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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; WILLIAMS  
RAISER; JAMES SODERNA; KEVIN BLAKE; BALDO DINO, FRANCIS S.  
PAGNANELLI,

Cross-Appellants

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

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BRIEF FOR THE UNITED STATES AS APPELLANT

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IN THE UNITED STATES COURT OF APPEALS  
FOR THE THIRD CIRCUIT

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

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

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

---

BRIEF FOR THE UNITED STATES AS APPELLANT

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STATEMENT OF JURISDICTION

The district court had jurisdiction pursuant to 18 U.S.C. 248(c)(2). The district court entered a final judgment on December 11, 1998. The United States filed a timely notice of appeal on February 4, 1999 (J.A. 180-182).<sup>1</sup> This Court has

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<sup>1</sup> "J.A. \_\_\_" refers to pages of the Joint Appendix filed with this brief. "R. \_\_\_" refers to the docket number of the pleading identified on the district court docket sheet. "Tr. \_\_\_" refers to the volume and page number of the transcript of the district court's evidentiary hearing for the preliminary injunction held  
(continued...)

jurisdiction pursuant to 28 U.S.C. 1291.

STATEMENT OF THE ISSUE AND STANDARD OF REVIEW

Whether the district court erred in holding that the defendants are jointly and severally liable, rather than individually liable, for statutory damages of \$5,000 "per violation" of the Freedom of Access to Clinic Entrances Act of 1994, 18 U.S.C. 248(a)(1).<sup>2</sup> This Court's review of the district court's interpretation of the statute is plenary.

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.

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<sup>1/</sup> (...continued)  
on July 8-10, 1997. "U.S. P/I Exh. \_\_," "U.S. S/J Exh. \_\_," or "Defendants' P/I Exh. \_\_" refers to the respective parties' exhibit that was admitted during either the preliminary injunction (P/I) hearing, or submitted with the parties' memorandum in support of the motion for or opposition to summary judgment (S/J).

<sup>2/</sup> The United States sought \$5,000 in damages per defendant, per violation in its complaint (J.A. 37-38). The district court requested briefs from the parties on this matter and issued a memorandum on June 18, 1998 (J.A. 169-173). The district court's final judgment incorporates the substantive portions of its June 18 memorandum and holds that statutory damages are issued per violation, jointly and severally among defendants who committed such violation.

STATEMENT OF THE CASE

On April 18, 1997, the United States of America filed a complaint against 30 defendants alleging violations of the Freedom of Access to Clinic Entrances Act of 1994 (FACE or Access Act), 18 U.S.C. 248(a)(1), between August 1996 and March 1997, at the premises of Metropolitan Medical Associates (MMA), a reproductive health services provider in Englewood, New Jersey (J.A. 19-39).<sup>3</sup> Specifically, the United States alleged that each defendant participated in one, two, or three protests that violated FACE by obstructing access to MMA, or by attempting to intimidate persons and to interfere with access to and the provision of reproductive health services by MMA (J.A. 24-32, 35-36).

The Honorable John C. Lifland, District Court of New Jersey, conducted an evidentiary hearing on the United States' Motion for Preliminary Injunction (R. 25) on July 8-10, 1997. In sum, evidence presented at the hearing established that five defendants blocked access to MMA on August 7, 1996; 12 defendants blocked access to MMA on January 18, 1997; and 19 defendants blocked access to MMA on March 15, 1997 -- all of which are in violation of FACE. Accordingly, on December 22, 1997, the district court entered an Order and Preliminary Injunction that enjoined defendants, including their employees, agents, and

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<sup>3/</sup> Following discovery, the parties stipulated to the dismissal of claims against defendant Mary Foley (R. 111). Since the district court did not issue an order modifying the caption, Ms. Foley remains listed as a party to this appeal.

others acting in concert with them, from blocking and impeding access to MMA, intimidating or attempting to intimidate or interfere with persons seeking access to MMA, and entering or being on MMA premises (J.A. 133-134).

