UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS

ERIC H. HOLDER, JR., ATTORNEY GENERAL OF THE UNITED STATES OF AMERICA,	:	CIVIL ACTION
Plaintiff,	:	
v.	:	
JUAN ANTONIO GAONA,	:	No. 5:10-cv-00494-XR
Defendant,	:	
v.	:	
PLANNED PARENTHOOD SEXUAL HEALTHCARE,	:	
Third-Party Defendant.	:	

MOTION TO DISMISS DEFENDANT'S FIRST-AMENDED ANSWER, FIRST-AMENDED COUNTERCLAIM AND JURY DEMAND

Eric H. Holder, Jr., Attorney General of the United States of America (the "United States Attorney General"), in his official and individual capacities, by the undersigned attorneys, moves to dismiss Defendant's counterclaims as stated in Defendant's First-Amended Answer, First-Amended Counterclaim and Jury Demand.

1. Paragraph 43 of the Defendant's First-Amended Answer, First-Amended Counterclaim and Jury Demand claims to bring counterclaims against the United States Attorney General "in his official and individual capacities." Any claims brought by the Defendant in this proceeding against the United States Attorney General in his official capacity must be dismissed for the reasons set forth in paragraph 3 of the Motion to Dismiss filed by the United States in this matter on September 10, 2010. Any claims brought by the Defendant in this proceeding against

the United States Attorney General in his individual capacity must be dismissed for the reasons set forth below:

2. Serving a United States Officer or Employee: Defendant's counterclaims should be dismissed because he has not accomplished service upon the United States Attorney General in compliance with Rule 4(i)(3) of the Federal Rules of Civil Procedure. The Federal Rules of Civil Procedure provide separate and distinct rules for serving federal officials in their official and individual capacities. See FRCP 4(i)(2)-(3). As Rule 4(i)(2) explains, in order to serve "a United States officer or employee sued only in an official capacity," a plaintiff need only employ certified or registered mail to the governmental agency, corporation, officer, or employee. In order to serve a federal employee sued in his or her individual capacity, however, a plaintiff must comply with Rule 4(i)(3), which states that in addition to serving the United States, a plaintiff must also serve the federal official under "Rule 4(e), (f), or (g)." Service under Rule 4(e) may be accomplished by one of four means: (1) "following state law for serving a summons in an action brought in courts of general jurisdiction in the state where the district court is located or where service is made;" (2) "delivering a copy of the summons and of the complaint to the individual personally;" (3) "leaving a copy of each at the individual's dwelling or usual place of abode with someone of suitable age and discretion who resides there;" or (4) "delivering a copy of each to an agent authorized by appointment or by law to receive service or process." FRCP Rule 4(e).

In this matter, Defendant did not accomplish service upon the United States Attorney General in accordance with Rule 4(e). The Defendant did not personally serve the United States Attorney General, did not leave copies of the summonses and complaints at the dwellings or usual places of abode of the United States Attorney General, nor leave copies of summonses and

complaints with the authorized agent of the United States Attorney General. As for service under state law, Rule 106(a) of the Texas Rules of Civil Procedure requires that service be accomplished by either personally serving the summonses and complaints, or by registered or certified mail. As noted above, the Defendant did not personally serve the United States Attorney General. Nor did the Defendant serve the United States Attorney General by registered or certified mail in accordance with Texas state law.

3. Third Party Practice: Defendant's counterclaims against the United States Attorney General in his individual capacity are not, in fact, counterclaims as governed by Rule 13 of the Federal Rules of Civil Procedure, and must, therefore, be dismissed. Counterclaims must be made "against an opposing party." FRCP Rule 13(a)(1). The United States Attorney General is a party to his matter in his official capacity only. The United States Attorney General is not a party to this matter in his individual capacity. Any claims against the United States Attorney General in his individual capacity must be brought through third party practice. Third party practice is governed by Rule 14 of the Federal Rules of Civil Procedure. Rule 14 allows a defendant to bring suit as a third-party plaintiff against a non-party "who is or may be liable to it for all or part of the claim against it." Here, Defendant does not plead that the United States Attorney General is liable for Defendant's conduct that violated the Freedom of Access to Clinic Entrances Act ("FACE Act"), 18 U.S.C. § 248, or the resulting harm of that conduct. Instead, independent of the Defendant's violation of the FACE Act, the Defendant pleads that the United States Attorney General in his individual capacity violated the Defendant's rights under the Constitution and federal law. Thus, the Defendant's claim against the United States Attorney General in his individual capacity is not properly before this Court as a counterclaim, and cannot properly be brought before this Court through third party practice under Rule 14.

Even if such a claim was appropriate to plead under Rule 14, the Rule requires that service be accomplished within 14 days of after the filing of the third party complaint's original answer, absent leave of the Court. FRCP Rule 14(a)(1). In this matter, the Defendant filed his original answer on July 13, 2010. The time for the Defendant to file a third-party complaint against the United States Attorney General in his individual capacity has long run. The Defendant has not sought leave from this Court to file such a claim; nor can the Defendant demonstrate any reason why this Court should grant leave to do so.

