injunction pursuant to Rule 65(a)(2) of the Federal Rules of Civil Procedure. Plaintiff subsequently filed a motion to separate the preliminary injunction hearing from the final injunction. Because the motion was unopposed, the hearing became limited to the merits of plaintiffs' motion for preliminary injunction.

avers that intervention in this action may actually help to avert future litigation, potentially conserving judicial and litigant resources.

Plaintiffs strongly oppose intervention by the Allentown Women's Center. Plaintiffs point out that the motion to intervene was filed within days of trial, after years of discovery (much of which involved the Center), months after the conclusion of a five-day preliminary injunction hearing, after the disposition of at least one dispositive motion and after the conclusion of extensive settlement negotiations conducted under the auspices of the court. Plaintiffs contend there is abundant authority for the proposition that the prejudice caused by the destruction of a settlement agreement mandates the denial of a late motion to intervene.

Plaintiffs also contend that the interests that the Allentown Women's Center claims to have in this suit were no less implicated before settlement than they are after it, and these interests were implicated throughout the entire Arietta I and Arietta II proceedings. Accordingly, plaintiffs contend that the Women's Center has insufficient justification for its delay in seeking intervention because it has known for years that (1) the FACE Act and the Fourteenth Amendment are not at issue in this lawsuit; (2) defendants ceased issuing citations to plaintiffs after April 2005; (3) plaintiffs had taken the public position that defendants had no legal basis for seeking any restriction on plaintiffs' First Amendment-protected activities on Keats Street;

and (4) this case could be settled at any time.

Defendants also oppose intervention by the Allentown Women's Center at this stage of the proceedings. In this regard, defendants aver that the Complaint was filed nearly two-and-a-half years ago, discovery is virtually complete, and at least one dispositive motion has been adjudicated.

Defendants contend that the proposed intervention will cause considerable prejudice to the existing parties because it would effectively scuttle the settlement, foreclose any realistic possibility of settling the action, and force the existing parties into an unnecessary trial. Defendants contend that the settlement agreement struck a balance between the rights of peaceful protest, the rights of the public in proceeding safely on public streets and the rights of the Women's Center, its employees and patients.

Regarding the reason for the delay, defendants contend that as early as the Arietta I proceedings and continuing until the time settlement was reached in Arietta II, the Allentown Women's Center was on notice that: (1) plaintiffs sought injunctive relief which would have an impact on the nature of permissible protest activity on Keats Street; (2) defendants would not advance all of the positions advocated by the Center; and (3) defendants sought to settle the case by balancing the interests of the public, the Women's Center, and lawful protest activity.

Accordingly, defendants contend that ever since this

litigation commenced the Women's Center was aware that its interests might be affected by the outcome of this case and that defendants' legal positions did not mirror those of the Center.

Applying the preceding principles to the within matter and after due consideration of the contentions of the parties, I conclude that the Women's Center motion to intervene was not filed in a timely fashion. The record of this case reflects that the Arietta I litigation, the root of this controversy, commenced on January 20, 2004, nearly three-and-a-half years ago. Even measured from November 15, 2004, the point at which the Complaint was filed commencing Arietta II, the case has been pending for over two-and-a-half years.

Because nearly all pre-trial proceedings have concluded in Arietta II, the stage of the proceedings weighs against the timeliness of intervention. Courts in this district have routinely denied motions for intervention where substantial discovery has already taken place or the action is almost trial-ready. Contawe v. Crescent Heights of America, Inc., Civ.A.No. 04-2304, 2005 WL 14000383, at \*4 (E.D.Pa. June 14, 2005)(Joyner, J.).

The discovery period in this case has ended and nearly all outstanding discovery issues have been resolved.<sup>6</sup> A five-day preliminary injunction hearing concluded on November 13,

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<sup>6</sup> I note that this highly vexatious discovery process involved the disposition of numerous discovery motions presented informally to United States Magistrate Judge Arnold C. Rapoport as well as a substantial number of motions for reconsideration presented for my consideration.

2006. The period in which to file dispositive motions has also expired. Thus, as they relate to the Arietta II litigation, the pre-trial proceedings have reached their logical end point.

