Nos. 99-5079, 99-5124, 99-5205

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

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UNITED STATES OF AMERICA,

Plaintiff-Appellant/
Cross-Appellee

v.

JOSEPH R. GREGG; RUBY C. MCDANIEL; LUIS MENCHACA; FRANCIS S. PAGNANELLI; WILLIAM C. RAISER; MICHAEL A. HENRY; ROSE KIDD; ARNOLD MATHESON; KATHARINE O'KEEFE; EVA ALVARADO; JOSEPH F. O'HARA; JOSEPH H. ROACH; ROBERT RUDNICK; JAMES SODERNA; JAMES SWEATT; ELIZABETH WAGI; BYRON ADAMS; KEVIN BLAKE; AMY BOISSONNEAULT; BALDO DINO; STEPHEN C. ELLIOT; SHERYL FITZPATRICK; MARY FOLEY; DENNIS GREEN; GEORGE LYNCH; RAYMOND MICCO; ALEXIS MULRENAN; RALPH TRAPHAGEN; JAMES TROTT; KIMIKO TROTT,

Defendants-Appellees,

ROSE KIDD; JAMES SWEATT; ELIZABETH WAGI; RAYMOND MICCO; WILLIAM RAISER; JAMES SODERNA; KEVIN BLAKE; BALDO DINO; FRANCIS S. PAGNANELLI,

Cross-Appellants

_____

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF NEW JERSEY

_____

BRIEF FOR THE UNITED STATES AS CROSS-APPELLEE AND REPLY BRIEF AS APPELLANT

_____

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES: **Page**

CASES—(continued): **Page**

CONSTITUTION AND STATUTES: **Page**

LEGISLATIVE HISTORY:

MISCELLANEOUS:

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BRIEF FOR THE UNITED STATES AS CROSS-APPELLEE AND REPLY BRIEF AS APPELLANT

STATEMENT OF RELATED CASES

This case has not previously been before this Court. Several defendants have filed cross-appeals, which are designated Case Nos. 99-5124 and 99-5205, and these matters are consolidated for briefing. The United States is not aware of any related judicial case or proceeding.

STATEMENT OF FACTS

The district court found that the defendants violated the Freedom of Access to Clinic Entrances Act of 1994 (Access Act or FACE), 18 U.S.C. 248, by obstructing access to Metropolitan Medical Associates (MMA), a reproductive health service provider in Englewood, New Jersey, on three occasions (Opening Br. 6-10). See United States v. Gregg, 32 F. Supp. 2d 151, 153-158 (D.N.J. 1998). The defendants do not challenge the district court's findings of FACE violations (Br. 4).[1/]

SUMMARY OF ARGUMENT

Defendants have failed to present valid reasons why statutory damages should be awarded per violation with joint and several liability among defendants. Defendants' analysis ignores the deterrent function of statutory damages and the underlying objectives of the Access Act. Further, defendants' assertion that the Attorney General does not have authority to seek statutory damages ignores the plain language of the statute.

Pagnanelli challenges the constitutionality of the Access Act as a violation of Congress's authority under the Commerce Clause and the First Amendment. Every court of appeals to address these challenges has rejected them. See United States v. Weslin, 156 F.3d 292, 296-298 (2d Cir. 1998), cert. denied, 119 S. Ct. 804 (1999); Hoffman v. Hunt, 126 F.3d 575, 583-589 (4th

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[1/] Nine of the 29 defendants have filed cross-appeals. These individuals are: Kevin Blake, Baldo Dino, Rose Kidd, Raymond Micco, William Raiser, James Soderna, James Sweatt, Elizabeth Wagi, and Francis Pagnanelli. They will be referred to collectively as "Pagnanelli."

Cir. 1997), cert. denied, 523 U.S. 1136 (1998); Terry v. Reno, 101 F.3d 1412, 1415-1422 (D.C. Cir. 1996), cert. denied, 520 U.S. 1264 (1997); United States v. Soderna, 82 F.3d 1370, 1373-1377 (7th Cir.), cert. denied, 519 U.S. 1006 (1996); United States v. Dinwiddie, 76 F.3d 913, 919-924 (8th Cir.), cert. denied, 519 U.S. 1043 (1996); United States v. Wilson, 73 F.3d 675, 679-688 (7th Cir. 1995), cert. denied, 519 U.S. 806 (1996); Cheffer v. Reno, 55 F.3d 1517, 1519-1522 (11th Cir. 1995).

Congress was well within its authority under the Commerce Clause when it enacted the Access Act. Congress made extensive findings, supported by overwhelming evidence, that the Access Act was intended to protect persons and things in interstate commerce, and to prohibit activity "which, viewed in the aggregate, substantially affects interstate commerce." United States v. Lopez, 514 U.S. 549, 561 (1995). Lopez reaffirmed that both purposes are appropriate exercises of Congress's authority under the Commerce Clause. Id. at 558-559. In addition, the Act's penalties are reasonably adapted to a permissible end.

Further, the Access Act does not regulate speech. By its terms, the Access Act proscribes only conduct -- force, threats of force, and physical obstruction -- used to injure, intimidate, or interfere with another. 18 U.S.C. 248(a). The Supreme Court has held that such conduct is not protected by the First Amendment protection. Wisconsin v. Mitchell, 508 U.S. 476, 484 (1993) (force); Madsen v. Women's Health Ctr., Inc., 512 U.S.

753, 774 (1994) (threats); Cameron v. Johnson, 390 U.S. 611, 617 (1968) (physical obstruction).

