UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
Louisville Division

UNITED STATES OF AMERICA, Plaintiff, v. RUSTY THOMAS, JAMES SODERNA, THOMAS RADDELL, DAVID GRAVES, LAURA BUCK, CHRIS KEYS, JAMES ZASTROW, EVA EDL, EVA ZASTROW, and DENNIS GREEN, Defendants.	)	Civil Action No. 3:17-cv-432-DJH

UNITED STATES' OPPOSITION TO
DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

The United States of America (the "United States") hereby opposes Defendants' Motion for Summary Judgment, Dkt. 62, in which they argue that the Freedom of Access to Clinic Entrances Act of 1994 ("FACE" or the "Act"), 18 U.S.C. § 248, violates the Free Speech Clause of the First Amendment both facially and as applied to them. As Defendants acknowledge, the Sixth Circuit and every Circuit Court of Appeals to consider a facial challenge to FACE has found that the Act is a content-neutral statute that does not violate the Free Speech Clause of the First Amendment. And Defendants' as-applied challenge fails because they have provided no evidence to support their claim that the volunteer escorts present at EMW on May 13, 2017, violated FACE, the predicate for their contention that the government violated the First Amendment by filing suit against them and not the volunteer escorts. In any event, Defendants

have failed to demonstrate that the government has adopted a policy or practice of selective enforcement of FACE in order to discriminate against a disfavored viewpoint. Defendants' motion is therefore without merit and should be denied.

INTRODUCTION

The United States brought this action against Rusty Thomas, James Soderna, Thomas Raddell, David Graves, Laura Buck, Chris Keys, James Zastrow, Eva Edl, Eva Zastrow, and Dennis Green ("Defendants") alleging that they attempted to and did, by physical obstruction, intentionally interfere with persons because they were or had been seeking or providing reproductive health services at the EMW Women's Surgical Center ("EMW") in Louisville, Kentucky, in violation of Section 248(a)(1) of FACE. 18 U.S.C. § 248(a)(1). *See* Dkt. 1, ¶¶ 19-23. Defendants sat in rows against the front doors of EMW on May 13, 2017, making it impossible to access the patient entrance. *Id.,* Ex. A, Video: "Official OSA Video of Louisville Rescue" at 00:30-36, 1:09-1:29. In the process of doing so, they pinned two volunteer clinic escorts against EMW's doors. Ex. A at 1:09-1:29; Ex. B, Video: "34 Another Video of Rescue" at 0:00-0:10; Ex. C, Video: "30 May 13 2017 Jordan Roose FB Live Video" at 15:20-15:43; Ex. D, Video: "May 13 2017 730" at 22:11-22:26. When one of those escorts tried to open a clinic door to relay a message from a staff member to local law enforcement, two of the Defendants leaned further against the door in order to close it. Ex. B at 2:15-2:46; Ex. C at 17:59-18:14. Despite police orders to move, Defendants persisted in blocking EMW's entrance until the police arrested them. *See* Dkt. 1, ¶ 22; Ex. A at 2:13-3:13; Ex. C at 16:08-27:09.

Defendants now challenge the constitutionality of FACE under the Free Speech Clause of the First Amendment, seeking summary judgment as a matter of law contending there is "no genuine dispute as to any material fact." Fed.R.Civ.P. 56. Defendants, however, bear the burden

of demonstrating the "'basis for [their] motion, and identify[ing] those portions of the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, which [they] believe[] demonstrate the absence of a genuine issue of material fact.'" *Maben v. Thelen*, 887 F.3d 252, 263 (6th Cir. 2018) (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986)). In considering Defendants' motion, the Court "should view the facts and draw all reasonable inferences in favor of" the United States. *Id.* (citing *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986)).

The Court should deny Defendant's motion because FACE is a content-neutral statute that does not violate the Free Speech Clause of the First Amendment. By its express terms, FACE reaches only violent, threatening, and physically obstructive conduct, and not protected First Amendment activity. *See* 18 U.S.C. 248(a)(1), (d)(1). And to the extent it implicates protected expression, it does so in a content-neutral manner. For this reason, the Sixth Circuit easily rejected a facial challenge to the Act under the First Amendment. *See Norton v. Ashcroft*, 298 F.3d 547, 552-553 (6th Cir. 2002) (collecting cases from other federal circuit courts, all of which have reached the same conclusion). Defendants' facial challenge thus fails under binding circuit precedent.

