

UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF TEXAS

ERIC H. HOLDER, JR.,  
ATTORNEY GENERAL OF THE  
UNITED STATES OF AMERICA,

Plaintiff,

v.

JUAN ANTONIO GAONA,

Defendant,

v.

PLANNED PARENTHOOD  
SEXUAL HEALTHCARE,

Third-Party Defendant.

CIVIL ACTION

No. 5:10-cv-00494-XR

**MOTION TO STRIKE**

Eric H. Holder, Jr., Attorney General of the United States of America  
(the "United States Attorney General"), by the undersigned attorneys, moves to strike  
Defendant's Affirmative Defenses:

1. Pursuant to Rule 12(f) of the Federal Rules of Civil Procedure, the United  
States Attorney General respectfully moves to strike the Defendant's first affirmative defense as  
stated in paragraph 25 of the Defendant's Original Answer and Jury Demand. Defendant's first  
affirmative defense is an insufficient defense. The Defendant's denial that his conduct did not  
violate FACE is not a recognized affirmative defense. See FRCP 8(c).

2. Pursuant to Rule 12(f) of the Federal Rules of Civil Procedure, the United  
States Attorney General respectfully moves to strike the Defendant's second affirmative defense

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as stated in paragraph 26 of the Defendant's Original Answer and Jury Demand. Defendant's second affirmative defense is an insufficient defense. In United States v. Bird, 124 F.3d 667 (5th Cir. 1997), the United States Court of Appeals for the Fifth Circuit held that "[b]y its terms, [FACE] prohibits only specified uses of 'force,' 'threat[s] of force,' and 'physical obstruction'; none of which are protected by the First Amendment." Id. at 683 (citations omitted). Federal courts across the country have uniformly held that conduct which violates FACE is not constitutionally protected speech or free exercise of religion. See Norton v. Ashcroft, 298 F.3d 547, 552 (6th Cir. 2002) ("All of our sister circuits to address First Amendment facial challenges to the Act have upheld the Act."); Planned Parenthood of Columbia/Williamette v. American Coalition of Life Activists, 290 F.3d 1058, 1077 (9th Cir. 2002) ("a threatening statement that violates FACE is unprotected under the First Amendment"); United States v. Gregg, 226 F.3d 253, 268 (3rd Cir. 2000) ("we hold that FACE is constitutional under the First Amendment"); United States v. Hart, 212 F.3d 1067, 1073 (8th Cir. 2000) ("The FACE Act survives [defendant's] First Amendment challenge."); United States v. Weslin, 156 F.3d 292, 296-98 (2nd Cir. 1998) (FACE does not violate First Amendment); Terry v. Reno, 101 F.3d 1412, 1418 (D.C. Cir. 1996) ("Applying long-standing Supreme Court precedents, we find the statute compatible with the First Amendment."); United States v. Soderna, 82 F.3d 1370, 1375 (7th Cir. 1996) ("The First Amendment forbids the states to outlaw peaceful nontrespassory picketing, . . . [b]ut the amendment does not extend its protection to the next step, where the picketer physically impedes entry to the picketed premises."); United States v. Dinwiddie, 76 F.3d 913, 919 (8th Cir. 1996) (FACE "is not facially inconsistent with the First Amendment"); American Life League, Inc. v. Reno, 47 F.3d 642, 652, 654 (4th Cir. 1994) (FACE does violate First Amendment Free

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Speech Clause and “does not offend the First Amendment’s Free Exercise Clause”).

3. Pursuant to Rule 12(f) of the Federal Rules of Civil Procedure, the United States Attorney General respectfully moves to strike the Defendant’s third affirmative defense as stated in paragraph 27 of the Defendant’s Original Answer and Jury Demand. Defendant’s third affirmative defense is an insufficient defense. FACE is a constitutional statute. Bird, 124 F.3d at 672-84; see also cases cited in paragraph 3 supra. The United States Attorney General has reasonable cause to believe the Defendant’s actions have violated FACE. Civil enforcement of the FACE statute pursuant to 18 U.S.C. § 248(c)(2) against the Defendant does not render the FACE statute unconstitutional.

WHEREFORE, the United States Attorney General respectfully requests this Court to issue an Order granting Plaintiff’s motion to strike Defendant’s affirmative defenses as stated in paragraphs 25 through 27 of the Defendant’s Original Answer and Jury Demand.

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Respectfully submitted,

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Assistant Attorney General  
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*/s/ Joe Rodriguez*

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*/s/ Wm. E. Nolan*

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**ORDER**

The Court, having considered Plaintiff's Motion to Strike, hereby GRANTS the Plaintiff's Motion, and IT IS HEREBY ORDERED that the Defendant's affirmative defenses as stated in paragraphs 25 through 27 of the Defendant's Original Answer and Jury Demand are stricken from the above-styled and numbered cause.

SIGNED this \_\_\_\_\_, 2010.

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XAVIER RODRIGUEZ  
UNITED STATES DISTRICT JUDGE

**CERTIFICATE OF SERVICE**

I hereby certify that on this 10<sup>th</sup> day of September 2010 I electronically filed the foregoing with the Clerk of Court using the CM/ECF system which will send notification of such filing to the following:

Allan E. Parker, The Justice Foundation, 8122 Datapoint Drive, Suite 812, San Antonio, Texas 78229;

Kathleen Cassidy Goodman, Law Office of Kathleen Cassidy Goodman, PLLC, 8122 Datapoint Drive, Suite 805, San Antonio, Texas 78229; and

David L. Ortega, Oppenheimer, Blend, Harrison & Tate, Inc., 711 Navarro, Suite 600, San Antonio, Texas 78205.

I hereby certify that on this 10<sup>th</sup> day of September 2010 a true and correct copy of the forgoing was served via first-class US Mail on the following:

R. Clayton Trotter, The Justice Foundation, 8122 Datapoint Drive, Suite 812, San Antonio, Texas 78229.

  
\_\_\_\_\_  
**JOSEPH C. RODRIGUEZ**  
Assistant United States Attorney