18-2454(L)

18-2623, 18-2627, 18-2630 (XAP)

United States Court of Appeals for the Second Circuit

PEOPLE OF THE STATE OF NEW YORK, By Letitia James, Attorney General of the State of New York,

Plaintiff-Appellant–Cross-Appellee,

v.

KENNETH GRIEPP, RONALD GEORGE, PATRICIA MUSCO, RANDALL DOE, OSAYINWENSE OKUONGHAE, ANNE KAMINSKY, BRIAN GEORGE, SHARON DOE, DEBORAH M. RYAN, ANGELA BRAXTON, JASMINE LALANDE, PRISCA JOSEPH, SCOTT FITCHETT, JR.,

Defendants-Appellees–Cross-Appellants,

DOROTHY ROTHAR,

Defendant.

On Appeal from the United States District Court for the Eastern District of New York

RESPONSE AND REPLY BRIEF FOR APPELLANT–CROSS-APPELLEE

BARBARA D. UNDERWOOD
Solicitor General
STEVEN C. WU
Deputy Solicitor General
ESTER MURDUKHAYEVA
Assistant Solicitor General of Counsel

LETITIA JAMES
Attorney General
State of New York
Attorney for Appellant–Cross-Appellee
28 Liberty Street
New York, NY 10005
(212) 416-6279

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PRELIMINARY STATEMENT

In this civil enforcement proceeding brought by the Attorney General of New York, the United States District Court for the Eastern District of New York (Amon, J.) denied a preliminary injunction that would have protected safe and reliable access to Choices Women's Medical Center, a reproductive health care facility in Jamaica, Queens. The court denied such relief even though the Attorney General presented extensive evidence that the individual defendants[1] here pursued a coordinated strategy to obstruct and intimidate patients from entering the facility.

Among other tactics, defendants have crowded and followed patients and their companions at extremely close distances and persisted in haranguing them despite multiple requests to stop. Defendants admit that their goal is to create a "blizzard of signs" on the sidewalk—directly in the path of patients attempting to reach Choices—and to confront

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[1] Defendants are Kenneth Griepp, Ronald George, Patricia Musco, Ranville Thomas (sued as Randall Doe), Osayinwense Okuonghae, Anne Kaminsky, Brian George, Sharon Richards (sued as Sharon Doe), Deborah Ryan, Prisca Joseph, Angela Braxton, and Jasmine LaLande. The Attorney General is not appealing from the denial of a preliminary injunction against defendant Scott Fitchett Jr.

patients in a "tag team" style until the patients reach the front door. Defendants have also pushed, shoved, and threatened volunteer escorts at the clinic, simply because those escorts were trying to help patients and companions reach the facility safely.

Defendants' efforts to defend the district court's decision are meritless. Contrary to defendants' arguments, this Court can and should reverse the decision below based on the district court's categorical refusal to consider nearly all of the Attorney General's documentary and testimonial evidence, as there was no basis for the court to reject that evidence in its entirety. The district court also applied cramped and incorrect interpretations of the governing law about obstruction, harassment, use of force, and threat of force, and relied on unreasonably favorable characterizations of the video evidence. This Court and others have routinely held that conduct indistinguishable from the conduct at issue here violates the laws protecting access to reproductive health clinics. The district court's refusal to enter a preliminary injunction stands squarely in conflict with those precedents.

Defendants' alternative grounds for affirmance are largely foreclosed by binding precedent. Contrary to defendants' argument, the

Attorney General—the chief law enforcement officer of New York State—has *parens patriae* standing to bring claims under the City law at issue here. As this Court has recognized, the State has a quasi-sovereign interest in protecting the health and well-being of its residents and can vindicate that interest by bringing actions under statutes with broad enforcement provisions. Defendants' vagueness and overbreadth challenges to two sections of the City's law are not ripe for appellate review and are baseless in any event. Finally, this Court and nine other federal circuits have already rejected arguments like defendants' that the federal clinic access law is an impermissible content-based regulation of speech.

ARGUMENT

POINT I

THE DISTRICT COURT ERRED IN CATEGORICALLY REJECTING BROAD SWATHS OF THE ATTORNEY GENERAL'S EVIDENCE

Defendants' primary contention on appeal is that the applicable standards of review preclude this Court from reviewing the district court's evidentiary rulings and factual findings in any meaningful respect. *See* Br. for Griepp Defendants (Griepp Br.) at 16-21; *see also* Br. for Braxton Defendants (Braxton Br.) at 5. In particular, defendants

insist that this Court must accept the district court's wholesale discarding of broad swaths of the Attorney General's evidence. *See* Griepp Br. at 24-32; Braxton Br. at 6-21. But the district court's treatment of the Attorney General's evidence was so extraordinary that this Court's intervention is necessary. "[W]hile clear-error review is deferential, it is not toothless." *United States v. Antone*, 742 F.3d 151, 165 (4th Cir. 2014) (quotation marks omitted). This Court has not only the power, but the obligation to "examine the record to see whether the facts actually support the decision." *Matter of Agnew*, 144 F.3d 1013, 1014 (7th Cir. 1998).

The Fourth Circuit's treatment of a highly analogous issue in *Jiminez v. Mary Washington College* is instructive. 57 F.3d 369 (4th Cir. 1995). That case involved a university professor's challenge to an employment decision that was assertedly the product of race and national origin discrimination. In ruling for the professor, the district court excluded all student evaluations from the first five semesters of the professor's tenure, on the ground that some of the negative evaluations were purportedly tainted by improper motives—thus making it impossible for the university to establish that it had fired the professor due to consistently poor evaluations. *Id.* at 378-80.

On appeal, the Fourth Circuit reversed, holding that the district court's blanket rulings with respect to the student evaluations constituted clear error and undermined the validity of any subsequent factual findings. *Id.* at 378. Even assuming there were evidence of some unreliable evaluations, the court found that "the record does not establish that *all* five semesters' worth of student evaluations should be disregarded," as the district court "made no specific findings with respect to each semester, but merely engaged in a wholesale dismissal of all evaluations." *Id.* at 381 (emphasis in original). And the Fourth Circuit rejected the professor's argument that the clear-error standard precluded appellate review of the district court's sweeping exclusion of evidence, explaining that its reversal was based principally on the lower court's "fact finding *processes* rather than [its] fact-finding *results*." *Id.* at 379 (emphasis added).

The district court's exclusion of the Attorney General's evidence in this proceeding closely parallels the rulings that the Fourth Circuit reversed in *Jiminez*. First, the district court rejected all of the contemporaneously created clinic escort recaps based on a single example of an inconsistency between one recap and later live testimony. (Special

Appendix (SPA) 12-13.) Even if this inconsistency were sufficient to warrant rejecting the particular escort recap in which it occurred—and it was not—the district court made no specific finding with respect to any of the dozens of remaining escort recaps that it disregarded. (SPA 12-13.) The district court's analysis of the escort recaps was therefore indistinguishable from the lower court's deficient ruling on student evaluations in *Jiminez*.

Second, the district court's class-wide rejection of patient questionnaires was likewise not supported by specific factual findings, but by a blanket determination that the questionnaires lacked "representative value" because of Choices' inconsistent record-keeping practices, which had resulted in some questionnaires being destroyed. (SPA 13.) However, the Attorney General did not introduce patient questionnaires as "representative" evidence, but as evidence of particular instances of misconduct, providing corroboration of the misconduct described in other testimonial and documentary evidence. *See* Br. for Attorney General (AG Br.) at 37-38. The court's concern about the missing questionnaires thus did not support its dismissal of the existing questionnaires.