The Court should also deny Defendants' as-applied challenge because they have failed to provide any evidence in support of their claim that the volunteer escorts at EMW on May 13, 2017, physically obstructed the clinic in order to intimidate or interfere with individuals who were seeking or providing reproductive health services. Nor have they presented any evidence that the government has a policy of enforcing FACE in a manner that violates the First Amendment.

ARGUMENT

A. The Court Should Deny Defendants' Motion for Summary Judgment, Because FACE Is a Content-Neutral Law That is Narrowly Tailored to Protect an Important Government Interest.

Congress enacted FACE in 1994 to protect against interference with a person's access to reproductive health services and exercise of religious rights. It has three substantive provisions. 18 U.S.C. § 248(a)(1) prohibits the use of force, threat of force, or physical obstruction to intentionally injure, intimidate, or interfere with any person because the person seeks to obtain or provide reproductive health services. 18 U.S.C. § 248(a)(2) prohibits the use of force, threat of force, or physical obstruction to intentionally injure, intimidate, or interfere with any person exercising his or her First Amendment right of religious freedom at a place of religious worship. Finally, 18 U.S.C. § 248(a)(3) prohibits intentionally damaging or destroying property of a reproductive health services facility or a place of religious worship. The Act provides for both criminal penalties and civil remedies. 18 U.S.C. §§ 248(b) and (c). As for civil enforcement, the Act permits actions by the Attorney General, state attorneys general, and aggrieved persons. 18 U.S.C. § 248(c). The Act explicitly provides that it does not reach "expressive conduct (including peaceful picketing or other peaceful demonstration) protected from legal prohibition by the First Amendment to the Constitution." 18 U.S.C. § 248(d)(1).

This case concerns only Section 248(a)(1) of the Act, which states:

> Whoever . . . by force or threat or threat of force or by physical obstruction, intentionally injures, intimidates or interferes with or attempts to injure, intimidate or interfere with any person because that person is or has been, or in order to intimidate such person or any other person or any class of persons from, obtaining or providing reproductive health services . . . shall be subject to the [criminal penalties and civil remedies set forth in Sections 248(b) and (c) of the Act].

18 U.S.C. § 248(a)(1).

Since FACE's passage in 1994, numerous cases have been brought to enforce Section 248(a)(1)'s reproductive health services protections. In many of those cases, the defendants raised facial challenges to the Act under the First Amendment. Every Circuit Court of Appeals—including the Sixth Circuit—that has reviewed the kind of facial challenge to FACE that Defendants raise has upheld the Act. *See, e.g., Norton*, 298 F.3d at 552-553.[1] They did so because the Act does not regulate the content of any speech made at facilities providing reproductive health services and instead forbids one of three kinds of conduct—use of force, threat of force, or physical obstruction—intended to intimidate people from providing or accessing such services. 18 U.S.C. § 248(a)(1). Force, threat of force, and obstruction are not protected by the First Amendment. *Norton,* 298 F.3d at 552 (citing *Wisconsin v. Mitchell*, 508 U.S. 476, 484 (1993)).[2] Defendants argue that the element of the Act requiring that the prohibited conduct be directed at persons obtaining or providing reproductive health services "makes the statute viewpoint centered." Dkt. 62-1 at 5. But the Seventh Circuit Court of Appeals rejected precisely this argument, stating: "It is not at all clear that the statute is aimed at the anti-abortion movement. We should not lightly impugn the motives of legislators. . . . The Freedom of Access to Clinic Entrances Act is . . . about conduct that, rather than being purely symbolic, like flag-burning . . . or wearing a black armband . . . has, like political assassination . .