Even if the actions regulated by the Access Act are considered expressive conduct sufficient to implicate the First Amendment, the Act easily passes the three-part test established in United States v. O'Brien, 391 U.S. 367 (1968). The Act furthers legitimate governmental interests by protecting interstate commerce, by permitting women to exercise their constitutional right to reproductive choice, and by helping to maintain public safety and order. The Act is content- and viewpoint-neutral; it prohibits interference with all reproductive health services, including pro-life pregnancy counseling and pregnancy care. Congress's reasons for prohibiting violent and obstructive conduct are unrelated to expressive conduct. Nor does the Act impinge unnecessarily on expression; persons with an anti-abortion viewpoint can express that view vehemently in words or nonviolent, nonobstructive action, even in the immediate vicinity of reproductive health clinics. Finally, assertions that the Access Act is overbroad and vague are equally without merit.

ARGUMENT

I

STATUTORY DAMAGES SHOULD BE AWARDED PER PERSON, PER VIOLATION

The United States asserts, consistent with the language of the Access Act, its legislative history, and its objectives, that statutory damages should be awarded per person, per violation

(Opening Br. 12-18). See 18 U.S.C. 248(c)(1); S. Rep. No. 117, 103d Cong., 1st Sess. 3-11, 22, 26-27 (1993). Defendants do not provide a substantive basis for this Court to reject the United States' interpretation. Defendants merely recite (Br. 11-13) portions of two district court opinions that held statutory damages are awarded per violation, with joint and several liability. See Milwaukee Women's Med. Servs., Inc. v. Brock, 2 F. Supp. 2d 1172 (E.D. Wis. 1998); Planned Parenthood v. Walton, No. CIV.A. 95-2813, 1998 WL 88373 (E.D. Pa. Feb. 12, 1998).[2/] Both courts, however, fail to address fully the statute's legislative history. Moreover, the court in Walton, id. at *2, erroneously concluded that statutory damages serve only a compensatory, and not a deterrent function.

FACE was enacted to impose new, substantial consequences on defendants, including statutory damages, because of the escalating violence directed at reproductive health providers, their patients, and their facilities. See S. Rep. No. 117, supra, at 3-11. Congress also made clear that statutory damages serve dual purposes of compensation and deterrence (Opening Br. 16-18). See S. Rep. No. 117, supra, at 22, 26-27. Deterrence will be substantially diminished, if not eliminated in some

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[2/] The United States incorrectly stated (Opening Br. 18 n.16) that a third court imposed joint and several liability for statutory damages. In United States v. Operation Rescue National, No. C-3-98-113 (S.D. Ohio Aug. 27, 1999), the court, ruling on motions for summary judgment, held that statutory damages were to be assessed jointly and severally. No statutory damages have been imposed. Trial is scheduled for February 2000.

circumstances, through joint and several liability since a shared damage award may be a minimal amount (Opening Br. 19-20).

Defendants also assert (Br. 7) that the United States seek to "convert statutory damages into penalty damages." First, the nature of defendants' objection is unclear since "penalty damages" is not a term of art or a phrase used in the Act. Whether defendants are attempting to compare "penalty damages" to civil penalties or punitive damages, either assertion is without merit. The Access Act has a separate provision regarding civil penalties, 18 U.S.C. 248(c)(2)(B), which sets forth specific ranges of damages for first or subsequent violations. The United States did not seek civil penalties in its complaint. See Joint Appendix 6-8. Nothing in the United States' brief or prior arguments can be characterized as seeking civil penalties via the statutory damages provision.

Further, individual liability for statutory damages is not akin to punitive damages. The mere fact that individual liability for statutory damages will lead to higher damage awards against each defendant than joint and several liability, which seems to be the heart of defendants' objection, does not render individual liability a "penalty" or otherwise make it improper under the statute. To the extent defendants argue that a statutory damages award is a "penalty" because it exceeds actual damages, this too is without merit. First, statutory damages are "in lieu of" actual damages, see 18 U.S.C. 248(c)(1)(B); "in lieu of" means "in the place of: instead of." Merriam-Webster's

Collegiate Dictionary 672 (10th ed. 1997). Because statutory damages are an alternate or replacement value, there is no requirement to assess actual damages before an award of statutory damages. Further, a statute may identify a statutory damage amount that exceeds actual damages. See Peer Int'l Corp. v. Pausa Records, Inc., 909 F.2d 1332, 1336-1337 (9th Cir. 1990) (award of maximum amount of statutory damages for 80 separate violations of copyright infringement($4 million) upheld even though amount vastly exceeded actual damages to plaintiff), cert. denied, 498 U.S. 1109 (1991).

Finally, defendants' comparison (Br. 13-14) of FACE liability to property loss caused by a traffic accident ignores the different purposes for liability. Traditional tort liability serves only to compensate a plaintiff. See Deisler v. McCormack Aggregates, Co., 54 F.3d 1074, 1083 n.16 (3d Cir. 1995) ("[c]ompensatory damages serve to compensate for harm sustained by a party") (citing Restatement (Second) of Torts § 903 (1977)). In contrast, FACE's statutory damages serve not only to compensate the plaintiff, but to punish each defendant and to deter future violations. See H.R. Rep. No. 306, 103d Cong., 1st Sess. 10 (1993); S. Rep. No. 117, supra, at 26-27.

II

THE ATTORNEY GENERAL HAS AUTHORITY TO SEEK STATUTORY DAMAGES

Defendants assert (Br. 7, 15) that the Attorney General does not have the authority to seek statutory damages and that only

private plaintiffs may seek such relief. Defendants simply ignore the plain language of the statute.