Third, the district court clearly erred in dismissing as non-credible nearly all of the live testimony from the Attorney General's clinic escort witnesses. The district court may not "insulate [its] findings from review by denominating them credibility determinations, for factors other than demeanor and inflection go into the decision whether or not to believe a witness." *Doe v. Menefee*, 391 F.3d 147, 164 (2d Cir. 2004) (quotation marks omitted). "[R]eviewing for clear error allows an appellate court to examine the district court's credibility determinations in light of the evidence in the record as a whole, in order to determine whether the credibility assessment can be reconciled with other evidence." *Id.*

Here, the district court's categorical rejection of nearly all of the escorts' substantive testimony was based on the court's disagreements with the escorts' characterization of video evidence and slight discrepancies over several days of testimony. *See* AG Br. at 38-42. Defendants defend the district court's decision by repeating these conclusions and casting aspersions on the escorts' characters. *See* Griepp Br. at 8-12, 24-29; Braxton Br. at 12-21. But neither the district court nor defendants offer any support for the proposition that a court can disregard all testimony about all subjects from a witness based on isolated instances of non-

credible testimony. To the contrary, and as this Court explained in *Ortega v. Duncan*, a district court's finding that a witness lacks credibility on one issue does not by itself support the inference that the witness was or was not truthful on a different occasion. 333 F.3d 102, 106-07 (2d Cir. 2003). "[E]valuating the truthfulness of [a witness's] trial testimony represents a separate and more comprehensive inquiry than simply evaluating" one instance of non-credible testimony. *Id.* at 107. *Ortega*'s concern is especially relevant where, as here, the escorts testified without contradiction about dozens of interactions with defendants.

In addition, the district court's rejection of all of the escort recaps and patient questionnaires eliminated a vast quantity of corroborating evidence that would have supported much of the escorts' testimony. And because the district court rejected *all* of the escort witnesses, it did not consider whether any of those witnesses corroborated each other. "[T]he district court's inadequate consideration of [this] substantial evidence" constitutes reversible error. *Antone*, 742 F.3d at 165 (quotation marks omitted); *see also Hayes v. Invesco, Inc.*, 907 F.2d 853, 856 (8th Cir. 1990) (finding factual findings clearly erroneous where "the district court failed to consider and misinterpreted crucial evidence").

POINT II

THE DISTRICT COURT MADE SEVERAL ERRORS OF LAW IN DENYING THE ATTORNEY GENERAL'S MOTION FOR A PRELIMINARY INJUNCTION

In addition to these evidentiary and fact-finding errors, the district court made numerous legal errors when applying the governing legal standards to the limited record evidence it found credible.[2] These errors independently require reversal.

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[2] The Griepp Defendants are incorrect to assert (Br. for Griepp Defendants (Griepp Br.) at 32-33) that the Attorney General's argument in this Point and in Point II of the opening brief relies on "discredited evidence." The opening brief makes patently clear (*see* AG Br. at 47, 58-59, 63-64) that it relies only on the evidence the court found credible. None of the pages that defendants cite suggest otherwise. *See* Griepp Br. at 33 (citing AG Br. at 48-51, 55-61, and 63). With one exception, the cited pages of the Attorney General's brief rely on video and photographic exhibits, defendants' testimony, and the escorts' testimony about specific statements made by defendants that the district court credited (*see* SPA 6). The sole exception—a reference on pages 51 to 52 to an escort's testimony about an incident where a patient almost left the clinic because she was overwhelmed by the number of protestors standing outside her car—was not cited as evidence of a past violation, but as a type of harm that the district court did not consider when evaluating the video evidence of comparable incidents.

A. The Attorney General Demonstrated a Likelihood of Success on the Merits.

1. The district court applied an unduly narrow definition of the statutory term "obstruction."

a. Obstruction does not require evidence that patients were barred from accessing the clinic.

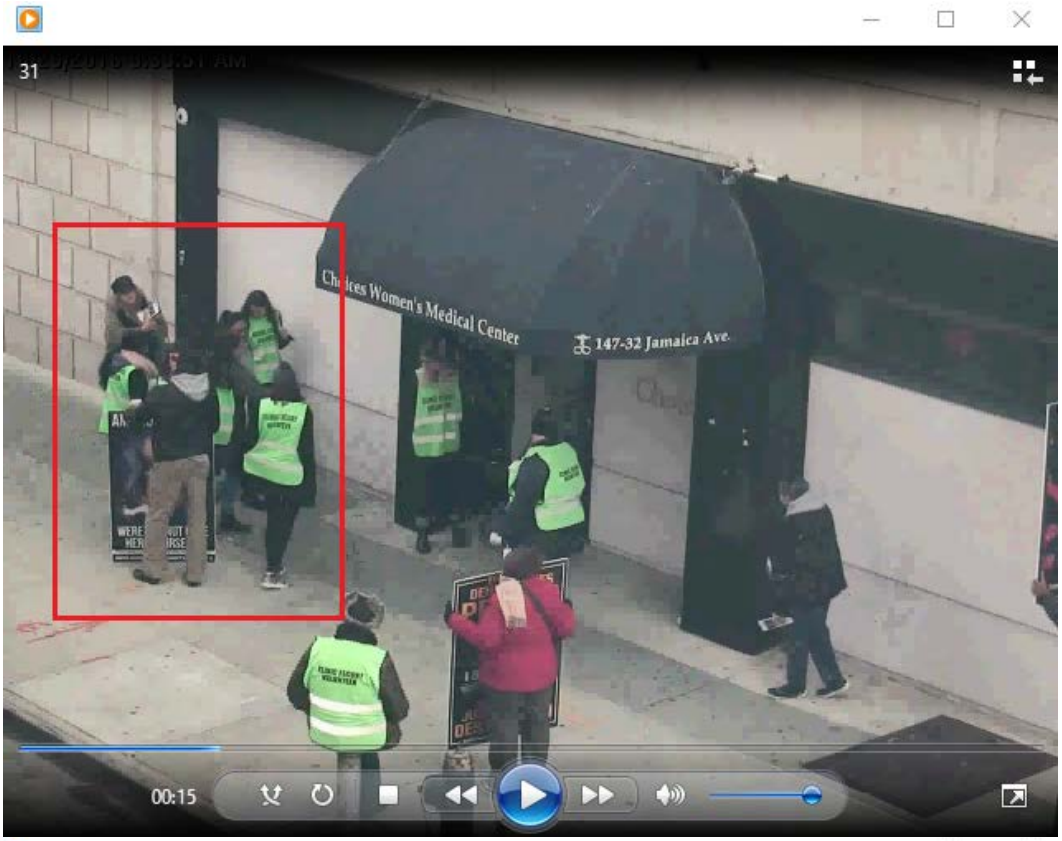
The district court erred in finding that the Attorney General failed to establish a likelihood of success on the merits of her obstruction claims under all three statutes. *See* AG Br. at 43-52. The root of this error was the district court's determination that defendants' conduct was permissible so long as they did not blockade an entrance, refuse to yield space to another person, or otherwise physically prevent someone from entering the clinic. (SPA 89.) To the contrary, the law prohibits all actions that "render[] passage to or from" a facility "unreasonably difficult or hazardous," 18 U.S.C. § 248(e)(4); Penal Law § 240.70(3)(d), or that "impede access to or from the facility," N.Y.C. Admin. Code § 10-1003(a)(2). Neither the statutory nor the ordinary definitions of the term "obstruction" (or "to obstruct") suggest that "only the complete blockage of a sidewalk could demonstrate obstruction." *Zalaski v. City of Hartford*, 723 F.3d 382, 392 (2d Cir. 2013).