Pending the disposition of certain outstanding motions, the next logical stage in these proceedings, if they were to continue, would be the trial. However, if I were to permit intervention and allow the Women's Center to file its Complaint in Intervention, the trial would be significantly delayed. In addition to adding a new party to the litigation, the Complaint in Intervention proceeds against the Arietta II plaintiffs and defendants jointly as defendants in the new action.

Accordingly, the result of intervention would be to significantly expand the scope of the action by interjecting new and legally unrelated claims into this litigation. The introduction of these new claims would require that I re-open discovery and provide a period of time for motion practice and related proceedings before the case would be ripe for trial. The net result would be a significant delay in what is already a multi-year proceeding.

Regarding prejudice to the existing parties, I conclude that allowing intervention would be highly prejudicial at this stage in the litigation. Where significant discovery has been undertaken and is essentially complete and all critical pre-trial issues have been resolved, in aid of basic fairness to the parties and the expeditious administration of justice, a

motion to intervene is properly denied. Commonwealth of Pennsylvania v. Rizzo, 530 F.2d 501, 507 (3d Cir. 1976).

After a lengthy and contentious settlement process, plaintiffs and defendants achieved a settlement. This process involved numerous discussions between counsel and multiple court-assisted settlement conferences. The settlement agreement and consent judgment duly balances the rights of plaintiffs to conduct peaceful protests; the rights of the public in proceeding safely on public streets; and the rights of the Women's Center, its patients, and employees.

Contrary to the contention of the Allentown Women's Center, intervention will not save the parties time and expense by averting future litigation. Intervention by the Center effectively commences a new litigation based on distinct claims within the confines of an existing case. The resources which would be expended are no different than if the Women's Center were to commence a new, separate legal action or engage in settlement negotiations prior to or during the commencement of a new separate action.

Intervention by the Women's Center at this stage of the litigation would, at best, force the parties to re-negotiate their settlement agreement, the terms of which achieve a delicate balance of public and private rights. Equally likely, however, is that the Center will be forced to fully litigate the merits of its claims through motion practice and a trial. The Women's Center could achieve the same result through independent

settlement negotiations or by commencing a new action.

For plaintiffs and defendants, all issues requiring a trial which relate to this litigation have been resolved. The interjection of a new party and new legal issues into this case would likely destroy the existing parties' settlement, render the existing parties' significant settlement negotiations a nullity and cause the existing parties as well as this court to incur significant costs and further delays. Accordingly, the prejudice factor weighs heavily against intervention.

Finally, I must consider the Women's Center reason for delay in seeking intervention. I find that there were multiple points in time when it should have become clear to the Center that defendants did not and would not mirror the positions held by the Women's Center or act to advance those positions in the manner in which the Center would have preferred.

A review of the record of this case supplies ample evidence that the point at which the Allentown's Women's Center knew or should have known that this litigation could have an impact upon its interests and that defendant City was not adopting all of the Center's positions was at the conclusion of Arietta I when the Center urged defendants to appeal Senior Judge Kelly's Order, but defendants refused.

By the commencement of Arietta II, the Women's Center had clear notice that the issue of protest activity on Keats Street was going to be at issue in the litigation. The Center was explicitly told that in order to fully advocate for its

interests, it needed to intervene. It did not do so.

The Women's Center relies on Mountain Top Condominium Association, supra, and Alcan Aluminum, supra, for the proposition that it was entitled to rely on defendant City to represent its interests in this litigation because the City is a governmental entity charged with representing the public interest, and the Center acted swiftly when it became clear that the City's legal positions did not comport with its own. However, unlike the intervenors in those cases, the Women's Center was advised early and often that the governmental entity would not take the positions for which the Center advocated.

In August 2004, defendants, including the City of Allentown, communicated to the Allentown Women's Center that they would not appeal Senior Judge Kelly's Order granting certain Arietta II plaintiffs a right to protest along the public walkways outside the Women's Center on Keats Street. In January 2005, the Center's request that defendants take an aggressive posture in Arietta II was specifically declined, and the Center was advised that it should intervene.

Since at least 2005, the Women's Center has kept itself abreast of this litigation. In monitoring the court's electronic docket, the Center should have been aware of the proposed guidelines which the parties had filed of record in this case. These filings were public documents, and they were continually referenced in subsequently-filed court documents, including documents which related to settlement conferences.