FACE provides that statutory damages of \$5,000 may be awarded "in lieu of actual damages \* \* \* per violation." 18 U.S.C. 248(c)(1)(B). At the district court's request, the parties submitted pleadings addressing the proper interpretation of statutory damages.<sup>4</sup> On June 18, 1998, the district court issued a memorandum concluding that the \$5,000 statutory damages were to be assessed per violation and that all defendants who participated in each violation are jointly and severally liable for that amount (J.A. 169-173).

On December 11, 1998, the district court granted the United States' Motion for Summary Judgment and issued a Memorandum and Order Entering Final Judgment (Addendum). See United States v. Gregg, 32 F. Supp. 2d 151 (D.N.J. 1998). The district court reiterated the facts as found after the preliminary injunction hearing and concluded that the defendants violated FACE when they conducted all three blockades. See id. at 153-158. The district court made the injunction permanent. See id. at 158-159. The

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<sup>4/</sup> The district court docket sheet does not reflect the three pleadings filed by the parties regarding the interpretation of statutory damages. The United States filed its Memorandum of Law Regarding Statutory Damages on March 10, 1998. The defendants filed their Answering Brief on Behalf of the Defendants with Respect to FACE Damages on March 23, 1998. The United States filed its Reply to Answering Brief of Defendants with Respect to Statutory Damages Under the Access Act on March 26, 1998.



district court also held the defendants who participated in each blockade jointly and severally liable for statutory damages of \$5,000. Thus, five defendants are jointly and severally liable for the August 7 blockade; 12 defendants are jointly and severally liable for the January 18 blockade; and 18 defendants are jointly and severally liable for the March 15 blockade. See id. at 160-161.<sup>5</sup>

The United States filed its notice of appeal on February 4, 1999 (J.A. 180-183) (Case No. 99-5079). Defendants Kevin Blake, Baldo Dino, Rose Kidd, Raymond Micco, William Raiser, James Soderna, James Sweatt, and Elizabeth Wagi filed a cross-appeal on February 18, 1999 (J.A. 184-188) (Case No. 99-5124). Defendant Francis Pagnanelli also filed a cross-appeal on February 18, 1999 (J.A. 189-192) (Case No. 99-5205).

#### STATEMENT OF FACTS

##### C. Relevant Statutory Provisions

The relevant provisions of the Freedom of Access to Clinic Entrances Act of 1994 (FACE), 18 U.S.C. 248, are as follows:

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<sup>5/</sup> Accordingly, the four defendants who participated in the January and March 1997, blockades -- Michael Henry, Rose Kidd, Arnold Matheson, and Katharine O'Keefe -- are jointly and severally liable for \$10,000, and Luis Menchaca, who participated in three blockades, is jointly and severally liable for \$15,000.

The judgment states that 19 defendants, including Mary Foley, are jointly and severally liable for the March 1997, protest. Given the stipulation of dismissal of Mary Foley (R. 111), see note 3, supra, we refer only to the 18 defendants who participated in the March 1997, protest.

(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 \* \* \* obtaining or providing reproductive health services;

\* \* \* \* \*

shall be subject to the penalties provided in subsection (b) and the civil remedies provided in subsection (c) [.]

\* \* \* \* \*

(c) Civil Remedies.--

(1) Right of action.--

(A) In general.--Any person aggrieved by reason of the conduct prohibited by subsection (a) may commence a civil action for the relief set forth in subparagraph (B) \* \* \* [.]

(B) Relief.--In any action under subparagraph (A), \* \* \* [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.

(emphasis added).

Further, in actions brought by the Attorney General, a court, "to vindicate the public interest, may also assess a civil penalty against each respondent" in amounts of \$10,000 to \$25,000, depending on whether these are initial or subsequent violations by the respondent. 18 U.S.C. 248(c)(2)(B).