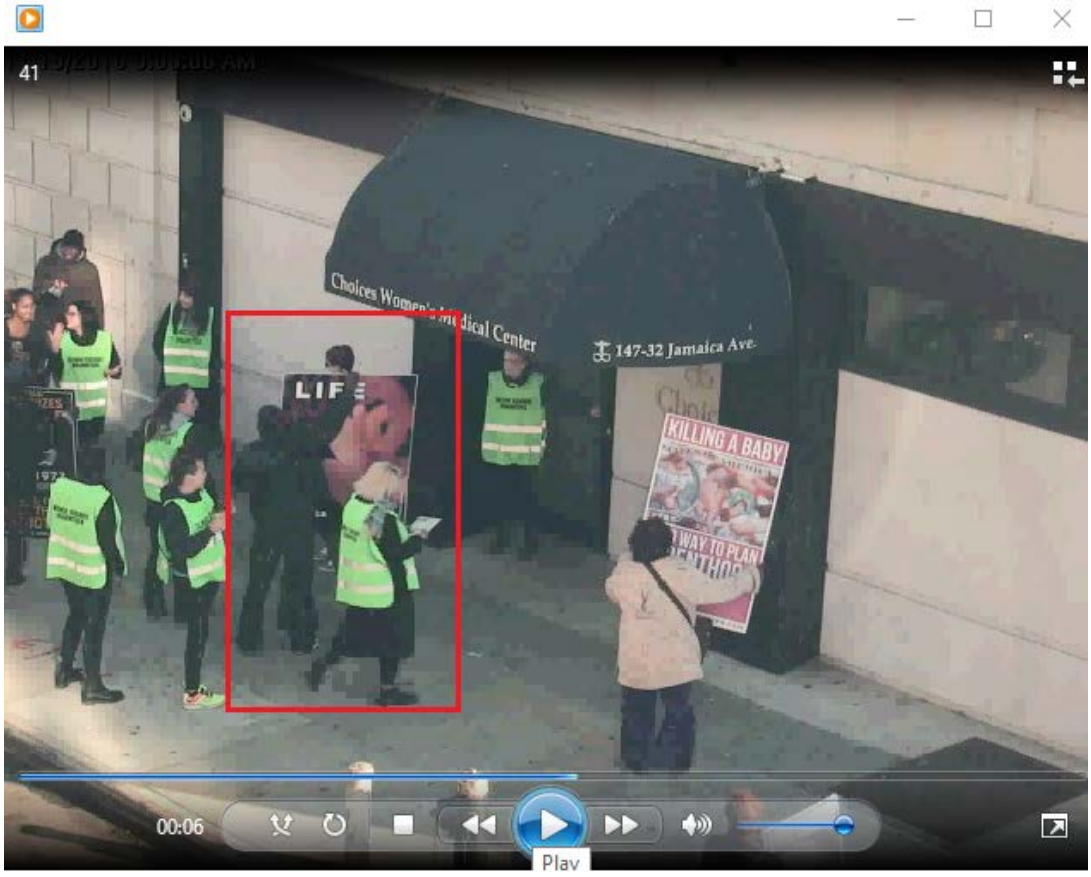
Cases involving the federal Freedom of Access to Clinic Entrances (FACE) Act have long understood obstruction to encompass a broad range of conduct, including standing in front of oncoming patients, using signs to impede patients, and standing outside of car doors. *See* AG Br. at 45-46 (collecting cases). Cases involving analogous statutes have found similar conduct to be obstructive. For example, the Third Circuit found that probable cause supported an arrest for obstruction under a Pennsylvania law that prohibited making a sidewalk "impassable without unreasonable inconvenience or hazard," where an individual "was standing in the middle of a sidewalk, causing pedestrians either to veer into the street or run into the wall to pass him." *Frantz v. Gress*, 359 F. App'x 301, 302 & n.3 (3d Cir. 2009). And a Connecticut state court found that protestors outside of an abortion clinic committed obstruction within the meaning of a disorderly conduct statute when they congested the sidewalk with "signs, [a] stroller[,] and [a] baby carriage." *State v. Muckle*, 108 Conn. App. 146, 154 (2008).

Defendants quibble with the Attorney General's descriptions of the video and photographic evidence in the record and exhort this Court to adopt wholesale the district court's characterization of such evidence.

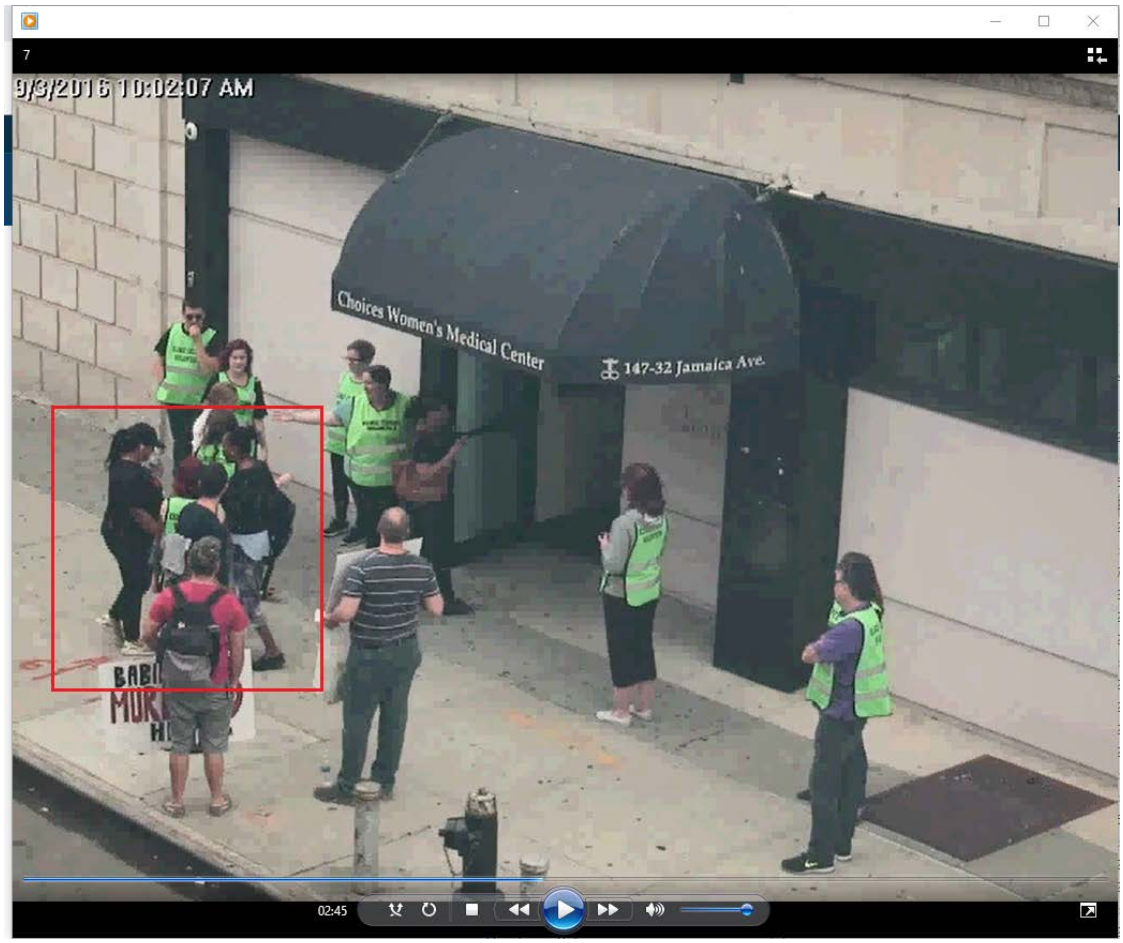
See, e.g., Griepp Br. at 19, 34-36; Braxton Br. at 21-24. But as the Supreme Court's decision in *Scott v. Harris* demonstrates, an appellate court need not uncritically adopt the lower court's "version of the story" told by uncontroverted video evidence. 550 U.S. 372, 378-80 (2007). As in *Scott*, the video and photographic evidence in this case is not consistent with the district court's characterization and therefore not entitled to deference. *See, e.g.*, *Young v. Martin*, 801 F.3d 172, 180 (3d Cir. 2015).