The Women's Center position is also undermined by its integral involvement in both Arietta I and Arietta II. Employees of the Center offered testimony at hearings; its employees were deposed; the Women's Center produced subpoenaed documents, records and videotapes as part of third-party discovery; the Center sought protective Orders from this Court; and, by its own admission, it monitored the progression of this case. Thus, the Center's dilatory filing of its motion to intervene weighs against its ability to intervene at this late stage.

Accordingly, after a thorough review of the relevant factual and procedural history this case and weighing the relevant factors relating to the timeliness of a motion to intervene, I find that the Motion to Intervene by the Allentown Women's Center is untimely. The proceedings are nearly complete, the existing parties would be prejudiced by adding an additional party with new legal claims and the Center's rationale for delay in seeking intervention is without merit.

#### Intervention of Right

Rule 24(a)(2) of the Federal Rules of Civil Procedure directs the court to consider the practical consequences of the litigation in deciding the merits of an application to intervene as of right. Harris v. Pemsley, 820 F.2d 592, 601 (3d Cir. 1987). In construing Rule 24(a)(2), the United States Court of Appeals for the Third Circuit has held that in order to intervene as of right an applicant must establish each of the following

four elements: (1) timeliness; (2) a sufficient interest in the underlying litigation; (3) a threat that the interest will be impaired or affected by the disposition of the underlying action; and (4) inadequate representation of the prospective intervenor's interest by the existing parties. Liberty Mutual Insurance Company v. Treesdale, Inc., 419 F.3d 216, 220 (3d Cir. 1998).

Although these requirements are intertwined, each must be met separately in order to intervene. Harris v. Pernsley, 820 F.2d at 596. Specifically, the "interest element" and the "impairment element" are separate and distinct aspects of the inquiry. Liberty Mutual Insurance Company, 419 F.3d at 227.

Pragmatic considerations dominate the inquiry and the court's interest in judicial economy will not prevail if intervention would cause the focus of the litigation to become unduly dissipated or cause case management to become exceptionally complex. Kleissler v. Ridgway Area School District, 157 F.3d 964, 970 (3d Cir. 1998).

The Third Circuit has noted that Rule 24(a)(2)'s requirement that the intervenor demonstrate an "interest relating to the property or transaction which is the subject of the action" has eluded precise and authoritative definition. Mountain Top Condominium Association, 72 F.3d at 366.

However, some general guidelines have emerged. A movant's interest in the underlying litigation must be "significantly protectable", meaning that it is "a legal interest as distinguished from interests of a general and indefinite

character." Harris v. Pernsley, 820 F.2d at 601. This interest must be recognized as one belonging to or owned by the proposed intervenor. Mountain Top Condominium Association, 72 F.3d at 366.

After the movant demonstrates a sufficient interest in the outcome of the underlying lawsuit, the movant must then demonstrate that its claim or claims are in jeopardy in the lawsuit. Liberty Mutual Insurance Company, 419 F.3d at 226. The proposed intervenor must establish that there is a tangible threat to a legally cognizable interest and that threat must be direct as opposed to contingent or remote. Harris v. Reeves, 946 F.2d 214, 219 (3d Cir. 1991). However, the court's review of the effect upon the interest is not limited to consequences of a strictly legal nature. The court may consider any significant legal effect upon the applicant's interests. Harris v. Pernsley, 820 F.2d at 601.

Courts have found a sufficient threats to an applicant's interest present where (1) the litigation could have a significant stare decisis effect upon the applicant's rights, (2) the contractual rights of the applicant might be affected by a proposed remedy and (3) the applicant is the real party in interest and would have standing to raise the claim itself. Kitzmilller v. Dover Area School District, 229 F.R.D. 463, 467 (M.D.Pa. 2005) (citing Harris v. Pernsley, supra, and Alcan Aluminum, supra).

Potential obstacles to the pursuit of an independent

lawsuit, including the time and cost of initiating an independent action, do not impair or impede the intervenor's ability to protect its interest to an extent warranting intervention as of right. See In re Holocaust Victims Assets Litigation, 225 F.3d 191, 202 (2d Cir. 2000).