D. Defendants' Three Blockades Of MMA Violated FACE

1. Metropolitan Medical Associates (MMA) is located in a two-story building at 40 Engle Street, Englewood, New Jersey.

See United States v. Gregg, 32 F. Supp. 2d 151, 153 (D.N.J. 1998).<sup>6</sup> Patients, staff, and visitors enter MMA through an entrance on Engle Street, pass a security station, and proceed up a staircase to the second floor to MMA's reception area. See ibid. Administrative offices are also located on the second floor.

2. On August 7, 1996, five defendants entered the MMA facility and sat at the top of the staircase on the second floor landing (see J.A. 81). See Gregg, 32 F. Supp. 2d at 153. Three defendants, Joseph Gregg, Luis Menchaca, and William Raiser, connected and locked U-shaped "kryptonite" bicycle locks around each of their necks and blocked access to the reception area. See ibid. Defendants Ruby McDaniel and Francis Pagnanelli similarly locked U-shaped "kryptonite" locks together and around each others' necks and blocked access to MMA's offices. See id. at 153-154. The Englewood Police Department instructed the defendants to remove the locks and to leave the area, but the protesters ignored the law enforcement officers and repeatedly stated, at times loudly and belligerently, their opposition to abortion. See id. at 154. Fire department personnel eventually were able to remove the locks from three defendants and carry

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<sup>6/</sup> The district court noted in both its opinion granting the preliminary injunction (J.A. 156) and on summary judgment, United States v. Gregg, 32 F. Supp. 2d 151, 153 n.1, 157-158 (D.N.J. 1998) (Addendum), that defendants did not object substantively to the facts presented by the United States regarding the three blockades at the preliminary injunction hearing, on motion for summary judgment, and as found by the district court.

them individually down the stairs to police cars. See ibid. Two defendants, however, needed to be carried by law enforcement personnel, while locked together, out of the MMA building. See ibid.<sup>7</sup> In addition to blocking completely the primary means of entry for patients, staff, and visitors to MMA<sup>8</sup>, the defendants' actions also upset some MMA staff. See ibid.

3. On January 18, 1997, 12 defendants<sup>9</sup> were initially part of a larger group of protesters who were on the sidewalk of Engle Street across from MMA chanting anti-abortion slogans and carrying placards decrying abortion. See Gregg, 32 F. Supp. 2d at 154. At one point, these defendants rushed across the street, notwithstanding the presence of police officers and vehicles near or in front of MMA's entrance, and sat or laid prone on the sidewalk immediately in front of MMA's doorway. See ibid. Some defendants also tried unsuccessfully to enter MMA's front door.

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<sup>7/</sup> As a result of their conduct at each protest, the defendants were arrested and charged with trespass and other related offenses (U.S. P/I Exh. 6, individual arrest records).

<sup>8/</sup> The phrase "physical obstruction" means "rendering impassable ingress to or egress from a facility that provides reproductive health services \* \* \* or rendering passage to or from such a facility \* \* \* unreasonably difficult or hazardous." 18 U.S.C. 248(e)(4). Thus, defendants need not render all means of entry or exit to a reproductive health services provider impossible to violate FACE. See United States v. Soderna, 82 F.3d 1370, 1377 (7th Cir.), cert. denied, 519 U.S. 1006 (1996); 18 U.S.C. 248(e)(4). The United States need only prove, as it has, that defendants blocked the primary means of access to MMA to violate FACE.

<sup>9/</sup> These defendants are Eva Alvarado, Michael Henry, Rose Kidd, Arnold Matheson, Luis Menchaca, Joseph O'Hara, Katharine O'Keefe, Joseph Roach, Robert Rudnick, James Soderna, James Sweatt, and Elizabeth Wagi.

The 12 defendants completely blocked ingress or egress or made entry to MMA facilities extremely difficult because of their presence. See ibid. These defendants ignored police instructions to leave the area and passively resisted movement, thereby requiring several law enforcement officers to lift and move each defendant from the doorway. See ibid. Videotapes that recorded part of this protest and the March 15 protest, including the defendants' blockades of MMA's entrance, were admitted in evidence during the district court's hearing on the preliminary injunction motion (Defendants' P/I Exh. 1; U.S. P/I Exh. 5).