[1] *See also United States v. Gregg*, 226 F.3d 253, 267 (3d Cir.2000), *cert. denied*, 532 U.S. 971 (2001); *United States v. Weslin*, 156 F.3d 292, 297 (2d Cir.1998), *cert. denied*, 525 U.S. 1071 (1999), *United States v. Bird*, 124 F.3d 667, 683–84 (5th Cir.1997), *cert. denied*, 523 U.S. 1006 (1998); *Terry v. Reno*, 101 F.3d 1412, 1418–1421 (D.C.Cir.1996), *cert. denied*, 520 U.S. 1264 (1997); *United States v. Soderna*, 82 F.3d 1370, 1374–77 (7th Cir. 1996), *cert. denied*, 519 U.S. 1006 (1996); *United States v. Dinwiddie*, 76 F.3d 913, 921–24 (8th Cir. 1996), *cert. denied*, 519 U.S. 1043 (1996); *Cheffer v. Reno*, 55 F.3d 1517, 1521–22 (11th Cir.1995); *American Life League, Inc. v. Reno*, 47 F.3d 642, 648–52 (4th Cir.1995), *cert. denied*, 516 U.S. 809 (1995).

[2] Contrary to Defendants' allegations in their memorandum to the Court, the Sixth Circuit Court of Appeals did consider the First Amendment implications of a prohibition of blockades when it considered the matter. *See Norton,* 298 F.3d at 552 ("The Act, however, does not directly apply to speech, but rather prohibits three types of conduct—use of force, threat of force, and physical obstruction—which are not protected by the First Amendment.").

. physical consequences that are independent of symbolic significance." *Soderna*, 82 F.3d at 1374-1375 (internal citations and quotations omitted).

Even to the extent FACE might incidentally affect some expressive elements, the Circuit Courts of Appeals have consistently held that the Act is content neutral. *Norton*, 298 F.3d at 553; *Gregg*, 226 F.3d at 267; *Dinwiddie*, 76 F.3d at 922-923; *Soderna*, 82 F.3d at 1374-1376; *American Life League, Inc. v. Reno*, 47 F.3d at 649-651. The Act prohibits interference with reproductive health services of any kind, not just abortion. 18 U.S.C. § 248(e)(5) (defining "reproductive health services" as "reproductive health services provided in a hospital, clinic, physician's office, or other facility, and includes medical, surgical, counselling or referral services relating to the human reproductive system, including services relating to pregnancy or the termination of a pregnancy."). The Sixth Circuit Court of Appeals has explained that "the Act applies to anyone who violates its terms, regardless of ideology or message." *Norton*, 298 F.3d at 553. And in the words of the D.C. Circuit Court of Appeals: "The Access Act thus does not play favorites: it protects from violent or obstructive activity not only [at] abortion clinics, but facilities providing pre-pregnancy and pregnancy counseling services, as well as facilities counseling alternatives to abortion." *Terry*, 101 F.3d at 1419. As courts have recognized, FACE therefore prohibits clinic employees who are protesting pay conditions from blocking facility access in order to prevent women from obtaining such services. *See Norton*, 298 F.3d at 553 (citing *Dinwiddie*, 76 F.3d at 923)). Thus, the Act applies to conduct that interferes with individuals because they are seeking or providing reproductive health services, regardless of the message animating that interference. In this respect, FACE is similar to the Massachusetts statute examined by the U.S. Supreme Court in *McCullen v. Coakley*. 134 S. Ct. 2518 (2014). That statute criminalized engaging in certain speech and expressive conduct while knowingly

standing on a public way or sidewalk within 35 feet of an entrance or driveway to any place, other than a hospital, where abortions were performed. *Id.* at 2525-2526. In holding that the statute was content neutral and subject to intermediate scrutiny, the Court stated: "The Act would be content based if it required enforcement authorities to examine the content of the message that is conveyed to determine whether a violation has occurred. . . . But it does not. Whether petitioners violate the Act depends not on what they say . . . but simply on where they say it." *Id.* at 2531 (internal quotations and citation omitted).