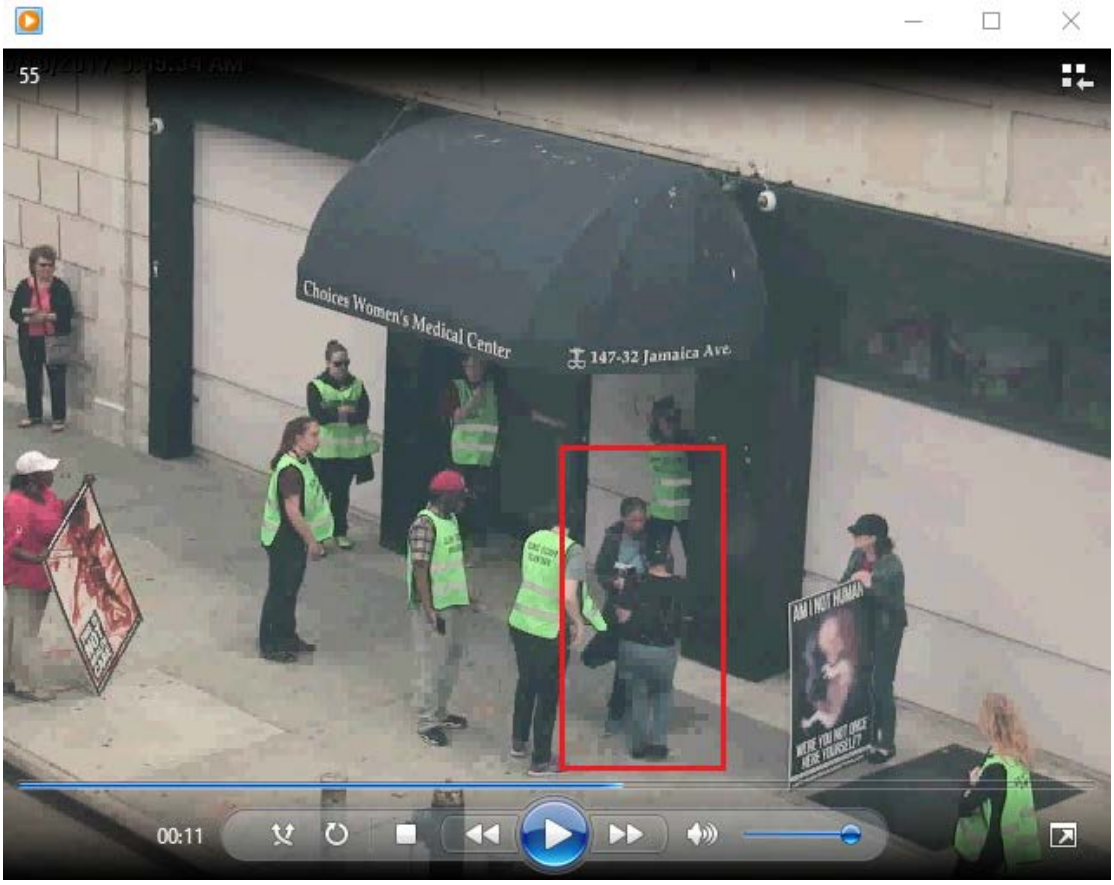
Here, the video evidence confirms that defendants committed obstruction within the meaning of the relevant statutes. For example, the following screen shots from Exhibits 31 and 41 show Ronald George and Ranville Thomas, respectively, standing in the middle of the sidewalk with large signs, forcing patients, companions, and escorts to crowd into a small pathway against the wall in order to access the clinic.


31
Choices Women's Medical Center
147-32 Jamaica Ave.
00:15


41
Choices Women's Medical Center
147-32 Jamaica Ave.
LIFE
KILLING A BABY
00:06
Play

Likewise, the following screenshots from Exhibits 7 and 55 show Angela Braxton and Sharon Richards, respectively, standing in front of women trying to enter the facility. Review of the complete videos confirms that defendants knowingly moved towards or in front of the oncoming patients, thereby acting with the requisite intent. These and other videos amply supported the Attorney General's obstruction claims. *See* AG Br. at 47-52.





b. The City's clinic access law prohibits conduct that impedes access to reproductive health care facilities, even without making access unreasonably difficult.

The Griepp Defendants also dispute the Attorney General's interpretation of the obstruction provision in the New York City Clinic Access Act (NYCCAA) as broader than the obstruction provisions contained in the federal FACE Act and the New York State Clinic Access Act (NYSCAA). *See* Griepp Br. at 36-40. But as explained in the Attorney General's opening brief (AG Br. at 43, 46), NYCCAA's plain text prohibits

impediments even when they do not rise to the level of making access "unreasonably difficult."

Section 10-1003(a)(2) of NYCCAA prohibits "knowingly obstruct[ing] or block[ing] the premises of a reproductive health care facility, so as to impede access to or from the facility." N.Y.C. Admin. Code § 10-1003(a)(2). The ordinary meaning of "impede" means to delay or to slow down. *See* AG Br. at 46; *see also Cambridge English Dictionary* (2019) (defining "impede" as "to slow something down or prevent an activity from making progress at its previous rate").[3] Unlike in the FACE Act and NYSCAA, nothing in NYCCAA requires that the obstructive conduct rise to the level of making access "unreasonably difficult." Therefore, NYCCAA prohibits any knowing obstructive act (such as standing in front of a person, or blocking a portion of a sidewalk with a sign) that results in slowing or delaying a person's access to a reproductive health care facility to any degree.

Defendants are wrong to suggest that applying NYCCAA's obstruction provision correctly would have no effect on the district court's ruling. *See* Griepp Br. at 38. The City law's deliberately broader scope

[3] https://dictionary.cambridge.org/us/

would cover any knowing obstruction that slows patients' or escorts' forward movement towards a clinic and would thus encompass more conduct than the district court thought relevant. And defendants are equally wrong to say that applying the provision correctly would require further fact-finding. *Id.* at 39. The undisputed video evidence establishes such obstruction without need for further fact-finding.

Finally, the Griepp Defendants are wrong to contend (*id.* at 39-40) that their due process rights have been violated because the Attorney General provided this interpretation of NYCCAA for the first time on appeal. The challenged interpretation is based on the text of the statute and the common understanding of the term "impede." Due process requires only that a statute provide "minimal guidelines" as to the conduct it proscribes when understood through common sense and ordinary practice; the Constitution does not demand "meticulous specificity." *Mannix v. Phillips*, 619 F.3d 187, 197 (2d Cir. 2010). Defendants offer no explanation as to why they "could not have known in advance" what conduct the plain text of a statute would proscribe. Griepp Br. at 40.

c. The district court correctly concluded that Brian George obstructed access to Choices.

Even under the district court's narrow view of obstruction, the court found that Brian George committed obstruction by slowly walking in front of patients, escorts, and others trying to access the clinic.[4] George challenges that ruling (*see* Griepp Br. at 50-52), but it is amply supported by the record. George admitted in a post-trial declaration to having "walked towards the clinic entrance with the clinic escorts and patient *while positioned in front of them*, trying to engage with the patient over my shoulder." (Joint Appendix (JA) 2187) (emphasis added). Contemporaneous notes taken by George's co-defendant Patricia Musco confirmed that "Brian does the slow walk *in front of the clients* so Sharon [Richards] and he can talk to them." (JA 2863) (emphasis added). And Musco admitted at trial that George slows his walk in front of the patients because "it gives us a little more time to speak to them and appeal for the baby." (JA 1860-1861.)

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[4] George erroneously characterizes the district court's ruling as "a final judgment." Griepp Br. at 52. To the contrary, the district court merely issued a preliminary ruling in the context of a preliminary injunction motion.

George is also wrong to suggest that "there is no evidence that [he] actually slowed any patient's pace." Griepp Br. at 51. Musco testified that George's conduct "get[s] more time in the 5 to 10 seconds that we can speak to them." (JA 1860-1861.) This conduct is textbook obstruction. *See, e.g.*, *People ex rel. Spitzer v. Operation Rescue Nat'l*, 273 F.3d 184, 194 (2d Cir. 2001). In any event, even if no patient had been slowed down, the law does not require any patient to have actually been obstructed by defendant's intentional conduct. *See United States v. Dugan*, 450 F. App'x 20, 22 (2d Cir. 2011).