4. On March 15, 1997, 18 defendants<sup>10</sup> were part of a larger protest of approximately 100 persons on the sidewalk of Engle Street across from MMA (Tr. 1.215). See Gregg, 32 F. Supp. 2d at 154. Protesters chanted anti-abortion statements, cheered defendants for crossing the street to block MMA's entrance, and carried placards with anti-abortion messages. See id. at 155. Initially, approximately eight defendants rushed across the street to MMA's entrance and either sat or laid down on the sidewalk, some joining arms to link themselves together. See id. at 154. Once again, the defendants ignored police requests to leave and many officers were needed to carry the defendants from the area to police cars. As police were carrying these

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<sup>10/</sup> These defendants are Byron Adams, Kevin Blake, Amy Boissonneault, Baldo Dino, Stephen Elliot, Sheryl Fitzpatrick, Dennis Green, Michael Henry, Rose Kidd, George Lynch, Arnold Matheson, Luis Menchaca, Raymond Micco, Alexis Mulrenan, Katharine O'Keefe, Ralph Traphagen, James Trott, and Kimiko Trott.

defendants away, a second "wave" of defendants ran across the street to take their colleagues' places immediately in front of MMA's entrance and continued blocking MMA's entrance. See ibid. These defendants also refused to leave; several resisted the police and needed to be removed forcibly from the sidewalk. See ibid. At one point, the situation was so "chaotic" that law enforcement needed to close Engle Street, a major thoroughfare, to vehicle traffic. See id. at 155. A total of 18 defendants obstructed access to MMA's entrance. See id. at 154. The defendants' actions also angered and upset patients and their companions; one person was particularly concerned about needing to step over a protester in order to get inside MMA. See id. at 154-155.<sup>11</sup>

C. District Court Opinion

The United States' appeal concerns only that portion of the district court's analysis and conclusion that statutory damages are to be assessed per violation with defendants jointly and severally liable for participating in each such violation. See United States v. Gregg, 32 F. Supp. 2d 151, 160-161 (D.N.J. 1998). The district court stated that the "dichotomy" of the civil damages and the civil penalty provisions reflects

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<sup>11/</sup> On April 19, 1997, the day after the complaint was filed, another anti-abortion protest occurred on Engle Street. See Gregg, 32 F. Supp. 2d at 155. Englewood Police, with the assistance of several other law enforcement agencies, implemented a different strategy from January 18 and March 15, 1997, and were able to stop anti-abortion protesters before they reached MMA's entrance. The United States has not alleged that any protesters' actions on April 19, 1997, violated FACE.

Congress's intent that statutory damages be awarded collectively against defendants per violation and that civil penalties be imposed against each defendant. See id. at 160. The district court considered \$5,000 a "fair and just" determination of relief for interference with the rights protected by FACE without regard to the number of defendants. Ibid. The district court also stated that, depending on the circumstances, one person may be as "effective" as a group in inflicting an injury, including intimidation and interference. Ibid.

Significantly, the district court recognized that joint and several liability would not provide a "meaningful financial deterrent" in this case. Id. at 161. As a solution, the district court stated that the United States could have sought actual damages or civil penalties. See ibid. The court also cited, id. at 160, two other district court opinions, only one of which held that multiple defendants are jointly and severally liable "per violation." See Milwaukee Women's Med. Servs., Inc. v. Brock, 2 F. Supp. 2d 1172, 1178 (E.D. Wis. 1998); see also Greenhut v. Hand, 996 F. Supp. 372, 379 (D.N.J. 1998) (single defendant held liable for \$10,000 for two separate violations; threats made in two telephone calls).