Finally, to intervene as of right, the proposed intervenor must establish that its interests are not adequately represented by the existing parties in the lawsuit. Harris v. Pernsley, 820 F.2d at 596. Generally, a proposed intervenor's rights are inadequately represented where: (1) the interests of the movant so diverge from those of the representative party that the representative party cannot devote proper attention to the movant's interests; (2) there is collusion between the existing parties; or (3) the representative party is not diligently prosecuting the suit. In re Safeguard Scientifics, 220 F.R.D. at 48 (internal citations omitted).

In approaching the adequacy analysis, the Third Circuit has explained:

The most important factor in determining the adequacy of representation is how the interest of the absentee compares with the interest of the present parties. If the interest of the absentee is not represented at all, or if all existing parties are adverse to him, then he is not adequately represented. If his interest is identical to that of one of the present parties, or if there is a party charged by law with representing his interest, then a compelling showing should be required to demonstrate why this representation is not adequate.

Mountain Top Condominium Association, 72 F.3d at 369 (Internal citations omitted.)

Without regard to the issue of timeliness, which has already been discussed, the Allentown Women's Center seeks intervention of right based upon its interest in the underlying litigation pursuant to Rule 24(a)(2). The Women's Center contends that it has a sufficient interest in the litigation because the settlement agreement specifically refers to the Center's entrance and parking lot, and will, as a practical matter, directly affect the Center's private property as well as its staff, patients and visitors.

The Allentown Women's Center claims that it faces a tangible threat to its interests through the physical construction of a raised sidewalk, the designation of a crosswalk, the unlawful taking of its private property and the manner in which plaintiffs are permitted to conduct protest demonstrations on Keats Street under the terms of the settlement agreement. The Women's Center also alleges that the settlement agreement designates a seven-foot extension into the Center's leased parking lot that impairs its private property rights.

With regard to the construction of a raised sidewalk on the northern side of Keats Street between the Women's Center building and its parking lot, the Center claims that this provision would impair its interests by narrowing the street,

rendering vehicular access more difficult. As a result of this narrowing, the Women's Center contends that it will be more difficult for emergency vehicles to utilize Keats Street, which would compromise the safety of the clinic for both patrons and employees. In addition to the alleged safety hazard, the Center contends that a narrower street would create entrance difficulties for disabled individuals and others who need to exit their vehicles at the clinic entrance door.

The Allentown Women's Center alleges that, as defined in the settlement, the narrow crosswalk and the duties to disperse fall short of the federal statutory protections contemplated by the FACE Act, 18 U.S.C. § 248, and also collectively create an undue burden for patients seeking access to abortion clinic facilities in violation of the due process clause of the Fourteenth Amendment. See Planned Parenthood v. Casey, 505 U.S. 833, 877, 112 S.Ct. 2791, 2820, 120 L.Ed.2d 674, 714 (1992).

The Women's Center contends that the creation of a seven-foot-wide crosswalk around which (and possibly within which) an unlimited number of protestors will be permitted to gather will likely result in the obstruction of access to the Center's clinic. The Center characterizes the crosswalk as "a narrow and intimidating gauntlet through which patients must pass".

The Allentown Women's Center asserts that the crosswalk

creates an insufficient amount of protected space for its staff, patients and visitors because protestors will be able to easily reach into the crosswalk and harass and impede entry and exit, especially if patients or visitors come with family members or protective escorts. Moreover, the Center claims that its interests are being impaired because plaintiffs may block the parking lot gate leading to the clinic and must only disperse when patients or visitors to the Center come within seven feet of the proposed crosswalk.

Finally, the Women's Center claims that its interests are not being adequately represented. The Center characterizes its interests as adverse to those of plaintiffs because plaintiffs' protest activities are aimed at discouraging or preventing women from utilizing the medical services provided by the Women's Center, and the protestors seek to shut down the Center.

The Allentown Women's Center claims that although defendants had been representing the interests of the Women's Center and defendants' interests are not directly adverse, the defendants' interests have now diverged from those of the Center. The Women's Center contends that defendants are primarily concerned with protecting themselves from liability and not in ensuring the safety and security of the Center and its property, staff and patients.