Section 248(c)(2)(B) of the Access Act provides, in relevant part:

> [i]n any action under subparagraph (A) [authority of Attorney General to commence civil action], the court may award appropriate relief, including temporary, preliminary or permanent injunctive relief, and compensatory damages to persons aggrieved as described in paragraph [248(c)](1)(B). * * *

18 U.S.C. 248(c)(2)(B) (emphasis added).

Section 248(c)(1)(B), which sets forth the relief available to private plaintiffs, provides, in relevant part:

> [w]ith respect to compensatory damages, the plaintiff may elect, at any time prior to the rendering of final judgment, to recover, in lieu of actual damages, an award of statutory damages in the amount of $5,000 per violation.

18 U.S.C. 248(c)(1)(B).

Clearly, Section 248(c)(2)(B) incorporates all of the text relevant to compensatory damages as set forth in Section 248(c)(1)(B). Thus, this includes the authority for the Attorney General to seek statutory damages in lieu of compensatory damages. See 18 U.S.C. 248(c)(1)(B) and (2)(B).

Defendants also claim (Br. 15), without citation, that "the legislative history makes it clear that the 'in lieu' of language was enacted for the benefit only of the private aggrieved provider, patient or employee." Congress provided two examples of when a patient or reproductive health providers may elect statutory damages, i.e., when proof of trauma or lost income is too difficult to establish for compensatory damages. See H.R.

Rep. No. 306, 103d Cong., 1st Sess. 13 (1993); S. Rep. No. 117, 103d Cong., 1st Sess. 26 (1993). These examples, however, are not exclusive, nor are they proof of a distinction between the Attorney General's and private plaintiffs' authority to seek compensatory relief. In fact, Congress approvingly cited the following testimony from the Attorney General:

> [I]t is very important that the Attorney General have authority to file a civil action. This approach follows the model of other statutes protecting individual rights * * * by shifting the burden of civil enforcement from private victims to the government, which is often better able to pursue such cases and vindicate the enormous interest that our society has in protecting individual rights.

S. Rep. No. 117, supra, at 27. Clearly, Congress, through its explicit incorporation of the compensatory damages provision, intended that the Attorney General have full authority to vindicate an individual's rights, including authority to seek statutory damages.

III

CONGRESS WAS WELL WITHIN ITS CONSTITUTIONAL POWERS WHEN IT ENACTED THE ACCESS ACT (Cross-Appeal)

Relying on United States v. Lopez, 514 U.S. 549 (1995), Pagnanelli contends (Br. 15-19) that Congress exceeded its authority under the Commerce Clause when it enacted the Access Act. See U.S. Const. Art. I, § 8, Cl. 3. Specifically, Pagnanelli contends (Br. 16) that FACE does not concern activities that have a "substantial relation to interstate commerce" because there is no evidence of aggregate activity to substantially affect commerce, nor a jurisdictional element in

the statute. Every court of appeals that has addressed such a challenge to Congress's authority under the Commerce Clause to enact FACE has rejected it. See United States v. Weslin, 156 F.3d 292, 296 (2d Cir. 1998), cert. denied, 119 S. Ct. 804 (1999); Hoffman v. Hunt, 126 F.3d 575, 583-588 (4th Cir. 1997), cert. denied, 523 U.S. 1136 (1998); Terry v. Reno, 101 F.3d 1412, 1415-1418 (D.C. Cir. 1996), cert. denied, 520 U.S. 1264 (1997); United States v. Soderna, 82 F.3d 1370, 1373-1374 (7th Cir.), cert. denied, 519 U.S. 1006 (1996); United States v. Dinwiddie, 76 F.3d 913, 919-921 (8th Cir.), cert. denied, 519 U.S. 1043 (1996); United States v. Wilson, 73 F.3d 675, 679-688 (7th Cir. 1995), cert. denied, 519 U.S. 806 (1996); Cheffer v. Reno, 55 F.3d 1517, 1519-1521 (11th Cir. 1995).

In Lopez, 514 U.S. at 553-559, the Supreme Court held that Congress exceeded its powers under the Commerce Clause and struck down the Gun-Free School Zones Act of 1990, 18 U.S.C. 922(q). The Court explained that there are "three broad categories of activity that Congress may regulate under its commerce power." Lopez, 514 U.S. at 558. First, Congress may regulate the channels of interstate commerce, e.g., to keep them "free from immoral and injurious uses," it may "regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities;" and Congress may regulate "those activities having a substantial relation to interstate commerce." Id. at 558-559. For a regulated activity to fall within the

third category, the activity must "substantially affect interstate commerce." Id. at 559. A court only need determine if there was a rational basis for Congress to conclude that an activity it regulated sufficiently affects interstate commerce. See id. at 557.

This Circuit has held that it should give "substantial deference to a Congressional determination that it had the power to enact particular legislation." United States v. Bishop, 66 F.3d 569, 576, cert. denied, 516 U.S. 1032 (1995); see id. at 578-580 (ample evidence before Congress of how carjacking affects interstate commerce to uphold criminalizing such conduct); see also United States v. Parker, 108 F.3d 28, 30-31 (with deference to legislative assessment, Child Support Recovery Act of 1992, 18 U.S.C. 228 et seq., within Congress's commerce power), cert. denied, 522 U.S. 837 (1997).