Every Court of Appeals that has considered a facial challenge to FACE has held that, because the Act is a content neutral law, it is subject to and withstands intermediate scrutiny. *Norton*, 298 F.3d at 553 ("As a content neutral restriction, the Act must withstand intermediate scrutiny."). *See also Dinwiddie*, 76 F.3d at 923; *Terry*, 101 F.3d at 1419-1420; *Gregg*, 226 F.3d at 268; *American Life League, Inc.*, 47 F.3d at 651; *United v. Wilson*, 154 F.3d 658, 664 (7th Cir. 1998). The Act is not, as Defendants contend, subject to strict scrutiny because it does not target the specific content of any speech. *Wilson*, 154 F.3d at 663; *Dinwiddie*, 76 F.3d at 921-924; *American Life League, Inc.*, 47 F.3d at 648-654.

The Act has uniformly withstood intermediate scrutiny because it is well established that the government has a "significant" interest in "protecting women who obtain reproductive-health services and ensuring that reproductive-health services remain available." *Dinwiddie*, 76 F.3d at 924 (citing H.R.Rep. No. 306, at 6; S.Rep. No. 117, at 14–17). This interest is "unrelated to any incidental suppression of free expression." *Norton*, 298 F.3d at 553. Finally, the restrictions FACE places on conduct are narrowly tailored to provide "'ample alternative means for communication'" as required by the First Amendment. *Id.* (quoting *Terry*, 101 F.3d at 1420). Subject to state law, protestors (holding any view) can still stand outside of reproductive health

clinics and express their views through voice, signs, and other legally protected means. *Terry*, 101 F.3d at 1420; *see also* 18 U.S.C. § 248(d)(1) ("Nothing in this section shall be construed to prohibit any expressive conduct (including peaceful picketing or other peaceful demonstration) protected from legal prohibition by the First Amendment to the Constitution.").

Defendants claim that a law prohibiting certain acts of interference with access to reproductive health services applies disproportionately to pro-life activists. *See* Dkt. 62-1 at 10. Whether individuals sharing Defendants' views have been prosecuted more frequently under FACE than those holding opposite views is irrelevant. *Norton*, 298 F.3d at 553 (citing *Soderna*, 82 F.3d at 1376). "A group cannot obtain constitutional immunity from prosecution by violating a statute more frequently than any other group." *Soderna*, 82 F.3d at 1376; *see also McCullen*, 134 S. Ct. at 2531 ("[A] facially neutral law does not become content based simply because it may disproportionately affect speech on certain topics."). And while Defendants cite *Hill v. Colorado*, 530 U.S. 703 (2000), and *McCullen*, neither case supports their position. As an initial matter, both cases address *speech* restrictions (*i.e.*, buffer zones), not restrictions on violent, threatening, or obstructive *conduct*. *Hill*, 530 U.S. at 707-708; *McCullen*, 134 S.Ct. at 2525-2526. Second, even in the speech context, both cases held that the restrictions at issue were content neutral. *Hill*, 530 U.S. at 719-725; *McCullen*, 134 S.Ct. at 2531-2534. Finally, rather than cast any doubt on the constitutionality of FACE, *McCullen* cited the Act approvingly. *McCullen*, 134 S.Ct. at 2537.

Defendants offer no persuasive justification for this Court to disregard binding precedent and a line of uniform appellate decisions upholding FACE against facial challenges. Defendants' motion does not dispute that they physically obstructed access to EMW on May 13, 2017. Rather, Defendants appear to equate their conduct to a blockade. *See* Dkt. 62-1 at 4, 6,

10, and 16. It was. *See* Ex. A at 00:30-36, 1:09-1:29. Thus, it was not the content of Defendants' speech that was proscribed by the law but their conduct.

Nor do Defendants contend that the law failed to provide them with alternative means of communicating their message. *See generally* Dkt. 62. Indeed, many present on May 13, 2017, were able to communicate their message without blocking the clinic doors. *See* Ex. A at 1:50-2:07, 2:20-2:50; Ex. C at 3:00-4:47 (showing numerous individuals present at EMW holding signs, speaking into megaphones, and talking with volunteer escorts about their views). For these reasons, the Court should reject Defendants' facial challenge to the Act.

B. The Court Should Deny Defendants' Motion for Summary Judgment Because There Are Disputed Issues of Material Fact Regarding Defendants' As-Applied Challenge.