#### SUMMARY OF ARGUMENT

Statutory damages of \$5,000 "per violation" should be assessed per defendant, per violation. The plain language of 18 U.S.C. 248(a) provides that statutory damages are to be awarded against "whoever" violates the Act. The purpose of statutory

damages is not only to compensate the plaintiff but also to punish the defendant for his or her violation and to deter future misconduct by the defendant and others. Joint and several liability, however, does not ensure a significant award will be imposed on a defendant and, thus, does not ensure a deterrent effect. Further, joint and several liability may promote rather than deter large scale activities in violation of FACE since the greater the number of participants, the lower the financial liability incurred by each participant.

#### ARGUMENT

STATUTORY DAMAGES SHOULD BE AWARDED PER DEFENDANT, PER VIOLATION

A. Individual Liability For Statutory Damages Is One Element Of Congress's Goal To Impose Significant Consequences For Violations Of FACE

1. The text, legislative history, and "'atmosphere in which [FACE] was enacted'" support imposing a statutory damages award per defendant, per violation. See New Rock Asset Partners, L.P. v. Preferred Entity Advancements, Inc., 101 F.3d 1492, 1498 (3d Cir. 1996) (citation omitted). First, the statute provides that "whoever" violates FACE is subject to civil remedies. 18 U.S.C. 248(a) (emphasis added). A plaintiff may seek, inter alia, compensatory damages or, "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). By using the term "whoever," Congress intended that each individual be liable for his or her prohibited conduct. If Congress intended joint and several



liability for all defendants, it would have so stated. See, e.g., 17 U.S.C. 504(c)(1). For example, statutory damages for copyright infringement are imposed "with respect to any one work, for which any one infringer is liable individually, or for which any two or more infringers are liable jointly and severally[.]" Ibid.<sup>12</sup>

2. Congress enacted FACE in the wake of a national campaign of disruption and violence targeted at reproductive health facilities, reproductive health providers, and patients. See Terry v. Reno, 101 F.3d 1412, 1416 (D.C. Cir. 1996), cert. denied, 520 U.S. 1264 (1997); United States v. Soderna, 82 F.3d 1370, 1372 (7th Cir.), cert. denied, 519 U.S. 1006 (1996); H.R. Rep. No. 306, 103d Cong., 1st Sess. 3, 6-10 (1993); S. Rep. No. 117, 103d Cong., 1st Sess. 3-21 (1993). Both the House and Senate Reports set forth an exhaustive account of the escalating violence. See H.R. Rep. No. 306, supra, at 6-10; S. Rep. No. 117, supra, at 3-10. As of April 1993, abortion providers and clinics had suffered 84 assaults, 36 bombings, 81 arsons, 71 chemical attacks, 131 death threats, two kidnappings, 327 clinic invasions, over 6,000 blockades, and one murder. See S. Rep. No. 117, supra, at 3, 6.

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<sup>12/</sup> The district court stated that FACE's civil penalties, which are assessed "against each respondent," contrast with the statutory damages provision and show Congress's intent to award relief differently for each provision. 18 U.S.C. 248(c)(2)(B); see Gregg, 32 F. Supp. 2d at 161. The alleged distinction between "per violation" and "each respondent" is eliminated, however, by examining the entire text. Damages are awarded in the singular; i.e., "whoever" violates the Act is subject to statutory damages "per violation." 18 U.S.C. 248(a) and 248(c).

Congress concluded that “[s]tate and local law enforcement authorities have failed to address effectively the systemic and nationwide assault” on reproductive health providers and patients. See H.R. Rep. No. 306, supra, at 10; S. Rep. No. 117, supra, at 19. First, due to the sheer size and frequency of blockades as compared to available law enforcement, law enforcement agencies often were overwhelmed by and unable to reign in the blockades and protestors’ other disruptive and violent acts. See S. Rep. No. 117, supra, at 19-20. Congress also recognized that opponents of abortion were engaged in a “national strategy” to try to stop doctors from performing abortions. H.R. Rep. No. 306, supra, at 9. Randall Terry, founder of Operation Rescue, “encourages mass disregard for the law so that judicial resources will become overtaxed and fail,” and he encourages protesters to consider whether courts and jails are “too overloaded to deal with rescue missions.” See S. Rep. No. 117, supra, at 11. The Dobbs Ferry, New York police department, with a force of 23, made 1,000 arrests over four years at blockades of reproductive health facilities. See H.R. Rep. No. 306, supra, at 7. In addition, some state and local law enforcement were sympathetic to protesters’ beliefs or actions. See S. Rep. No. 117, supra, at 19; H.R. Rep. No. 306, supra, at 10. Further, local law enforcement “inherent[ly]” cannot address effectively “interstate law enforcement issues.” See H.R. Rep. No. 306, supra, at 10.