The Court held that the Gun-Free School Zones Act did not fall within the first two categories of activities that Congress could regulate pursuant to its Commerce Clause powers. See Lopez, 514 U.S. at 559. After more extensive analysis, the Court also rejected the argument that the Act fell within the third category. The Court explained that there were no express findings by Congress regarding the effects of the Gun-Free School Zones Act on interstate commerce. See id. at 562. Nor could the Court discern any reasonable basis to conclude that the intrastate activity that the Act regulates had a substantial effect on interstate commerce. See id. at 563-567. In addition,

there was no jurisdictional element in the Act to require a case-by-case evaluation of whether the gun at issue was engaged in interstate commerce. See id. at 561.[3/] To conclude that mere possession of a firearm in a school district substantially affects interstate commerce would require the Court to "pile inference upon inference in a manner that would bid fair to convert congressional authority under the Commerce Clause to a general police power." Id. at 567.

Unlike the Gun-Free School Zones Act, the Access Act satisfies both the second and third categories identified by the Lopez Court; the Act is a proper exercise of Congress's power to "protect * * * persons or things in interstate commerce," and to regulate activities that substantially affect interstate commerce. Cf. Lopez, 514 U.S. at 558-559; see Soderna, 82 F.3d at 1373; Hoffman, 126 F.3d at 586-588.

W. Individuals Seeking And Providing Reproductive Health Services And Reproductive Health Clinics That Provide Abortions Are Engaged In Interstate Commerce

The Access Act prohibits action that interferes with persons and entities engaged in interstate commerce and, therefore, is within Congress's power to regulate commerce. See Soderna, 82 F.3d at 1373; Dinwiddie, 76 F.3d at 919-920. Congress reasonably concluded that reproductive health clinics

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[3/] Pagnanelli also asserts (Br. 17-18) that the Access Act exceeds Congress's Commerce Clause authority because the statute does not contain a jurisdictional element. Where there are express findings by Congress of a substantial effect on interstate commerce, as here, the statute need not contain a case-by-case jurisdictional element. See Lopez, 514 U.S. at 561-562; Terry, 101 F.3d at 1418.

that provide abortion services and individuals associated with the clinics are involved in interstate commerce. See S. Rep. No. 117, 103d Cong., 1st Sess. 31 (1993).

Congress found that many patients who seek services from abortion providers and doctors who perform such services engage in interstate commerce by traveling from one State to another. See S. Rep. No. 117, supra, at 31; H.R. Rep. No. 306, 103d Cong., 1st Sess. 8, 10 (1993); accord H.R. Conf. Rep. No. 488, 103d Cong., 2d Sess. 7 (1994). Also, Congress determined that there was a national market for abortion services. See S. Rep. No. 117, supra, at 17. Congress further concluded that the violent and threatening conduct that is now subject to FACE

> interfer[es] with the interstate commercial activities of health care providers, including the purchase and lease of facilities and equipment, sale of goods and services, employment of personnel and generation of income, and purchase of medicine, medical supplies, surgical instruments and other supplies from other states * * *.

H.R. Conf. Rep. No. 488, supra, at 7; see also S. Rep. No. 117, supra, at 11, 32.[4/]

[4/] These findings accurately reflect the extensive testimony and evidence presented to the respective committees. See Abortion Clinic Violence: Hearings Before the Subcomm. on Crime and Criminal Justice of the House Comm. on the Judiciary, 103d Cong., 1st Sess. 3 (1993) (letter of Att'y Gen. Reno, stating that "patients and staff frequently travel interstate" to receive or to administer abortion-related services); The Freedom of Access to Clinic Entrances Act of 1993: Hearing on S. 636 Before the Senate Comm. on Labor and Human Resources, 103d Cong., 1st Sess. 59, 65 (1993) (statement of Willa Craig, Executive Director, Blue Mountain Clinic, Missoula, MT, that "[a] large number of our abortion and our prenatal patients travel an average of 120 miles to their appointments at our clinic due to lack of services in their own areas. These areas include Idaho,

(continued...)

The Supreme Court has determined that an entity is engaged in interstate commerce "when it is itself 'directly engaged in the production, distribution, or acquisition of goods or services in interstate commerce.'" United States v. Robertson, 514 U.S. 669, 672 (1995) (quoting United States v. American Bldg. Maintenance Indus., 422 U.S. 271, 283 (1975)). The Seventh and Eighth Circuits have recognized that FACE prohibits action that interferes with persons and entities engaged in the receipt and delivery of reproductive health services, including abortions, in interstate commerce. In Soderna, the Seventh Circuit held that the Access Act is "a statute that really does seek to remove a significant obstruction, in rather a literal sense, to the free movement of persons and goods across state lines." 82 F.3d at 1373 (citing Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964) and Katzenbach v. McClung, 379 U.S. 294 (1964)); see also Dinwiddie, 76 F.3d at 919-920 (Access Act properly regulates persons and things in interstate commerce). Accordingly, with appropriate deference to Congress's findings on the interstate nature of reproductive health services, and how threats and obstruction interfere with the delivery of such services, this Court similarly should conclude that Congress

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[4/](...continued)
eastern Washington, Wyoming and Canada."); S. Rep. No. 117, supra, at 17 ("The availability of abortion services is already very limited in many parts of the United States."); S. Rep. No. 117, supra, at 17 n.29 ("Nationwide, 83% of counties have no abortion provider. * * * In North Dakota, the only physician who performs abortions commutes from Minnesota.").

acted within its authority to enact FACE. See Soderna, 82 F.3d at 1373; Bishop, 66 F.3d at 576.

B. The Access Act Proscribes Activity That Has A Substantial, Adverse Effect On Interstate Commerce

Pagnanelli contends (Br. 16) that protest activity, even in the aggregate, does not substantially affect interstate commerce. It is not the protest itself, but the consequences of obstruction -- i.e., interference or stoppage of the operations of reproductive health clinics and delays for patients -- that substantially affect interstate commerce. Cf. Lopez, 514 U.S. at 558-559.