Plaintiffs oppose the contentions of the Women's Center on several grounds. Plaintiffs assert that the FACE Act and the

due process clause of the Fourteenth Amendment are not implicated in the Arietta II lawsuit because it is simply a civil rights action related to plaintiffs' lawful right to protest under the First Amendment. Moreover, plaintiffs contend that the interest asserted by the Women's Center is in actuality a generalized interest in public safety and the free flow of traffic on Keats Street, which are not rights owned by the Center.

Plaintiffs further contend that even if the Women's Center did have interests implicated in the settlement or other disposition of this lawsuit, the Center cannot show that its interests will be impaired. Plaintiffs allege that through the settlement agreement they are giving up a degree of their lawful protest rights, which could not possibly affect the Center's rights under the FACE Act or Fourteenth Amendment. Plaintiffs also contend that the settlement agreement will not bind the Women's Center in any way, the settlement does not require the Center to do anything or refrain from doing anything, and the settlement does not interfere with any of the Center's rights or duties.

Finally, plaintiffs contend that the generalized interests of the Women's Center in unimpeded pedestrian and vehicular traffic flow on Keats Street have been adequately represented by defendants. Plaintiffs assert that the Center's interests under the FACE Act and the Fourteenth Amendment have been represented, even though defendants had no duty to represent

those interests. Plaintiffs also contend that the Center's recent dissatisfaction with the terms of the settlement agreement does not lead to the conclusion that defendants' representation of those interests has been inadequate.

Defendants also oppose the attempt of the Allentown Women's Center to intervene as of right on multiple grounds. Defendants contend that the terms of the settlement agreement do not provide for the construction of a raised walkway, but rather call for the designation of a flat walkway area on Keats Street. Defendants assert that this walkway will not constitute an obstruction that would impede vehicular access because there is no physical obstruction.

Moreover, defendants aver that plaintiffs have agreed to evacuate the area and allow both individuals seeking access to the Women's Center and vehicular traffic to pass unimpeded. Without such an obstruction, defendants contend that the Center does not have an interest protected by the FACE Act which could be violated by the settlement agreement because there is no physical impediment to access. Thus, defendants assert there is no impairment of any cognizable legal interest.

Defendants also contend that the settlement agreement cannot impair the Women's Center interests by creating a violation of the FACE Act because the agreement provides additional protection for the Center's patients, visitors and employees beyond that to which they are statutorily entitled. Defendants assert that the terms of the settlement agreement

comport with the FACE Act by removing protestors from the crosswalk area when patients, visitors and employees of the Center seek to enter or leave the clinic by crossing Keats Street to and from the clinic to and from the parking lot, if they elect to use the designated area.

Under the settlement agreement, defendants assert that protestors are expressly prohibited from touching visitors and employees of the Women's Center, and from obstructing their entry and exit. Defendants point out that there is no federal or state statutory right to a buffer zone around a clinic entrance, and a feature of the settlement agreement is to create such a zone which may be utilized by those associated with the Center at their election.

Finally, defendants contend that the Allentown Women's Center has failed to demonstrate inadequate representation by defendants. Defendants assert that where a party's interests are represented by a governmental entity, the party alleging inadequate representation must make a compelling showing of inadequacy in order to rebut the presumption of adequacy. Defendants argue that simply because defense counsel does not advance every position for which the Women's Center advocates does not prove that its interests are not being represented.

Defendants contend that the Allentown Women's Center fails show inadequacy because the settlement agreement reflects a compromise that protects the safety and well-being of the Center's patients, staff and visitors, including their rights of

unimpeded entry and exit to the Center's clinic. Moreover, defendants assert that the Women's Center's position is undermined by its concession that defendant City of Allentown was an adequate representative up until the point it settled the within action.

I have already determined that the Allentown Women's Center Motion to Intervene is untimely. As I explain below, applying the foregoing to the parties' respective positions and the factual record of this case, the Women's Center has also failed to establish the other three requisite elements for intervention of right.

I find that the Women's Center does not have a significantly protectable legal interest in the underlying dispute between plaintiffs and defendants. To begin with, many of the interests the Center purports will be harmed by the settlement agreement are rendered moot by the disclosure of the actual terms of the agreement, which are now publicly available.