2. Defendants followed and harassed individuals within fifteen feet of a clinic.

The district court erred in finding that the Attorney General failed to establish a likelihood of success on the merits of her follow-and-harass claims under NYCCAA. *See* AG Br. at 52-58. Defendants again object to the plaintiff's description of the underlying record evidence (Griepp Br. at 40-43; Braxton Br. at 24-27), but it is uncontested that defendants have a concerted policy and practice of following and speaking with individuals even after those individuals have indicated verbally or through body language that they do not wish to speak to the defendants

(JA 1750, 1809). The video evidence confirms that defendants follow patients, companions, and escorts at extremely close distances and persist until the patient enters the clinic. *See generally* AG Br. at 21-24, 52-58. Indeed, the district court found that defendants "continue to engage patients, companions, or escorts after being told they have no interest in their message." (SPA 97.) And the district court encouraged defendants to "voluntarily discontinu[e] the practice of speaking to patients who have affirmatively asked to be left alone." (SPA 102.)

Defendants maintain that these facts are all irrelevant because speech on a public sidewalk is "at its most protected." Griepp Br. at 43. But the First Amendment "does not guarantee the right to communicate . . . at all times and places or in any manner that may be desired." *Heffron v. International Soc'y for Krishna Consciousness, Inc.*, 452 U.S. 640, 647 (1981). The government's interests in maintaining safety and order and in protecting a woman's right to safely access constitutionally protected medical services are important concerns that warrant some limitations on the time, place, and manner in which protestors exercise their right to speak in public spaces. *See Hill v. Colorado*, 530 U.S. 703, 728-30 (2000); *see also Mastrovincenzo v. City of New York*, 435 F.3d 78, 100 (2d Cir.

2006). Here, the government is entitled "to protect those who wish to enter health care facilities, many of whom may be under special physical or emotional stress, from close physical approaches by demonstrators." *Hill*, 530 U.S. at 730. The considerable interests of "residents, visitors, and workers must be balanced" against the interest of protesters. *See Concerned Jewish Youth v. McGuire,* 621 F.2d 471, 478 (2d Cir. 1980).

NYCCAA vindicates these important interests by protecting a person's right to refuse to speak with defendants after an initial approach without being chased down the street or pursued by a "tag team" of protestors. As explained in the Attorney General's opening brief (AG Br. at 53-54), communications made after a request to stop are harassing—especially in the context of an interaction between strangers on a public sidewalk outside of a reproductive health facility. *See also People v. Feliciano*, 2002 N.Y. Slip Op 50077(U), at *2 (1st Dep't App. Term 2002). Defendants fail to support their suggestion (Griepp Br. at 43) that the relative brevity of their interactions with patients, escorts, and companions on a public sidewalk immunizes their conduct. The government is entitled to protect women from nonconsensual close contact with

protestors on the way into a medical facility, even if it is not entitled to shield them from exposure to the protestors' message.

Finally, defendants insist that harassment requires "repeated" conduct to constitute a violation. *See* Griepp Br. at 42 (citing Penal Law § 240.25). As explained in the Attorney General's opening brief, NYCCAA's follow-and-harass provision incorporates the various definitions of harassment contained in Penal Law §§ 240.25 and 240.26. *See* AG Br. at 52-53; see also *infra* at 40-43. While section 240.25 requires "intentional[] and repeated[]" harassment, multiple subsections of section 240.26 have no such requirement. Under ordinary principles of statutory interpretation, harassment is proven any time "a violation of any one of the subdivisions of the harassment statute[s]" is established. *People v. Todaro*, 26 N.Y.2d 325, 330 (1970). Defendants offer no support for their suggestion (Griepp Br. at 42) that a NYCCAA plaintiff would have to prove the elements of every subdivision of both section 240.25 and section 240.26 to state a cause of action.

3. Defendants used force in their attempts to reach patients.

The district court erred in finding that the Attorney General failed to establish a likelihood of success on the merits of her force claims under all three statutes. *See* AG Br. at 59-62. As the Attorney General explained in her opening brief (*id.* at 59), the district court's erroneous evidentiary rulings resulted in the court evaluating only one video supporting the force claims. The district court's ruling represents a failure to grapple with substantial evidence and justifies reversal. See *supra* Point I.

On appeal, defendants again disagree with the Attorney General's description of the video evidence. *See* Griepp Br. at 44; Braxton Br. at 27-28. The video speaks for itself. (Exhibit 21.) In addition, defendants contend that the record showed evidence of only "incidental bumping," which cannot be unlawful. Griepp Br. at 45. But the bumping, jostling, shoving, and other physical contact that occurred was the direct result of defendants' *intentional* acts placing themselves in close physical proximity to the patients, companions, and escorts. Defendants are not entitled to come within inches of other individuals and then claim that any resulting contact is incidental. To the contrary, a person "is presumed to intend the

natural and probable consequences of one's acts." *United States v. Carboni*, 204 F.3d 39, 47 (2d Cir. 2000) (quotation marks omitted).

4. Defendants used threats of force to intimidate escorts and patients.

The district court erred in finding that the Attorney General failed to establish a likelihood of success on the merits of her threat of force claims. To the contrary, statements made to escorts by Ranville Thomas and Ronald George that they could "die at any moment," that they "never know when death may come," and that they "could die from being shot by a bullet while on the sidewalk," among others, constituted true threats. Thomas's statements to patients that the escorts would not be there when the patients left the clinic were likewise actionable. *See* AG Br. at 62-68.

Defendants correctly note that courts should look to the context in which a statement is made to determine whether it constitutes a true threat, but they are fundamentally mistaken in assessing the applicable context here. *See* Griepp Br. at 45-48. First, defendants are wrong to argue that there is "no relevant 'context' of abortion violence in New York any more" on the ground that there have been no recorded instances of abortion-motivated violence in the state since the 1998 murder of

Dr. Barnett Slepian. *Id.* at 46 n.8. Defendants do not explain why a reasonable listener—especially a reasonable volunteer or patient at a reproductive health clinic—would fail to consider the nationwide context of violence directed at abortion providers.

Moreover, trespassing, obstruction, serious violence, and threats of violence aimed at abortion providers have dramatically increased in the last five years, with threats of death or serious harm nearly doubling in the span of a year.[5] Well-publicized instances of recent abortion-related violence include the 2015 shooting at a Planned Parenthood in Colorado Springs resulting in three deaths,[6] a 2017 attempted pipe bombing at a woman's clinic in Champaign, Illinois,[7] and a 2018 incident where a Massachusetts man intentionally crashed a stolen truck into a Planned

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[5] *See* Nat'l Abortion Fed'n, 2017 Violence and Disruption Statistics, *at* https://prochoice.org/wp-content/uploads/2017-NAF-Violence-and-Disruption-Statistics.pdf.

[6] *See* Julie Turkewitz & Jack Healy, *3 Are Dead in Colorado Springs Shootout at Planned Parenthood Center*, N.Y. Times, Nov. 27, 2015.

[7] *U.S. abortion clinics face surge of 'emboldened' protesters, survey shows*, Associated Press, May 7, 2018.

Parenthood in New Jersey, injuring three people including a pregnant woman.[8]

Like defendants, the district court paid only lip service to the past and present history of violence at abortion clinics in evaluating the effect that Thomas and George's statements would have on the average volunteer clinic escort or patient. (SPA 74.) The district court also failed to explain why Thomas and George's statements could not have reflected both a religious philosophy and a true threat of violence. (SPA 76.)

Second, defendants correctly note that "true threats must generally communicate a threat of violence to be carried out by the speaker (or the speaker's co-conspirators)." Griepp Br. at 47 (quotation marks and emphasis omitted). But defendants fail to explain why the statements at issue in this case communicate a message that someone other than George or Thomas intends to carry out the threats of violence. To the contrary, courts have routinely found similarly phrased statements to constitute true threats, even when they do not explicitly say that the speaker intends to engage in harmful conduct. *See, e.g., United States v.*

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[8] *See* Jacey Fortin, *Man Crashes Truck Into Planned Parenthood Clinic, Police Say*, N.Y. Times, Feb. 17, 2018.