1. Congress also made extensive findings regarding the substantial effects that activity prohibited by the Access Act has on interstate commerce. See S. Rep. No. 117, supra, at 14; H.R. Rep. No. 306, supra, at 8-9. In sum, the Senate found that the activity regulated by the Access Act had

> a significant adverse impact not only on abortion patients and providers, but also on the delivery of a wide range of health care services. This conduct has forced clinics to close, caused serious and harmful delays in the provision of medical services, and increased health risks to patients. It has also taken a severe toll on providers, intimidated some into ceasing to offer abortion services, and contributed to an already acute shortage of qualified abortion providers.

S. Rep. No. 117, supra, at 14; see H.R. Rep. No. 306, supra, at 8-9.

The Senate had ample evidence to support these findings. The Senate Report cited numerous doctors from around the country who stopped performing abortions as a result of the threats,

tactics, and pressures of anti-abortion groups. See S. Rep. No. 117, supra, at 17. Congress also considered testimony about the adverse affects such activity had on patients.[5/] See S. Rep. No. 117, supra, at 15.

The House further explained that violent and obstructive acts now subject to FACE "have destroyed millions of dollars worth of property, endangered lives and curtailed access to health care for women, especially in rural areas." H.R. Rep. No. 306, supra, at 8.[6/] Damage to facilities not only eliminates, on a temporary or permanent basis, abortion services but also other health services provided by such facilities. See S. Rep. No. 117, supra, at 14-15. Thus, there is a "direct" causal connection between the commission of acts prohibited by FACE and the availability of reproductive health services in interstate commerce. Dinwiddie, 76 F.3d at 921; see Wilson, 73 F.3d at 680-682.

[5/] Dr. Pablo Rodriguez testified, for example, that "[w]omen who do make it in have a heightened level of anxiety and a greater risk of complications. The delay caused by the [attacks] has forced some patients to seek care elsewhere due to the fact that their gestational age has gone beyond the first trimester." S. Rep. No. 117, supra, at 15.

[6/] The House Report cited the National Abortion Federation's Report, which showed that between 1984 and 1992 "there have been 28 bombings, 62 arsons, 48 attempted bombings and arsons, 266 bomb threats, and 394 incidents of vandalism. * * * The total cost of such incidents to clinics in 1992 totaled almost $1.8 million in property damage alone." See H.R. Rep. No. 306, supra, at 8. Further, in 1992 there were 57 instances in which persons injected butyric acid into reproductive health clinics providing abortion services, which resulted in "almost half a million dollars" of damage to these clinics. See H.R. Rep. No. 306, supra, at 9.

2. Testimony at the hearings regarding the Access Act also supports Congress's finding that "[m]any of the activities * * * have been organized and directed across State lines." S. Rep. No. 117, supra, at 13. Attorney General Janet Reno testified that "much of the activity has been orchestrated by groups functioning on a nationwide scale, including, but not limited to, Operation Rescue, whose members and leadership have been involved in litigation in numerous areas of the country." The Freedom of Access to Clinic Entrances Act of 1993: Hearing on S. 636 Before the Senate Comm. on Labor and Human Resources, 103d Cong., 1st Sess. 14 (1993).

Evidence that interference with abortion services is a problem of national scope further buttresses Congress's conclusion that the proscribed conduct has a substantial effect on interstate commerce. See Wilson, 73 F.3d at 683; see also Summit Health, Ltd. v. Pinhas, 500 U.S. 322, 329-330 (1991) (Congress could prevent the boycott of one ophthalmologist because of the potential, aggregate impact on interstate commerce); Heart of Atlanta Motel, Inc., 379 U.S. at 253-256 (evidence of a "nationwide" practice of excluding blacks from hotels, which deterred many blacks from traveling, supported Congress's finding that such discrimination substantially affects interstate commerce).

3. Once a court finds that Congress had a rational basis for concluding that an activity substantially affects interstate commerce, "the only remaining question for judicial inquiry is

whether 'the means chosen by [Congress] [are] reasonably adapted to the end permitted by the Constitution.'" Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264, 276 (1981) (quoting Heart of Atlanta Motel, Inc., 379 U.S. at 262); see Weslin, 156 F.3d at 296; Wilson, 73 F.3d at 680 n.6. The Act's civil and criminal penalties are designed to compensate victims and deter violent and obstructive conduct. These penalties are reasonably adapted to the Act's permissible ends, which include: "(1) protecting the free flow of goods and services in commerce, (2) protecting patients in their use of the lawful services of reproductive health facilities, (3) protecting women when they exercise their constitutional right to choose an abortion, (4) protecting the safety of reproductive health care providers, and (5) protecting reproductive health care facilities from physical destruction and damage." American Life League, Inc. v. Reno, 47 F.3d 642, 647 (4th Cir.), cert. denied, 516 U.S. 809 (1995).

Thus, Congress's well-grounded findings of how obstruction and violence temporarily and permanently stop reproductive health service providers' services and interfere with doctors and patients demonstrate that Congress had a rational basis to conclude that the activity subject to the Access Act "sufficiently affects" interstate commerce. See Dinwiddie, 76 F.3d at 920; Wilson, 73 F.3d at 680-683.

Finally, to the extent Pagnanelli also contends (Br. 16-17) that Congress exceeded its Commerce Clause authority because the Access Act does not regulate commercial activity, this assertion

is also without merit. In fact, courts have consistently rejected this argument and held that Congress can regulate noncommercial entities and activities that substantially affect interstate commerce. See Hoffman, 126 F.3d at 587; Terry, 101 F.3d at 1417; Dinwiddie, 76 F.3d at 920; Wilson, 73 F.3d at 684.