The terms of the agreement indicate that there will be no interference with vehicular traffic or the entry and exit of emergency vehicles by the construction of a sidewalk or by protestors. Defendants do not intend to build a raised sidewalk along Keats Street, but will instead be designating a flat walkway area along the northern side of Keats Street using painted lines.

The settlement agreement imposes a duty on plaintiffs to move out of the way so as not to impede the passage of

vehicles. Therefore, large vehicles, whether emergency or specialized, will be able to pass through Keats Street unimpeded under the settlement agreement to the same extent they could pass before the agreement.

The Women's Center argument concerning defendants' alleged taking of private property within its parking lot by the settlement agreement is mooted by defendants' clarification at oral argument. Although paragraph 2(g) of the settlement agreement calls for the designation of a seven foot by seven foot square in front of the exit gate adjacent to the clinic within the Center's parking lot, defense counsel clarified at oral argument that defendants have no intention of entering or seizing this area of private property unless specifically invited to do so by the Women's Center or the landlord of the parking lot.<sup>7</sup>

Without the Center's consent to enter the property and designate the "buffer zone" area, the area will exist only by imaginary lines. Thus, there is no actual threat of an unlawful taking with regard to the private property of either the Women's Center or the landlord of the parking lot.

The Allentown Women's Center purports to have an interest in the usage of Keats Street, specifically the free flow of traffic, public safety and the ability of the Center's patients, staff and visitors to cross the street unimpeded. Therefore, the Women's Center interests are the freedom of use

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<sup>7</sup> N.T. at 44.

of, and access to, Keats Street, including the ability to drive along and cross the street without obstruction.

These interests are of a general nature and are of indefinite character. They cannot be said to be owned by or the property of the Women's Center. There is nothing about these interests that implicate the legal rights of the Center or its staff, patients and other visitors any more than they implicate the generalized legal rights of a member of the public desiring usage of, and access to, Keats Street.

The mere fact that a non-party's interests may be incidentally affected by the strategic choice of a municipality within the confines of a litigation is not alone sufficient to grant the affected party a right to intervene and effectively exercise a veto over the government's decisions. The party seeking intervention must demonstrate a particularized ownership interest that will be affected by the outcome of the litigation.

Defendants' (specifically the City of Allentown's) decisions regarding how it wishes to utilize its property, including its public streets, may have an effect upon surrounding private property. However, those affected by its decisions do not necessarily have sufficiently affected interests for the purposes of intervention.

My conclusion that the Allentown Women's Center lacks a sufficient interest to intervene is further supported by the nature of the underlying litigation. At its heart, the underlying dispute between plaintiffs and defendants in

Arietta II relates to the rights of plaintiffs to protest under the First Amendment and the rights of the City to enforce zoning, traffic and loitering laws. This is not a dispute regarding the right to seek out the services of a medical clinic which provides abortions to its patients or the rights of this clinic, its patients and its staff to have unimpeded entry and exit to the facility and its parking lot.

Although there is no doubt that plaintiffs selected Keats Street as the site for their protest activity specifically because that is where Women's Center employees, patients and visitors must cross to enter and leave the clinic's parking lot, it does not necessarily follow that the clinic to which the protests are directed has definite and legally cognizable interests which are implicated in a lawsuit regarding protest activity. The Center does not have special or enhanced rights to intervene because it is a facility that provides medical services to its patients which are subject to considerable public controversy.

Even assuming, arguendo, that the Allentown Women's Center had a sufficient interest in the outcome of the underlying litigation, it has not shown that its interests will be impaired by the proposed settlement. The existing parties' settlement agreement does not bind the Women's Center in any way with respect to possible future FACE Act or Fourteenth Amendment litigation. The Center is a non-party and will not be bound by res judicata principles.

Neither the FACE Act, nor the due process clause of the Fourteenth Amendment were placed at issue by any party in the Arietta I and Arietta II proceedings. Similarly, the Women's Center is not the real party in interest in this litigation. Defendants City of Allentown and the individual defendants are the only parties that could have any liability as a result of the underlying lawsuit.

It also does not appear that the cost of initiating new litigation based on violations of the FACE Act or Fourteenth Amendment would be significantly different than commencing the case-within-a-case sought by the motion to intervene or is otherwise cost prohibitive.