Scott, 958 F. Supp. 761, 769-70 (D. Conn. 1997) (finding that "[a] bullet could come your way today" and "just because you are young does not mean your life won't be taken early" constituted true threats), *aff'd and remanded* 145 F.3d 74 (2d Cir. 1998); *People ex rel. Spitzer v. Kraeger*, 160 F. Supp. 2d 360, 372 (N.D.N.Y. 2001) (finding "[y]ou need to repent because you never know how long you have" and "[a]re you sure you want to go in there? There are a lot of wackos going around shooting people" to be threats).

B. The Attorney General Demonstrated That Defendants Were Likely to Repeat Their Misconduct Absent Injunctive Relief.

The district court correctly concluded that the record established statutory violations by Brian George, Patricia Musco, and Anne Kaminsky, but it erred in finding no likelihood of future violations. *See* AG Br. at 68-71. Defendants' attempts to justify the district court's decision are without merit. *See* Griepp Br. at 48-50.

First, Brian George argues that there is no reasonable likelihood that his obstructive "slow-walking" would repeat in the future, as the district court found. *Id.* at 48-49. But George vigorously challenges the district court's predicate ruling that his conduct constituted unlawful

physical obstruction at all. *See* Griepp Br. at 50-54; see also *supra* at 18-19. A defendant's "continued insistence on justifying [his] actions in committing" past violations is persuasive evidence of a likelihood of future violations. *United States v. Laerdal Mfg. Corp.*, 73 F.3d 852, 856 (9th Cir. 1995); *see also Commodity Futures Trading Comm'n v. British Am. Commodity Options Corp.*, 560 F.2d 135, 142 (2d Cir. 1977)

Moreover, the only evidentiary support for the district court's denial of the preliminary injunction as to George was a conclusory promise made by George in a post-trial declaration that he "'will not engage in that behavior again.'" (SPA 90-91 (quoting JA 2187).) George submitted this declaration only after his counsel conceded at the post-hearing oral argument that there was no evidence in the record to support George's assertion that he would stop slow-walking. (JA 2184-18 to JA 2184-20.) The district court should have rejected the declaration as an improper attempt to supplement the record, or at a minimum, should have re-opened the record to offer the Attorney General an opportunity to cross-examine George (who did not testify). In any event, even if the declaration were admissible evidence of George's voluntary cessation of slow-walking, this Court has long held that the "cessation of illegal activity

does not ipso facto justify the denial of an injunction," especially where, as here, the defendant continues to maintain the propriety of his actions. *SEC v. Management Dynamics, Inc.*, 515 F.2d 801, 807 (2d Cir. 1975); *see also SEC v. Okin*, 139 F.2d 87, 88 (2d Cir. 1943).

Second, Musco and Kaminsky do not challenge the district court's determination (SPA 29, 43; *see also* AG Br. at 26, 71) that they interfered with the operation of a reproductive health care facility by falsely telling approaching patients that the clinic was closed. Rather, defendants contend that the district court correctly denied injunctive relief because the record showed only a single violation of the provision as to each defendant. *See* Griepp Br. at 49-50. But a single violation can readily support an injunction in appropriate circumstances; indeed, the Supreme Court has explained that an injunction "can be utilized even without a showing of past wrongs." *United States v. W.T. Grant Co.*, 345 U.S. 629, 633 (1953). Here, Musco and Kaminsky's challenge to the validity of NYCCAA's clinic interference provision (Griepp Br. at 66-68; see also *infra* at 50-52) demonstrates that these defendants also maintain the legality of their underlying conduct, which demonstrates the likelihood of future violations.

POINT III

THE DISTRICT COURT CORRECTLY REJECTED DEFENDANTS' STANDING AND CONSTITUTIONAL CHALLENGES

Defendants collectively raise numerous alternative grounds for affirming the district court's denial of the Attorney General's motion for a preliminary injunction.[9] Each of these arguments is baseless.

A. The Attorney General Has *Parens Patriae* Standing to Enforce NYCCAA.

Contrary to defendants' arguments (Griepp Br. at 53-55; Braxton Br. at 29-30; *see also* Br. for Fitchett (Fitchett Br.) at 3), the Attorney General was entitled to pursue claims under the City's clinic access law pursuant to the well-established doctrine of *parens patriae* standing.[10]

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[9] Defendants have improperly styled their alternative arguments for affirmance as cross-appeals. *See* Plaintiff's Mot. to Dismiss Cross-Appeals, 2d Cir. ECF No. 115; *see also* Plaintiff's Reply in Supp. of Mot. to Dismiss Cross-Appeals, 2d Cir. ECF No. 135. For the reasons explained in plaintiff's fully briefed motion to dismiss, there is no jurisdictional basis for the cross-appeals. And both jurisdictional and prudential concerns weigh heavily against the Griepp Defendants' suggestion (Griepp Br. at 23 n.3) that this Court should essentially provide an advisory opinion on these issues if it affirms the decision below on the same grounds as the district court.

[10] The Attorney General is expressly authorized to enforce violations of the FACE Act and the NYSCAA. *See* 18 U.S.C. § 248(c)(3);

That doctrine gives a State standing to assert claims—which might otherwise be brought by private parties—when the State has distinct "quasi-sovereign" interests to protect, including its interest in "the health and well-being—both physical and economic—of its residents." *Purdue Pharma L.P. v. Kentucky*, 704 F.3d 208, 215 (2d Cir. 2013); *see also Alfred L. Snapp & Son, Inc. v. Puerto Rico*, 458 U.S. 592, 607 (1982).

A State must satisfy three criteria to demonstrate *parens patriae* standing: it must (1) identify a "quasi-sovereign interest" distinct "from the interests of particular private parties;" (2) allege "injury to a sufficiently substantial segment of its population"; and (3) show "that individuals [upon whose behalf the State is suing] could not obtain complete relief through a private suit." *Connecticut v. American Elec. Power Co.*, 582 F.3d 309, 335-36 (2d Cir. 2009) (alterations in original; quotation marks omitted), *rev'd on other grounds* 564 U.S. 410 (2011). Defendants do not challenge the district court's conclusion (SPA 57-60) that the Attorney General easily satisfies the first two criteria. Rather, defendants dispute only the third criterion, arguing that private

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Civil Rights Law § 79-m. Defendants do not challenge the Attorney General's standing to enforce the federal and state statutes.

individuals would be able to obtain complete relief without the Attorney General's involvement. *See* Griepp Br. at 54-55. Defendants further assert that NYCCAA's text precludes the Attorney General's lawsuit. *See id.* at 53-54; Braxton Br. at 29-30. Neither argument has merit.

First, the district court correctly found that "individuals could not obtain complete relief through a private suit" to enforce NYCCAA. (SPA 60.) As the district court explained, "[f]ew private actors would have the time or resources to engage in the year-long investigation—comprising video surveillance, several undercover operations, and numerous employee and escort interviews—necessary to identify the named defendants and document their activities." (SPA 60 (citation omitted).) In addition, the district court accurately noted that "[e]ven if such private actions were financially viable . . . private litigants would not have the same incentive to obtain complete and prospective relief for *all* New Yorkers." (SPA 61-62 (emphasis added).)

The district court's conclusions are consistent with long-standing case law from the Supreme Court and this Court. In *Maryland v. Louisiana*, for example, a group of States sued Louisiana to challenge the imposition of a tax on certain uses of natural gas. 451 U.S. 725, 728

(1981). As the Supreme Court explained, *parens patriae* standing was appropriate because "individual consumers cannot be expected to litigate the validity of the [tax] given that the amounts paid by each consumer are likely to be relatively small." *Id.* at 738. This Court has likewise found *parens patriae* standing in a case involving agricultural worker visas, noting that the circumstances of individual workers "would make litigation of the individual claims difficult and costly," and that individual litigation would not ensure "that relief against widespread and future discrimination would be actively pursued." *Puerto Rico ex rel. Quiros v. Bramkamp*, 654 F.2d 212, 217 (2d Cir. 1981).