IV

THE ACCESS ACT DOES NOT VIOLATE THE FIRST AMENDMENT (Cross-Appeal)

Pagnanelli contends (Br. 19) that the Access Act restricts speech and expressive conduct that is protected under the First Amendment. Every court of appeals that has addressed this issue has held that the Access Act does not violate the First Amendment. See United States v. Weslin, 156 F.3d 292, 296-298 (2d Cir. 1998), cert. denied, 119 S. Ct. 804 (1999); Hoffman v. Hunt, 126 F.3d 575, 588-589 (4th Cir. 1997), cert. denied, 523 U.S. 1136 (1998); Terry v. Reno, 101 F.3d 1412, 1418-1422 (D.C. Cir. 1996), cert. denied, 520 U.S. 1264 (1997); United States v. Soderna, 82 F.3d 1370, 1374-1377 (7th Cir.), cert. denied, 519 U.S. 1006 (1996); United States v. Dinwiddie, 76 F.3d 913, 921-924 (8th Cir.), cert. denied, 519 U.S. 1043 (1996); Cheffer v. Reno, 55 F.3d 1517, 1521-1522 (11th Cir. 1995); see also United States v. Bird, 124 F.3d 667, 683-684 (5th Cir. 1997) (rejecting claim that the Access Act is unconstitutionally overbroad), cert. denied, 523 U.S. 1006 (1998).

A. The Access Act Prohibits Conduct That Is Not Protected By The First Amendment

Pagnanelli's assertion (Br. 19) that picketing and counseling are protected by the First Amendment is correct, but this statement has no bearing on their violation of the Access Act. The defendants did not violate the Access Act by picketing or sidewalk counseling, but by obstructing access to Metropolitan Medical Associates (MMA) on August 7, 1996, January 18, 1997, and March 15, 1997. See United States v. Gregg, 32 F. Supp. 2d 151, 153-155 (D.N.J. 1998).

The Access Act regulates conduct, not expression. See Terry, 101 F.3d at 1418. By its terms, the Access Act proscribes solely the use of "force," "threat[s] of force," or "physical obstruction" to interfere with, intimidate, or physically obstruct persons who are attempting to obtain or provide reproductive health services. 18 U.S.C. 248(a); see Hoffman, 126 F.3d at 588; Cheffer, 55 F.3d at 1521. The term "physical obstruction" is narrowly defined to reach only conduct that "render[s] * * * ingress to or egress from a [reproductive health care] facility" "impassable," or "unreasonably difficult or hazardous." 18 U.S.C. 248(e)(4). The term "interfere with" is narrowly defined to reach only conduct that "restrict[s] a person's freedom of movement." 18 U.S.C. 248(e)(2); Cheffer, 55 F.3d at 1521.

Activities that injure, threaten, or obstruct are not protected by the First Amendment, whether or not such conduct communicates a message. See United States v. Wilson, 154 F.3d

658, 662-663 (7th Cir. 1998), cert. denied, 119 S. Ct. 824 (1999); Terry, 101 F.3d at 1418-1419. The Supreme Court has consistently "reject[ed] the 'view that an apparently limitless variety of conduct can be labeled "speech" whenever the person engaging in the conduct intends thereby to express an idea.'" Wisconsin v. Mitchell, 508 U.S. 476, 484 (1993) (quoting United States v. O'Brien, 391 U.S. 367, 376 (1968)). Thus, "a physical assault is not by any stretch of the imagination expressive conduct protected by the First Amendment." Wisconsin, 508 U.S. at 484; Terry, 101 F.3d at 1419 (quoting Wisconsin). In R.A.V. v. City of St. Paul, 505 U.S. 377, 388 (1992), the Court held that "threats of violence are outside the First Amendment." Further, in Cameron v. Johnson, 390 U.S. 611, 616 (1968), the Court upheld a statute prohibiting picketing that obstructs or unreasonably interferes with ingress or egress to or from a courthouse.

The Access Act's prohibition against obstruction and unreasonable interference with ingress to or egress from a building, like the similarly worded statute upheld in Cameron, see 390 U.S. at 612 n.1, "does not abridge constitutional liberty 'since such activity bears no necessary relationship to the freedom to . . . distribute information or opinion.'" Id. at 617 (quoting Schneider v. New Jersey, 308 U.S. 147, 161 (1939)); accord Cox v. Louisiana, 379 U.S. 536, 555 (1965); American Life League, Inc. v. Reno, 47 F.3d 642, 648 (4th Cir.), cert. denied, 516 U.S. 809 (1995). Since the defendants' blockades of access

to MMA are not protected under the First Amendment, this Court should affirm the district court's judgment. See Wilson, 154 F.3d at 663; Terry, 101 F.3d at 1418-1419.

B. Even If The Access Act Proscribes Some Expressive Conduct, The Act Is A Constitutional Content-Neutral Regulation Of Conduct

Pagnanelli's assertion (Br. 20-24) that the Access Act is viewpoint-based, focusing only on anti-abortion views, is without merit. Even if the Access Act affects protected speech, the district court was correct in concluding that the statute is nonetheless constitutional because it is content-neutral. Joint Appendix 151-152; see Terry, 101 F.3d at 1419.