Congress also found that “[a]nother problem with reliance on State and local laws is that the penalties for violations of these laws are often so low as to provide little if any deterrent effect.” See S. Rep. No. 117, supra, at 20 (emphasis added); see also H.R. Rep. No. 306, supra, at 10. For example, some protesters are charged fines no greater than parking tickets, and in some instances protesters are charged only \$50. As Congress aptly recognized, a protester easily can pay a nominal fine, return to the continuing blockade, and conclude that penalties are not that arduous or costly to require him or her to stop violating the law. See S. Rep. No. 117, supra, at 20-21. The nominal sanctions or consequences for past acts may be one factor for the increased violence and unlawful activity preceding FACE.

Thus, because state and local action were inadequate to stem the violence and interference with federally protected rights, Congress enacted FACE with substantial federal remedies. See United States v. Wilson, 154 F.3d 658, 662 (7th Cir. 1998), cert. denied, 119 S. Ct. 824 (1999); H.R. Rep. No. 306, supra, at 6-10; S. Rep. No. 117, supra, at 3, 17-21. Apart from criminal sanctions, see 18 U.S.C. 248(b), Congress created a civil right of action for private individuals, the Attorney General, and states’ attorneys general to seek injunctive relief, compensatory or statutory damages, punitive damages and attorney’s fees for private individuals, and civil penalties in actions by the Attorney General and States. See 18 U.S.C. 248(c).

3. Congress intended that FACE's statutory damages compensate individuals for harms suffered and impose punishment with an objective of deterrence for future misconduct. See S. Rep. No. 117, supra, at 22, 26-27. As the Senate explained:

[the Act] will also enable victims to recover monetary damages for injuries they may suffer. Because of the expense and other difficulties of proving actual damages (for example, a clinic's lost income), the Act provides for statutory damages of \$5,000 per violation, at the plaintiff's election. \* \* \* Finally, as an additional deterrent, the law authorizes the award of punitive damages (in private cases) and civil penalties (in cases brought by the Attorney General of the United States or of a State).

S. Rep. No. 117, supra, at 26 (emphasis added); see also H.R. Rep. No. 306, supra, at 10. The Senate also approvingly cited comments by Attorney General Janet Reno that civil remedies are an essential element of the legislation and that "the authorization of statutory damages is appropriate to encourage victims to pursue violations and as a deterrent to violators." S. Rep. No. 117, supra, at 27 (emphasis added).<sup>13</sup>

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<sup>13/</sup> While the statutory text (joint and several liability) and context is different from FACE, several courts have held that statutory damages for copyright violations, see 17 U.S.C. 504(c), also serve to compensate a plaintiff (without regard to proof of actual damages) and punish and deter future violations. See, e.g., Cass County Music Co. v. C.H.L.R., Inc., 88 F.3d 635, 643 (8th Cir. 1996) (statutory damages "'have evolved[,] \* \* \* arguably preeminently, to punish the defendant'"); Chi-Boy Music v. Charlie Club, Inc., 930 F.2d 1224, 1229 (7th Cir. 1991) (consider "efficacy of the damages as a deterrent" in assessing the amount of statutory damages); Peer Int'l Corp. v. Pausa Records, Inc., 909 F.2d 1332, 1337 (9th Cir. 1990) (maximum statutory damages awarded for each of 80 violations upheld, despite vastly exceeding actual damages, in order to "sanction and vindicate the statutory policy") (quoting F.W. Woolworth Co. v. Contemporary Arts, Inc., 344 U.S. 228, 233 (1952)), cert. denied, 498 U.S. 1109 (1991). The fact that a court may award statutory damages within a range under the Copyright Act, as

(continued...)