The interest of the Allentown Women's Center in unobstructed access to its clinic is premised on rights conferred by the FACE Act and the due process clause of the Fourteenth Amendment. See Planned Parenthood v. Casey, 505 U.S. 833, 877, 112 S.Ct. 2791, 2820, 120 L.Ed.2d 674, 714 (1992). However, a review of the applicable provisions of the FACE Act and Fourteenth Amendment substantive due process jurisprudence demonstrates that the proposed settlement agreement between plaintiffs and defendants does not run afoul of the protections offered by either.

In the relevant part, the FACE Act provides:

**(a) Prohibited activities.--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 penalties provided in subsection (b) and the civil remedies provided in subsection (c)....

....

**(d) Rules of Construction.**-- Nothing in this section shall be construed--

(1) 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.

Thus, the FACE Act neither mandates the existence of a buffer zone between protestors and the staff and patrons of medical facilities providing abortions nor specifies precise measurements for a crossing corridor.

Despite the contentions of the Allentown Women's Center that the settlement agreement is likely to cause plaintiffs to obstruct access to the Center's clinic, the terms of the agreement indicate the contrary. Under the settlement, individuals, including staff, patients and visitors of the Women's Center, may take advantage of a seven-foot wide crosswalk (a "safety zone") within which those affiliated with the Center will not be obstructed by plaintiffs during their passage to and

from the Center's clinic.

Although protestors are allowed to demonstrate, they may not impede access either through physical obstruction or unlawful intimidation. Therefore, the terms of the settlement agreement precisely comport with the intent and dictates of the FACE Act.

The settlement agreement does not compel employees, patients or visitors of the Allentown Women's Center to utilize the designated crosswalk. Those affiliated with the Women's Center are free to seek passage across Keats Street in either direction in any manner they choose. Thus, the only change to the status quo (which the Center does not contend violates its rights) is the addition of a safe passage corridor.

Similarly, the terms of the settlement agreement do not create an undue burden for patients seeking access to abortion clinic facilities in violation of the due process clause of the Fourteenth Amendment. My research has revealed no reported case which supports the proposition that the existence of conditions in which patients and staff must walk through protestors in order to gain access to an abortion clinic is a de facto undue burden in violation of Planned Parenthood v. Casey. Notably, any such case would seemingly declare much of the FACE Act unconstitutional because it specifically permits protest activities.

The desire of the Allentown Women's Center for a blanket prohibition on plaintiffs' ability to stand in the crosswalk at all times and its desire for a wider corridor simply

do not equal cognizable impairments of its interests or de facto obstructions to accessing the Women's Center clinic. Accordingly, I find that the Center has failed to show a sufficient impairment of its alleged interests.

Finally, I find that defendants have adequately represented the interests of the Allentown Women's Center throughout this litigation, including in the settlement agreement. To determine whether the interests of the Women's Center have been adequately represented, I must consider the interests represented by the existing parties. The interests of the Center and plaintiffs are clearly divergent because it is plaintiffs' express purpose to close down the Women's Center and prevent it from providing reproductive services.

Defendants, specifically defendant City of Allentown, represents the interests of all its residents. The interests they represents include the interests of the plaintiffs in carrying out protest activities as well as the interests of the Women's Center, its employees and it patrons in accessing the clinic and utilizing its services. Moreover, the municipal entity is charged with carrying out federal, state and local policies which include the protections offered by the First and Fourteenth Amendments, state zoning and traffic laws and municipal ordinances.

In the context of this litigation, the municipal entity is in a defensive posture. Its interests are adverse to

plaintiffs and aligned with the interests of the Allentown Women's Center because it has jointly represented all defendants and it has sought to protect the purported interest of the Women's Center in unimpeded access to the Center's clinic. Accordingly, defendants are entitled to the rebuttable presumption of adequate representation.

Throughout Arietta I and Arietta II, defendants have advanced positions in aid of the Women's Center interests in the safety and security of its facility, staff, patients and visitors as well as the free flow of traffic along Keats Street. Defendants have consistently advocated for the unobstructed passage of the Women's Center staff, patients and visitors between the clinic and the Center's parking lot.