Here, the Attorney General seeks to vindicate the right of all New Yorkers to access reproductive health care services safely and reliably. Such vindication "should not be made dependent upon the possible relief obtained by" individual plaintiffs. *Id.* In this case, the ability of individual patients, escorts, and clinic owners to obtain meaningful relief is dramatically constrained by their financial resources, their understandable concerns about privacy, and the necessary limitation of any private lawsuit to the particular plaintiffs' limited experiences. In addition, individual plaintiffs are far less likely than the Attorney

General to seek and obtain prospective injunctive relief that would adequately protect the rights of all New Yorkers.[11] The district court therefore properly held that the mere prospect of individual litigation did not strip the Attorney General of *parens patriae* standing.

Second, defendants argue that the Attorney General lacks "standing" to enforce NYCCAA because she is not expressly identified in NYCCAA's right-of-action provisions. Griepp Br. at 53-54; Braxton Br. at 29-30.[12] But this Court has expressly rejected the proposition that "states may only sue in their *parens patriae* capacity when a statute specifically

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[11] It is irrelevant for purposes of *parens patriae* analysis that the corporation counsel is authorized to seek injunctive and equitable relief on behalf of the City of New York. *See* N.Y.C. Admin. Code § 10-1005. The *parens patriae* inquiry focuses on whether *individuals* can obtain complete relief through *private* suits. *American Elec. Power*, 582 F.3d at 336. Moreover, the corporation counsel is authorized to seek only injunctive relief, while the Attorney General seeks injunctive relief as well as statutory and compensatory damages in this action. (JA 71.)

[12] While defendants frame this argument as a challenge to the Attorney General's "standing" under NYCCAA, "what has been called 'statutory standing' in fact is not a standing issue, but simply a question of whether the particular plaintiff has a cause of action under the statute." *Klein ex rel. Qlik Techs., Inc. v. Qlik Techs., Inc.*, 906 F.3d 215, 221 (2d Cir. 2018) (quotation marks omitted). "It is precisely to avoid incorrectly portraying them as jurisdictional requirements that we now avoid the term 'statutory standing'" to refer to right-of-action provisions. *Id.* (quotation marks omitted).

provides for suits by states." *Connecticut v. Physicians Health Servs. of Connecticut*, 287 F.3d 110, 120-21 (2d Cir. 2002). To the contrary, the Supreme Court has affirmatively held that a State may sue to ensure that a statutory "scheme operates to the full benefit of its residents." *Snapp*, 458 U.S. at 610. Accordingly, States presumptively have *parens patriae* standing to enforce a statute (assuming the criteria discussed above have been satisfied), unless the statute by its terms precludes state enforcement. And this Court has repeatedly refused to find such preclusion when statutes have "a broad remedial provision that allows any 'aggrieved person' to bring an action"; such language thus "permit[s] states to enforce the rights protected" by the underlying statute as *parens patriae*. *Clearing House Ass'n v. Cuomo*, 510 F.3d 105, 125-26 (2d Cir. 2007) (quotation marks omitted), *aff'd in part and rev'd in part on other grounds* 557 U.S. 519 (2009); *see also Physicians Health Servs.*, 287 F.3d at 121.

NYCCAA's right-of-action provisions contain exactly the type of expansive language that this Court has long found to be consistent with the States' *parens patriae* powers. Section 10-1004 authorizes "*any person* whose ability to access a reproductive health care facility has been

interfered with, and any owner or operator of a reproductive health care facility or owner of a building in which such a facility is located" to bring a civil enforcement action. N.Y.C. Admin. Code § 10-1004 (emphasis added).[13] Even more on point, NYCCAA expressly *preserves* the lawful authority of all city, state, and federal law enforcement officers. Specifically, section 10-1007 states that "[t]his chapter does not limit the lawful exercise of any authority vested in . . . a law enforcement officer of the city, the state of New York or the United States acting within the scope of such person's official duties." N.Y.C. Admin. Code § 10-1007(c). Accordingly, NYCCAA reflects the intent to preserve all existing sources of enforcement authority—including the Attorney General's long-standing *parens patriae* authority to defend the health and well-being of New Yorkers.[14] *See* Executive Law § 63(1) ("The attorney general shall .

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[13] The Griepp Defendants are thus simply incorrect in stating (Griepp Br. at 53) that NYCCAA "does not contain a broad enforcement provision that permits suit by any person injured or aggrieved." Indeed, NYCCAA broadly defines the term "person" to include "an individual, corporation, not-for-profit organization, partnership, association, group or *any other entity*." N.Y.C. Admin. Code § 10-1002 (emphasis added).

[14] New York City agrees that section 10-1007 "illustrates that [NYCCAA] was not intended to limit the right and power of the Attorney General," and therefore "supports the State's position" that the Attorney

. . prosecute and defend all actions and proceedings in which the state is interested").

Defendants' reliance on this Court's decision in *Physicians Health Services* is misplaced. In that case, this Court found that a particular provision of the Employment Retirement Income Security Act of 1974 (ERISA) precluded Connecticut from bringing an ERISA claim as *parens patriae* against a health insurance provider. *Physicians Health Servs.*, 287 F.3d at 112, 120. But the ERISA provision at issue in *Physicians Health Services* differs in two critical respects from NYCCAA.

First, the ERISA provision "strictly limit[ed] the universe of plaintiffs who may bring certain civil actions" to "a participant, beneficiary, or fiduciary" of a regulated plan—thus excluding all other potential plaintiffs. *Id.* at 120-21 (quotation marks omitted). As already explained, NYCCAA's right-of-action provisions are not so restricted. *See* N.Y.C. Admin. Code § 10-1004. Second, the ERISA provision expressly authorized state enforcement in a different context, leading this Court to find that Congress's decision to "expressly empower[]" states for one

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General has *parens patriae* standing to enforce the statute. Br. for the City of New York (NYC Br.) at 24 n.12.

purpose supported "the inference that Congress intentionally omitted states" for other purposes. *Physicians Health Servs.*, 287 F.3d at 121 (alteration and quotation marks omitted). By contrast, NYCCAA broadly preserves all pre-existing state enforcement authority. N.Y.C. Admin. Code § 10-1007(c). There is thus no basis to conclude that the New York City Council intended to preclude the Attorney General from exercising her long-existing *parens patriae* authority when it enacted NYCCAA.

B. There Is No Merit to Defendants' Constitutional Challenges to NYCCAA.

Defendants assert facial vagueness and overbreadth challenges to NYCCAA's prohibitions on (i) following and harassing another person within fifteen feet of a clinic; and (ii) interfering with clinic operations. *See* Griepp Br. at 59-68; Braxton Br. at 24 n.4. Those claims are also meritless.

As an initial matter, these arguments are not ripe for appellate review. The district court expressly reserved decision on defendants' challenge to the follow-and-harass provision for purposes of the preliminary injunction motion (SPA 97) but will resolve that question when it rules on defendants' fully briefed motions to dismiss (*see* E.D.N.Y.