4. Absolute Immunity: The Defendant's counterclaims against the United States Attorney General in his individual capacity are barred by absolute immunity. In the Defendant's First-Amended Answer, First-Amended Counterclaim and Jury Demand, the Defendant clearly seeks to impose personal liability on the United States Attorney General for bringing a civil FACE Act claim against the Defendant on behalf of the United States. Defendant's attempt must fail. The Supreme Court has held that acts undertaken by a governmental lawyer in the course of his role as an advocate are cloaked in absolute immunity. See Buckley v. Fitzsimmons, 509 U.S. 259, 272-74 (1993). Accord Cousin v. Small, 325 F.3d 627, 631-37 (5th Cir. 2003) (discussion of absolute immunity shield for criminal prosecutors); Saunders v. Bush, 15 F.3d 64, 67 (5th Cir. 1994) (federal government officials responsible for initiating civil proceedings are entitled to absolute immunity).

Absolute immunity is immunity from suit, not just from ultimate liability for damages. Mireles v. Waco, 502 U.S. 9, 11 (1991). It defeats a suit at the outset. See Imbler v. Pachtman, 424 U.S. 409, 419 n.13 (1976). The availability of absolute immunity is decided by reference to the function being performed at the time of the events giving rise to the personal-liability claim, rather than by reference to the identity of the government actor. Forrester v. White, 484 U.S.

219, 229 (1988). Here, Defendant asserts that the United States Attorney General has violated his constitutional and statutory rights by filing the underlying Complaint in this lawsuit – a civil FACE Act claim against the Defendant. As stated throughout the filings in this case, however, the filing of the civil FACE Act claim against the Defendant by the United States Attorney General in the name of the United States, was an act completed by the United States Attorney General in his official capacity, as authorized to do so by the FACE Act. 18 U.S.C. § 248(c)(2). The Complaint in this case against the Defendant clearly sets forth the facts upon which the United States bases its FACE Act claim, and nothing stated in the Complaint gives rise to any reasonable inference that the Defendant is being sued for any reason other than for violating the FACE Act. Such action by the United States Attorney General, therefore, is cloaked in absolute immunity just as a prosecutor's decision to initiate a criminal action would be. See Butz v. Economou, 438 U.S. 478, 516 (1978). Thus, this Court must dismiss Defendant's counterclaims against the United States Attorney General.

5. Qualified Immunity: Even if absolute immunity did not bar the Defendant's counterclaims, the United States Attorney General is entitled to qualified immunity. The filing of the civil FACE Act claim by the United States Attorney General against the Defendant did not violate any clearly established statutory or constitutional rights.

Qualified immunity shields government officials who perform discretionary governmental functions from civil liability so long as their conduct does not violate any "clearly established statutory or constitutional rights of which a reasonable person would have known." Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). Qualified immunity "provides ample protection to all but the plainly incompetent or those who knowingly violate the law." Malley v. Briggs, 475 U.S. 335, 341 (1986). Qualified immunity is not merely a defense to liability. It is intended

to afford sweeping protection to federal officials from the entirety of the litigation process. Government officials are accorded qualified immunity "to shield them from undue interference with their duties and from potentially disabling threats of liability." Harlow, 457 U.S. at 806; see also Burns v. Reed, 500 U.S. 478 (1991) (recognizing that prosecutors were entitled to qualified immunity for advising police officers that they could interview a suspect under hypnosis). Accordingly, the Supreme Court has repeatedly emphasized that an official's entitlement to qualified immunity must be resolved at the earliest possible stage of the litigation and that "discovery should not be allowed" until it is determined that the plaintiff has properly stated a claim for the violation of a clearly established right. Harlow, 457 U.S. at 818-19; Crawford-El v. Britton, 523 U.S. 574, 598 (1998); Anderson v. Creighton, 483 U.S. 635, 647 n.6 (1987).

In assessing a qualified immunity defense, a court must determine "whether the plaintiff has alleged a violation of a clearly established constitutional or statutory right." Michalik v. Hermann, 422 F.3d 252, 257-258 (5th Cir. 2005). "A right is clearly established if its contours are 'sufficiently clear that a reasonable official would understand that what he is doing violates that right.'" Id. at 258 (citation omitted). "If the allegations do not establish the violation of a constitutional right, the officer is entitled to qualified immunity." Price v. Roark, 256 F.3d 364, 369 (5th Cir. 2001). The plaintiff bears the burden of proving that a government official is not entitled to qualified immunity. Michalik, 422 F.3d at 258. For the reasons set forth in the Complaint in this matter, the Defendant's conduct violated FACE, and the United States Attorney General in his official capacity brings this civil lawsuit to remedy the Defendant's violation. The Defendant's counterclaim offers no evidence to suggest that such action violates clearly established statutory or constitutional rights. Instead, the Defendant simply seeks to restate his affirmative defenses to his underlying conduct as counterclaims against the

government authority enforcing the FACE Act. For the same reasons that this Court should strike Defendant's affirmative defenses, it should shield the United States Attorney General from liability through qualified immunity.