In determining whether FACE's statutory damages of \$5,000 should be assessed individually or jointly and severally, this Court should consider FACE's objective of imposing a significant consequence to stop the spiraling violence directed at reproductive health facilities, providers, and patients. Cf. Cass County Music Co. v. C.H.L.R., Inc., 88 F.3d 635, 643 (8th Cir. 1996) (copyright statutory damages serve objectives of compensation and punishment). Several defendants' prior actions illustrate how injunctions or nominal fines alone do not deter repeat violations. Seventeen defendants are subject to court orders that enjoin violations of FACE or of trespass laws against specific reproductive health providers or nationwide, impose criminal judgment for violations, or impose judgment of contempt for violating prior orders (U.S. S/J Exh. C, district and state court orders and opinions).<sup>14</sup> In the absence of a substantial

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<sup>13/</sup> (...continued)  
opposed to a set amount under FACE, is irrelevant. In either instance, the court should consider the purpose of the statute when interpreting its terms.

<sup>14/</sup> See, e.g., United States v. McDaniel, No. 96 Civ. 9202 (S.D.N.Y. July 7, 1997) (injunctive relief for obstructing access to New York City clinic in violation of FACE against five defendants: Joseph Gregg, Ruby McDaniel, Joseph O'Hara, Francis Pagnanelli, and William Raiser); United States v. Roach, 947 F. Supp. 872, 878 (E.D. Pa. 1996) (injunctive relief for obstructing access to Pennsylvania clinic and FACE violations "anywhere" against ten defendants: Joseph Roach, Kevin Blake, Amy Boissoneault, Sheryl Fitzpatrick, Dennis Green, Joseph O'Hara, Katharine O'Keefe, Franco Pagnanelli, William Raiser, and James Trott); United States v. Menchaca, No. 96 Civ. 5305 (S.D.N.Y. Sept. 10, 1996) (injunctive relief for obstructing access to Dobbs Ferry, New York clinic in violation of FACE against three defendants: Amy Boissoneault, Sheryl Fitzpatrick, and Luis Menchaca); Commonwealth v. Blake, 654 N.E.2d 64, 65 (Mass. App. (continued...))

financial award to show the true costs of illegal conduct, which will not occur with joint and several liability, the district court's injunction and order in this case may have no greater influence on stopping illegal conduct than other courts' orders.<sup>15</sup>

A \$5,000 damage award imposes a substantial but reasonable punishment and effectively serves to punish and deter misconduct. By imposing the statutory damage award per defendant, this Court fulfills Congress's objective of raising the stakes and consequences for individuals who violate the Access Act and who interfere or intimidate other people exercising their constitutional right to an abortion. See S. Rep. No. 117, supra, at 3, 22, 26-27.<sup>16</sup>

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<sup>14/</sup> (...continued)  
Ct. 1995) (criminal contempt for violating order forbidding trespass at clinic that provides reproductive health services).

<sup>15/</sup> The district court also stated that a plaintiff can pursue civil penalties against a defendant if the plaintiff believes statutory damages, awarded jointly and severally, are insufficient. See Gregg, 32 F. Supp. 2d at 161. While this option exists for the Attorney General and states' attorneys general, a private plaintiff may not seek the "additional" deterrent of civil penalties. S. Rep. No. 117, 103d Cong., 1st Sess. 26 (1993); see 18 U.S.C. 248(c)(2) and 248(c)(3). Private plaintiffs must satisfy the standard associated with an award of punitive damages. See 18 U.S.C. 248(c)(1)(B). Further, this argument ignores the distinct, deterrent value of statutory damages.