1. In determining the level of scrutiny applicable to the Access Act, the first question is whether the Act is content- and viewpoint-neutral. See Wilson, 154 F.3d at 663-664; American Life League, 47 F.3d at 648. A statute is content-neutral if Congress prohibits conduct without reference to the content of the violator's message, and even if there is an incidental effect on some speech. Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989) (restrictions on volume for outdoor amphitheater upheld). The principal inquiry is whether the statute serves purposes unrelated to the content of expression. Ibid.; American Life League, 47 F.3d at 649.

The Access Act itself identifies its purposes:

> [I]t is the purpose of this Act to protect and promote the public safety and health and activities affecting interstate commerce by establishing Federal criminal penalties and civil remedies for certain violent, threatening, obstructive and destructive conduct that is intended to injure,

> intimidate or interfere with persons seeking to obtain or provide reproductive health services.

Pub. L. No. 103-259, § 2, 108 Stat. 694; H.R. Conf. Rep. No. 488, 103d Cong., 2d Sess. 7 (1994). Thus, the Access Act is justified not by reference to the content of any expression it may incidentally affect, but by the needs to protect interstate commercial transactions, to protect women who seek to exercise their constitutional right to reproductive choice, and to maintain public safety and order. See Terry, 101 F.3d at 1419; American Life League, 47 F.3d at 649.

2. Further, the Access Act expressly prohibits interference with persons because they are providing or obtaining "reproductive health services," which encompasses "services relating to pregnancy." 18 U.S.C. 248(e)(5) (emphasis added). This includes "counselling" that a pro-life group might give to a pregnant woman to urge her not to have an abortion, as well as medical care for women who choose to terminate their pregnancy. 18 U.S.C. 248(e)(5). As Congress explained, the Act applies

> evenly to anyone who engages in the prohibited conduct, regardless of their views on the issue of abortion. * * * [B]y covering reproductive health services and not merely abortion, the bill would apply to blockades by pro-choice activists -- should such blockages occur -- outside clinics engaged in pro-life counseling or providing abortion alternatives.

H.R. Rep. No. 306, 103d Cong., 1st Sess. 3 (1993).[7/] Thus, Pagnanelli's viewpoint is "irrelevant" to assessing whether the Act applies; the focus is on the defendants' conduct "because of its harmful effects," not because of the content of the message. See American Life League, 47 F.3d at 649; see also Terry, 101 F.3d at 1419.

3. Pagnanelli also asserts (Br. 21-22) that FACE coverage for anti-abortion protests and interference, but not labor protests directed at the same facility, renders FACE content-based. This argument is also unavailing; Pagnanelli misunderstands the nature of content-neutral and viewpoint-based statutes. The Access Act's prohibition on interference and obstruction "because" such persons seek to obtain or provide reproductive health services does not infuse a content-based element that violates the First Amendment. See 18 U.S.C. 248(a);

[7/] Pagnanelli contends (Br. 21, 23) that the statute only affects activities of anti-abortion protesters, and that any reference in the statute or legislative history to coverage of activity by pro-life supporters is a "counterfactual, hypothetical scenario" that does not reflect neutrality. There is no basis for Pagnanelli's assertion of "hypothetical" coverage. As discussed, the statute and legislative history are unequivocal on coverage of both pro-life and pro-abortion activists who engage in unlawful activity. See American Life League, 47 F.3d at 649. Further, the Department of Justice neutrally enforces the Access Act against individuals who interfere with persons who are providing "pro-life," anti-abortion reproductive health counseling services, just as it prosecutes defendants for interfering with the provision of reproductive health services that include abortion. In United States v. Mathison, No. 95-CR-85 (E.D. Wa. Sept. 1, 1995), for example, the government successfully prosecuted the defendant with violating the Access Act by threatening to injure persons who provide pro-life counseling.

see also Terry, 101 F.3d at 1419; Dinwiddie, 76 F.3d at 923; American Life League, 47 F.3d at 650.

The Access Act's motive requirement limits the reach of the statute to that conduct in which Congress had the strongest federal interest: intentional, rather than merely incidental, interference with access to reproductive health services. Congress reasonably determined that activity undertaken for the purpose of interfering with access to reproductive health services is more damaging to federal interests than activity that is undertaken for other reasons. See Dinwiddie, 76 F.3d at 923; American Life League, 47 F.3d at 649-650. Congress may choose, as it did here, to legislate against only those evils it considers inflict the greatest societal harm. See Wisconsin v. Mitchell, 508 U.S. 476, 487 (1993); Terry, 101 F.3d at 1420; Dinwiddie, 76 F.3d at 924; American Life League, 47 F.3d at 650.[8/] Congress found that interference motivated by a desire to prevent delivery of reproductive health services "inflict[s] greater individual and societal harm," Wisconsin, 508 U.S. at 487-488, in part because it targets women who are exercising

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[8/] In Wisconsin, 508 U.S. at 487-488, the Court unanimously upheld a statute mandating a penalty-enhancement for crimes that are committed "because" of the race of the victim. Like Pagnanelli, the defendant in Wisconsin argued that he was being punished because of his motive for committing the crime. See id. at 487. The Court concluded that "motive plays the same role under the Wisconsin statute as it does under federal and state anti-discrimination laws, which we have previously upheld against constitutional challenge." Ibid. The Court concluded that the statute at issue in Wisconsin was directed at conduct, not expression, and it "singles out * * * bias-inspired conduct because [it] is thought to inflict greater individual and societal harm." Id. at 487-488.

their constitutional right to reproductive freedom. See H.R. Rep. No. 306, supra, at 12; S. Rep. No. 117, 103d Cong., 1st Sess. 24 (1993). In this respect, the Access Act is indistinguishable from the ordinance in Wisconsin, 508 U.S. at 487; it is directed at conduct rather than expression. See Terry, 101 F.3d at 1420.