Defendants mount an as-applied challenge to FACE by arguing that the government enforced the Act against them but not against volunteer escorts present at EMW on May 13, 2017, because of their respective viewpoints, in violation of the First Amendment. But Defendants' claim that viewpoint discrimination had anything to do with the government's enforcement of FACE against them, as opposed to the volunteer escorts, is not only unsupported by the record, it is contradicted by it.[3]

As a threshold matter, Defendants have not pointed to any evidence that the volunteer escorts present at EMW on May 13, 2017, physically obstructed the entrance or exit to the clinic. In fact, video evidence indicates that two volunteer escorts first stood in the way of Defendants' physical obstruction of EMW's entrance, when Defendants pinned them to the clinic doors with their bodies. Ex. A at 1:09-1:29; Ex. B at 0:00-0:10; Ex. C at 15:20-15:43; Ex. D at 22:11-22:26.

[3] *Scott v. Harris*, 550 U.S. 372, 380 (2007) ("When opposing parties tell two different stories, one of which is blatantly contradicted by the record, so that no reasonable jury could believe it, a court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment.") (cited in *Shreve v. Franklin Cty., Ohio*, 743 F.3d 126, 132 (6th Cir. 2014)).

This same video evidence also shows that, rather than obstruct EMW's entrance, the escorts attempted to open the clinic's doors, but several Defendants pressed their bodies against the doors to force them shut. Ex. B at 2:15-2:46; Ex. C at 17:59-18:14. *See also* Ex. G E. Zastrow Dep. Tr. at 30:6-10; Ex. F Edl Dep. Tr. at 69:19-72:6; Ex. I Raddell Dep. Tr. at 59:3-14. The video also shows the escorts relaying EMW staff requests to law enforcement, in an attempt to clear Defendants from in front of the entrance. Ex. B at 2:30-2:34; Ex. C at 17:59-18:05; Ex. D at 24:02-25:03.

Nor have Defendants cited any evidence that the volunteer escorts present at EMW on May 13, 2017, possessed the requisite intent to intimidate or interfere with or attempt to intimidate or interfere with anyone trying to obtain or provide reproductive health services at the clinic that day. On the contrary, Defendants' account and the facts in the record show quite the opposite. Defendants themselves label these two individuals "escorts," Dkt. 62-1, at 13, that is, people volunteering to *facilitate* access by patients to EMW's reproductive health services. A different escort testified that volunteer escorts try to facilitate clinic access during a 2017 hearing before this court. Ex. E Hr'g Tr. at 34:14-18 ("Q. Could you explain, what is a clinic escort? A. We are volunteers that are here at the invitation -- we go to the clinic at the invitation of the clinic, but we actually walk people past protestors that are trying to stop them from entering the clinic."). *See also* Ex. F Edl Dep. Tr. at 44:17-21 ("Q. You understand that those people are typically present to walk with individuals who are trying to enter abortion facilities. Correct? A. Sometimes, yeah."). The escort who testified at the hearing explained that the escorts' "primary goal is the patient and providing support for them for their decision[.]" Ex. E at 36:4-5. Rather than intent to interfere with access to reproductive services, the record shows that the escorts at EMW try to do exactly the opposite. Thus, instead of intentionally interfering with access to

reproductive health services, the evidence shows the two escorts attempting to free the providers trapped inside EMW, and to clear the entrance for patients. As a result, they were protected by FACE. *United States v. Hill*, 893 F. Supp. 1034 (clinic escorts are "providers of reproductive health services" under FACE when they are performing their official duties at the time of the violation).

Even if Defendants were able to demonstrate that the volunteer escorts present at EMW on May 13, 2017, engaged in physical obstruction of the clinic in order to intimidate people from providing or accessing reproductive health services, Defendants have failed to demonstrate that the government has adopted a policy or practice of selective enforcement in order to discriminate against a disfavored viewpoint. *McGuire v. Reilly*, 386 F.3d 45, 62-63 (1st Cir. 2004); *Hoye v. City of Oakland*, 653 F.3d 835, 855 (9th Cir. 2011). This is a high hurdle. "When wearing its prosecutor hat, the government has a great number of legitimate, non-discriminatory reasons for the actions it takes to engage in or decline prosecution." *McGuire,* 386 F.3d at 63.