<sup>16/</sup> The United States is aware of three other district courts that have interpreted FACE's statutory damages provision and have imposed joint and several liability on defendants. See United States v. Operation Rescue Nat'l, No. C-3-98-113 (S.D. Ohio Aug. 27, 1999) (summary judgment order); Milwaukee Women's Med. Servs., Inc. v. Brock, 2 F. Supp. 2d 1172, 1178 (E.D. Wis. 1998); Planned Parenthood v. Walton, No. 95-2813, 1998 WL 88373, at \*2 (continued...)

B. Joint And Several Liability Defeats The Access Act's Objective Of Imposing Substantial Consequences On Defendants

Joint and several liability promotes the large scale blockades, interference, and intimidation that FACE sought to eliminate because it removes any substantial but fair consequence for violating FACE and dilutes any punitive and deterrent effect of a damage award. With joint and several liability, the total damages award "per violation" remains the same, yet the more persons who violate the law, the smaller the amount each person must pay. For example, if only 100 individuals participate in a blockade in violation of the Access Act, each defendant would only be liable for \$50, which is akin to a parking ticket. Thus, a protester has no incentive to stop violating the Access Act. See S. Rep. No. 117, supra, at 20-21.

The varying number of defendants who blockaded MMA on the three dates in issue epitomizes the adverse consequences of joint and several liability. Each of the five defendants who blocked access to MMA in August 1996 would have to pay \$1,000; whereas the 12 defendants who participated in the January 1997 blockade would have to pay only \$416.66, and each of the 18 defendants who participated in the March 1997 blockade would have to pay only \$277.77. Thus, the March 1997 blockade, which created the most

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<sup>16/</sup> (...continued)  
(E.D. Pa. Feb. 12, 1998). No opinion, however, includes a substantive analysis of its conclusion, fully addresses FACE's legislative history, or addresses the punishment and deterrent objectives of statutory damages. The court in Operation Rescue relied extensively on the district court's analysis in this case. Accordingly, these opinions do not provide persuasive authority for this Court.

disruption to MMA and traffic on Engle Street, resulted in the smallest consequence to defendants. See Gregg, 32 F. Supp. 2d at 153-155. The message of these awards is clear: engage others to minimize one's own liability.<sup>17</sup>

Further, the principle underlying joint and several tort liability -- compensation -- does not control here since FACE statutory damages serve a purpose beyond compensation. Cf. 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))). As discussed herein, FACE's statutory damages also serve the distinct purpose of punishing each defendant and of deterring future violations. See H.R. Rep. No. 306, supra, at 10; S. Rep. No. 117, supra, at 26-27.

Finally, the defendants may argue that individual liability for statutory damages will give a plaintiff a windfall. In choosing between individual or joint and several liability, however, individual liability, and a potential windfall, more effectively enforces FACE and is consistent with FACE's purpose

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<sup>17/</sup> The district court stated that a single award of \$5,000 is sufficient since the interference caused by one person may be no different than that caused by a group. See Gregg, 32 F. Supp. 2d at 160. A plaintiff's emotional distress as a result of being subjected to intimidating and obstructive conduct by 18 individuals who are chanting anti-abortion sentiments such as "baby killers" is likely to be greater than being subjected to a blockade and protest by five people, and thus the larger protest warrants a higher amount of damages. Of course, a plaintiff has the option of pursuing actual damages. One purpose of statutory damages, however, is to allow compensation to plaintiffs for harm suffered that is difficult to quantify, including emotional distress. See H.R. Rep. No. 306, supra, at 13.



and legislative history. The adverse consequences of joint and several liability impose far greater costs to the statute's civil enforcement objective of curtailing violence and interference with constitutionally protected rights than any financial benefit that may accrue to a victim. As the defendants' own conduct have shown, injunctions and nominal fines under FACE or trespass laws do not deter repeat violations. While the nominal consequences of joint and several liability may promote illegal conduct, it is unlikely that, given the burdens associated with pursuing litigation, a plaintiff will initiate frivolous proceedings with hopes of a potential windfall award.

CONCLUSION

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

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

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