The Defendant complains that the United States Attorney General, by bringing this lawsuit, is violating the Defendant's First Amendment speech and free exercise rights. But conduct that violates the FACE Act is not protected free speech or free exercise of religion. Contrary to clearly establishing constitutional protection for such conduct, the United States Court of Appeals for the Fifth Circuit in United States v. Bird, 124 F.3d 667 (5th Cir. 1997), 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 appellate courts across the country have uniformly held the same. 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 Lie 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."); Untied 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 Speech Clause and "does not offend the First Amendment's Free Exercise Clause"). Therefore, this Court must dismiss the Defendant's counterclaims, as the United States Attorney General is shielded from such claims by qualified immunity.

6. The Religious Freedom Restoration Act: Finally, the Defendant alleges that he was denied his right to the free exercise of his religion as protected by the Religious Freedom Restoration Act ("RFRA"), 42 U.S.C. § 2000bb et seq. The Defendant's RFRA claims against the United States Attorney General in either his official or individual capacity must be dismissed for the reasons set forth in paragraph 3 of the Motion to Dismiss filed by the United States in this matter on September 10, 2010, and for the reasons herein.

First, the Defendant does not allege any substantial burden on his ability to exercise his religion. The mere filing of a lawsuit seeking injunctive relief does not substantially burden a defendant's ability to exercise his or her religion, even if the relief sought in the lawsuit would do so. And in this matter, the Complaint filed against the Defendant is based on a violation of the FACE Act, and the relief sought is well within clearly established First Amendment parameters. See United States v. Bird, 124 F.3d 667 (5th Cir. 1997) (FACE does not violate First Amendment); United States v. McMillan, 946 F.Supp. 1254 (S.D. Miss. 1995) (Court upheld appropriateness of 25-foot buffer zone as remedy for FACE violation). The Defendant has not, and cannot demonstrate any action by the United States Attorney General to support his claim that he has been substantially burdened in his ability to exercise his religion.

Second, RFRA does not create a cause of action against the United States Attorney General in his individual capacity. The text of RFRA indicates that Congress has authorized suits against government entities, not individual government employees. The phrase "appropriate relief against a government" would be an odd way for Congress to indicate that individual employees must pay money judgments from their personal assets, which is what the Defendant seeks from the United States Attorney General here. In common usage, the term "government" means an entity, not an individual person employed by the government. See Black's Law Dictionary 715 (8th ed. 2004) (noting that the term "government" "refers collectively to the political organs of a country"). And taken as a whole, the phrase "appropriate relief against a government" would not appear to encompass actions for money damages at all, as sovereign immunity generally prevents money damages from being an "appropriate" form of relief to seek from a government. See Lane v. Peña, 518 U.S. 187, 192 (1996). RFRA's definition of "government," read in proper context, does not change this common sense construction. RFRA defines "government" as "a branch, department, agency, instrumentality, and official (or other person acting under color of law) of the United States, a State, or a subdivision of a State." 42 U.S.C. § 2000bb-2(1). In this definition, only the phrase "official (or other person acting under color of law)" could conceivably implicate a government employee in his or her individual capacity. Careful analysis of this phrase, however, indicates that it does not. A plaintiff may seek judicial relief from a government employee in two different capacities: "official capacity" and "individual capacity." The term "official capacity" denotes a suit nominally against an official, but in reality against the government itself, while "individual capacity" denotes a suit against the officer personally. See Hafer v. Melo, 502 U.S. 21, 25 (1991); Kentucky v. Graham, 473 U.S. 159, 165 (1985). RFRA's reference to "official," then, is

referring to the prospect of an official-capacity suit – a suit that, consistent with the preceding text, would seek "relief against a government." 42 U.S.C. § 2000bb-1(c).

Third, even if such a cause of action is allowed under RFRA, the Defendant is entitled to qualified immunity for the same reasons discussed in paragraph 6 of this Motion.

WHEREFORE, the United States Attorney General respectfully requests this Court to issue an Order granting Plaintiff's motion to dismiss the Defendant's Original Answer and Jury Demand, and as amended in Defendant's First-Amended Answer, First-Amended Counterclaim and Jury Demand.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of October 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:

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ORDER

The Court, having considered Plaintiff's Motion to Dismiss, hearby GRANTS the Plaintiff's Motion, and IT IS HEREBY ORDERED that the Defendant's counterclaims as stated in the Defendant's First-Amended Answer, First-Amended Counterclaim and Jury Demand are dismissed from the above-styled and numbered cause.

SIGNED this _____ day of _____, 2010.

_____
XAVIER RODRIGUEZ
UNTIED STATES DISTRICT JUDGE