4. A content-neutral law must satisfy the criteria set forth in United States v. O'Brien, 391 U.S. 367, 377 (1968). See Associated Film Distribution Corp. v. Thornburgh, 800 F.2d 369, 373 (3d Cir. 1986), cert. denied, 480 U.S. 933 (1987). "[W]hen 'speech' and 'nonspeech' elements are combined in the same course of conduct," a regulation of such conduct will be constitutional (1) "if it furthers an important or substantial governmental interest;" (2) "if the governmental interest is unrelated to the suppression of free expression;" and (3) "if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." O'Brien, 391 U.S. at 376-377. In O'Brien, the Supreme Court held that the government had a substantial interest in maintaining the efficiency of the selective service system to prohibit burning Selective Service registration cards; the government's focus was on noncommunicative aspects of conduct and the efficiency of operations; and no "alternative means * * * would more precisely and narrowly" maintain the efficiency of the service system. Id. at 380-382.

Similarly, the Access Act easily satisfies each of the O'Brien requirements. First, the Access Act furthers at least three substantial and legitimate government interests: protecting persons engaging in interstate commerce from interference, protecting a woman's freedom to seek lawful medical or counseling services in connection with her pregnancy, and maintaining public order and safety. See Terry, 101 F.3d at 1419; American Life League, 47 F.3d at 651-652; Pub. L. No. 103-259, § 2, 108 Stat. 694; H.R. Conf. Rep. No. 488, supra, at 7-8. As discussed at page 22, supra, these interests are unrelated to any expressive content the forbidden conduct may have. See American Life League, 47 F.3d at 652 (assessment of whether interests are related to suppression of free speech similar to analysis of whether law is content-neutral); see also Madsen v. Women's Health Ctr., Inc., 512 U.S. 753, 767-768 (1994) (state court order imposing a buffer zone around a reproductive health clinic justified by significant state interest in ensuring public safety and protecting a woman's freedom to seek lawful medical services).

The Act is narrowly tailored so as not to impinge unnecessarily on expression. This requirement is satisfied if a restriction "promotes a substantial governmental interest that would be achieved less effectively absent the" restriction, and if it does not "burden substantially more speech than is necessary to further" the government's legitimate interests. Turner Broad. Sys., Inc. v. FCC, 520 U.S. 180, 213-214 (1997)

(citing Ward, 491 U.S. at 799). Clearly, protection of the right to reproductive choice and access to reproductive health services -- the objectives of FACE -- are threatened in the absence of FACE. There would be no federal means to protect and compensate victims or to punish and deter individuals who engage in conduct that interferes with reproductive health services. As discussed in our opening brief (Br. 13-15), Congress enacted FACE because existing state and federal laws were inadequate to stem the violence and interference caused by the acts of anti-abortion protesters. See H.R. Rep. No. 306, supra, at 3-10; S. Rep. No. 117, supra, at 2-21.

Further, the Access Act is narrowly drawn to prohibit only unprotected conduct, not speech. See American Life League, 47 F.3d at 652. The Access Act's limiting definitions of key statutory terms ensure that it proscribes only force, threats, and obstruction that interfere with access to reproductive health care. See Cheffer, 55 F.3d at 1521-1522; 18 U.S.C. 248(e). Thus, given the Act's focus on conduct, it "proscribes no more expressive conduct than necessary to protect safe and reliable access to reproductive health services." American Life League, 47 F.3d at 652.

Third, the Act leaves open every peaceful and nonobstructive means for people to express their views, even in the immediate vicinity of health services facilities. See Weslin, 156 F.3d at 298; Terry, 101 F.3d at 1420; American Life League, 47 F.3d at 652. "The Access Act does not prohibit protestors from praying,

chanting, counseling, carrying signs, distributing handbills or otherwise expressing opposition to abortion, so long as these activities are carried out in a non-violent, non-obstructive manner." Id. at 648; see id. at 652. Instead, the Act narrowly targets solely that conduct that Congress legitimately seeks to prevent: obstruction, interference, and violence against clinics, clinic personnel, and patients. See 18 U.S.C. 248. Thus, the Act is narrowly tailored to achieve its legitimate ends, and ample alternatives for expression, be it pro-choice or pro-life, remain unfettered. Cf. O'Brien, 391 U.S. at 377; see American Life League, 47 F.3d at 652.

V

PAGNANELLI'S ASSERTION THAT FACE IS "VAGUE AND OVERBROAD" IS WITHOUT MERIT (Cross-Appeal)

Pagnanelli asserts (Br. 24-25) that FACE is "vague and overbroad" because he has unveiled the United States' alleged intention to seek damages from the other individuals who were engaged in peaceful protests at the times the defendants engaged in obstructive acts that violated FACE. Pagnanelli bases this contention on the United States' description of other protesters' activities in its statement of facts (Opening Br. 8-9). The United States briefly described the acts of the other protesters in order to provide context for defendants' action. The other protesters, unlike defendants, did not engage in activities that violate FACE. In fact, the United States specifically described a fourth protest that occurred on April 19, 1997, which did not

result in any violation of FACE, because local police were able to prevent any obstruction of the reproductive health facility (Opening Br. 10 n.11).

CONCLUSION

This Court should reject Pagnanelli's appeal, reverse the district court's judgment regarding the interpretation of FACE statutory damages, and assess statutory damages per defendant, per violation.

Respectfully submitted,

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CERTIFICATION OF BAR MEMBERSHIP

David K. Flynn is a member of the Third Circuit bar.

CERTIFICATE OF SERVICE

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