Defendants seem to equate their conduct to a blockade of the clinic. *See* Dkt. 62-1 at 4, 6, 10, and 16. They must. Video evidence and deposition testimony shows that Defendants sat in front of the clinic (a fact Defendants do not dispute in their motion), making it impossible for patients and workers to enter or exit. Ex. A at 00:30-36, 1:09-1:29; Ex. G E. Zastrow Dep. Tr. at 20:20-23:6, 25:13-26:19, 29:12-30:5, 31:3-7, 32:4-15, 34:4-25; Ex. F Edl Dep. Tr. at 63:23-65:1; Ex. H Graves Dep. Tr. at 44:8-22; Ex. I Raddell Dep. Tr. at 53:10-54:4.[4]

[4] Defendants claim (without factual support) that their actions left open the rear door to the Clinic "so that anyone who wished to enter could do so with only the minor inconvenience of walking to another door." Dkt. 62-3 at 3. "Physical obstruction" under the Act is defined as "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). The availability of an alternative entrance does not insulate Defendants from being found to have, by physical obstruction, intimidated or interfered with anyone seeking to obtain or provide reproductive health services. *New York ex rel. Spitzer v.Cain*, 418 F.Supp.2d 457, 480 n.18 (S.D.N.Y. 2002) ("That patients may eventually have reached the [facility] in spite of defendants' actions is . . . beside the point."); *United*

Defendants have not, however, pointed to any undisputed material facts in support of their claim that the United States selectively enforced FACE against them on the basis of their views. Fed. R. Civ. P. 56(c)(1); *Searcy v. City of Dayton*, 38 F.3d 282, 286 (6th Cir. 1994) (moving party meets its burden under Rule 56 by "showing—that is, pointing out to the district court—that there is an absence of evidence to support the nonmoving party's case") (internal quotations and citation omitted). Defendants have not cited to any evidence in the record that the United States has an "intentional policy or practice" of enforcing FACE against only those groups and individuals sharing Defendants' view. No such evidence exists. Thus, this case is unlike *Hoye*, for example. There, a written enforcement policy and training materials suggested that a content-neutral buffer zone ordinance applied only to those trying to dissuade women from obtaining reproductive services, not escorts seeking to facilitate entry to clinic. 653 F.3d at 850-851. Nor have Defendants cited to any "'pattern of unlawful favoritism'" on the part of the government when enforcing FACE. *McGuire*, 386 F.3d at 64 (quoting *Thomas v. Chicago Park Dist.*, 534 U.S. 316, 325 (2002)). On the contrary, at least one "pro-choice" protestor has been criminally prosecuted under the Act. *United States v. Mathison*, Crim. No. 95-0850FVS (E.D. Wash. 1995) (cited in *Norton*, 298 F.3d at 553).

Viewing this evidence and drawing all reasonable inferences in favor of the United States indicates that there are genuine issues of material fact concerning the manner in which FACE was applied to Defendants. For this reason, Defendants' motion for summary judgment should be denied.[5]

States v. Gregg, 32 F.Supp.2d 151, 156 (D.N.J. 1998) ("[A]s long as access is made 'unreasonably difficult or hazardous,' it is not necessary to establish that there was absolutely no way to enter an abortion facility in order to prove a violation of the Act.") (internal citation omitted).

[5] Defendants make passing mention throughout their motion to the provisions of FACE that address intimidation, activity at places of religious worship, and destruction of property. But the United States' complaint does not allege that Defendants violated any of those provisions, and thus they lack standing to challenge them. U.S. CONST., art. III, §1.

CONCLUSION

For the foregoing reasons, this Court should deny Defendants' Motion for Summary Judgment because FACE is a content-neutral statute that does not violate the Free Speech Clause of the First Amendment and there are genuine issues of material fact concerning the application of the Act in this case.

Dated: May 21, 2018

Respectfully Submitted,

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