Defendants have negotiated a settlement which provides for safe and unobstructed passage between the Allentown Women's Center clinic and parking lot, and which provides for unobstructed vehicular traffic. Thus, although the legal positions of the Women's Center did not always parallel those of defendants, their interests have not so diverged that defendants failed to devote proper attention to the Center's interests.

Defendants also had no duty to raise claims unrelated to the subject matter of this litigation such as FACE Act and Fourteenth Amendment violations. Such claims can be raised by separate lawsuit. Moreover, in the case of the FACE Act, defendants lack standing to raise such claims. See 18 U.S.C. § 248(2)-(3) which confers government standing to enforce the

FACE Act only upon the Attorney General of the United States and upon State Attorneys General as *parens patriae* in the name of their respective states.

The Allentown Women's Center provided no evidence that there was, or is, collusion between the existing parties or that defendants were not diligently defending the suit. Accordingly, the Women's Center has not met its burden to show that defendants have been inadequate representatives of the Center's interests.

#### Permissive Intervention

Rule 24(b) governs permissive intervention. Whether to allow permissive intervention is committed to the sound direction of the court. Kitzmiller, 229 F.R.D. at 471. As relevant herein, a party may permissively intervene upon timely application "when an applicant's claim or defense and the main action have a question of law or fact in common". Fed.R.Civ.P. 24(b)(2).

In deciding whether to permit a party to intervene permissively, "the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties." Fed.R.Civ.P. 24(b). Additionally, if the interests of the proposed intervenor are already presented in the litigation, the court is well within its discretion to deny an application to permissively intervene. Hoots v. Commonwealth of Pennsylvania, 672 F.2d 1133, 1136 (3d Cir. 1982).

I need not discuss the contentions of the parties

because they largely mirror those which I considered at length in the parties' briefs concerning intervention of right. I have already deemed the Motion to Intervene by the Allentown Women's Center is untimely. As part of that analysis, I considered the extreme delay and the related prejudice that allowing intervention at this late stage would cause to the existing parties in the litigation and held that it would be unduly burdensome to all.

I have also already considered the interrelationship between the Women's Center Complaint in Intervention and the underlying litigation. The Women's Center legal claims under the FACE Act and due process clause of the Fourteenth Amendment as well as the factual basis of those claims concern the rights of the Center's patients to have unobstructed access to the Women's Center's medical facility in order to have a legal medical procedure performed. I held that these claims do not share significant legal or factual commonality with issues present in the underlying action, which primarily concerns plaintiffs' rights to protest on a public street outside the Center's clinic.

The Allentown Women's Center should not be given a seat at the settlement table merely to interject new claims and possibly forever scuttle the possibility of a settlement. The Center's interests were represented throughout this litigation and were taken into account in drafting the parties' settlement agreement. Allowing a dilatory party to enter litigation at the zero hour and exercise a veto right over a hard-fought settlement

agreement would be contrary to the policy of consolidation of disputes and judicial economy underlying intervention.

If the Allentown Women's Center believes the parties' settlement agreement violates its rights after the agreement is implemented, it is free to pursue an independent action. However, I will not permit the Center to permissively intervene at this late juncture.

#### CONCLUSION

For all the foregoing reasons I deny the Motion to Intervene by the Allentown Women's Center and dismiss the accompanying Complaint in Intervention.



O R D E R

NOW, this 12th day of July, 2007, upon consideration of the Motion to Intervene and accompanying Complaint in Intervention filed by movant Allentown Women's Center on April 5, 2007; upon consideration of Plaintiffs' Memorandum of Law in Opposition to Non-Party Allentown Women's Center's Motion to Intervene, which opposition was filed April 16, 2007; upon consideration of Defendants' Response to the Motion to Intervene of Allentown Women's Center, which opposition was filed April 16, 2007; after oral argument conducted on April 18, 2007; and for the reasons expressed in the accompanying Opinion,

IT ORDERED that the Motion to Intervene is denied.

IT IS FURTHER ORDERED that movant Allentown Women Center's Complaint in Intervention is dismissed.

BY THE COURT:

/s/ James Knoll Gardner  
James Knoll Gardner  
United States District Judge