ECF Nos. 57, 75, 79). Moreover, defendants never challenged the clinic interference provision below. There is no reason for this Court to reach questions that the district court is either actively considering or has not been given an opportunity to resolve. *See Hartford Courant Co. v. Pellegrino*, 380 F.3d 83, 90 (2d Cir. 2004).[15]

Defendants' challenges also fail on the merits. Defendants' vagueness and overbreadth arguments all rely on the premise that NYCCAA's use of the terms "follow and harass" and "interfere" "fail[] to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits." *Hill*, 530 U.S. at 732. But for the reasons explained below, defendants have failed to establish that these

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[15] It is not necessary for this Court to resolve defendants' challenge to grant relief to plaintiff. The Attorney General does not ask this Court to grant her motion for a preliminary injunction, but rather to reverse the decision below and remand for further proceedings, at which point the district court can properly rule on defendants' challenges in the first instance. The Braxton Defendants also incorrectly contend that "the Attorney General conceded that 90% of its case is under the follow and harass provision." Br. for Braxton Defendants at 24 n.4 (citing JA 147-148). While counsel for the Attorney General stated that "90 percent of [defendants'] conduct violates this provision," she never suggested that other provisions of federal, state, and city law would fail to reach the same conduct. (JA 147-148.)

terms are so indeterminate that they "proscribe no comprehensible course of conduct at all." *United States v. Powell*, 423 U.S. 87, 92 (1975).

a. The "follow-and-harass" provision adopts the definition of harassment contained in the state Penal Law.

Section 10-1003(a)(3) makes it "unlawful for any person . . . to follow and harass another person within 15 feet of the premises of a reproductive health care facility." N.Y.C. Admin. Code § 10-1003(a)(3).

Defendants contend that the follow-and-harass provision is unconstitutionally vague because it does not define the term "harass." *See* Griepp Br. at 59-60. But, as explained in the Attorney General's opening brief (AG Br. at 15, 53) and in New York City's amicus brief (NYC Br. at 6-7, 11-15), NYCCAA's legislative history makes manifestly clear that the follow-and-harass "prohibition is modeled on the state Penal Law provisions relating to the crimes of harassment and stalking." N.Y.C. Council, *Report of the Committee on Public Safety* at 1 (Feb. 28, 1994), *reprinted in* 1994 N.Y.C. Legislative Annual 20. The committee report for the 2009 amendments to NYCCAA reiterated this understanding, explaining that "[t]he word 'harass' has its ordinary meaning in [NYCCAA] just as it does when used in the crime of 'harassment' in

the State Penal Law." N.Y.C. Council, Comm. on Civil Rights, *Committee Report of the Governmental Affairs Divisions* (4/1/09 Report) at 10 (Apr. 1, 2009); *see also* N.Y.C. Council, *Hearing of the Joint Committee on Women's Issues and Civil Rights* at 32:20-34:7 (Nov. 18, 2008) (testimony of Karen Agnifilo, General Counsel, Office of the Criminal Justice Coordinator). And the 2009 committee report expressly identified Penal Law §§ 240.25 and 240.26 as the statutory definitions the follow-and-harass provision incorporates. *See* 4/1/09 Report at 10 & nn.35-36.

The Penal Law definitions of "harassment" that NYCCAA incorporates are long-standing and easily satisfy the requirement that a statutory prohibition "convey[] sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices." *VIP of Berlin, LLC v. Town of Berlin*, 593 F.3d 179, 187 (2d Cir. 2010) (quotation marks omitted); *see also People v. Dupont*, 107 A.D.2d 247, 251-52 (1st Dep't 1985) (describing history of New York's criminal harassment proscriptions). From the time the Penal Law was enacted in 1965, its harassment provisions have covered specific enumerated categories of conduct done "with intent to harass, annoy or alarm another person," including, for example, subjecting a person to

physical contact and repeatedly committing acts that place another person in reasonable fear of physical injury. *See* William C. Donnino, Practice Commentaries to Penal Law § 240.26, 39 McKinney's Cons. L. of N.Y. at 93 (2017) (noting that the categories of conduct have been renumbered and divided into different degrees since 1965). "[A] complaint charging harassment . . . is sufficient if the evidence establishes a violation of any one of the subdivisions of the harassment statute." *Todaro*, 26 N.Y.2d at 330.

Defendants offer no justifiable reason for this Court to reject the construction intended for the statute by the legislative body that enacted it. Although defendants insist (Griepp Br. at 60) that the City Council's committee reports are "not part of the law," this Court has noted that "the most authoritative and reliable materials of legislative history, includ[e] the conference committee report [and] committee reports." *Disabled in Action of Met. N.Y. v. Hammons*, 202 F.3d 110, 124 (2d Cir. 2000). And both this Court and the New York Court of Appeals have relied on New York City Council committee reports in evaluating challenges to city laws like NYCCAA. *See, e.g.*, *Ognibene v. Parkes*, 671

F.3d 174, 179-80 (2d Cir. 2011); *In re Hernandez v. Barrios-Paoli*, 93 N.Y.2d 781, 789 (1999).

Defendants' remaining arguments on the supposed vagueness of the follow-and-harass provision are equally meritless. First, defendants rely on inapposite case law for the proposition "that a statute that fails to define the term 'harassment' is both vague and overbroad." Griepp Br. at 60 (citing *Dorman v. Satti*, 862 F.2d 432 (2d Cir. 1988) and *People v. Golb*, 23 N.Y.3d 455 (2014)). Neither of the cases that defendants cite supports their argument.

In *People v. Golb*, the New York Court of Appeals invalidated a provision of New York's aggravated harassment statute, which made it a misdemeanor for a person to "'*communicate*[] with a person . . . in a manner likely to cause annoyance or alarm'" if that communication was done "'with intent to harass, annoy, threaten or alarm another person.'" 23 N.Y.3d at 466-67 (quoting then-Penal Law § 240.30(1)(a)) (emphasis added). The court explained that this provision expressly regulated "pure speech," and that any such regulation "must be sharply limited to words which, by their utterance alone, inflict injury or tend naturally to evoke immediate violence." *Id.* at 467 (quotation marks omitted). The court's

decision in *Golb* thus had nothing to do with the *conduct* of "harassment" that Penal Law §§ 240.25 and 240.26 (and by extension NYCCAA) prohibit.[16]

Likewise, this Court's decision in *Dorman v. Satti* did not turn on a statute's definition (or lack thereof) of harassment. At issue in *Dorman* was a Connecticut law that prohibited "'interfer[ing] with the lawful taking of wildlife by another person, or acts in preparation for such taking, with intent to prevent such taking'" and "'harass[ing] another person who is engaged in the lawful taking of wildlife or acts in preparation for such taking.'" 862 F.2d at 433 (quoting then-Conn. Gen. Stat. § 53a-183a) (emphasis omitted). Although the parties raised a number of vagueness challenges to the statute, including the absence of a definition for "interfere" and "harass," the Court's decision rested on the absence of a definition for "acts in preparation." As the Court

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[16] Indeed, the City Council considered and expressly rejected including a provision in NYCCAA that would have made it unlawful "to communicate with and harass such other persons by telephone, telegraph, mail or other form of written communication in a manner likely to seriously alarm or annoy a reasonable person, or to cause such communication to be initiated." Memorandum, Council Amendments to Clinic Access and House of Worship Bills (Feb. 25, 1994), *reprinted in* N.Y. Leg. Servs., NYC Legislative History: 1994 Local Law #3, at 19.

explained, because "act[] in preparation is nowhere defined in the statute . . . the Act reaches a wide range of activities confined to no particular time, place or manner." *Id.* at 437 (quotation marks omitted).

Second, defendants wrongly assert (Griepp Br. at 64-66) that the Attorney General has altered her interpretation of the follow-and-harass provision during the course of this litigation. To the contrary, the Attorney General's post-hearing submissions expressly referred to the relevant provisions of the Penal Law (§§ 240.25 and 240.26) in defining the scope of the follow-and-harass provision. (*See* E.D.N.Y. ECF No. 189 ¶¶ 28-31.) And while the Attorney General did not reference these statutes in her earlier-filed opposition briefs to defendants' motions to dismiss, she unambiguously argued for this construction of the follow-and-harass provision at oral argument on those motions. (JA 130-131.) Defendants also make much of a pre-complaint memorandum written by an Assistant Attorney General giving instructions to investigators about potential violations they may observe at the clinic. *See* Griepp Br. at 64 (citing JA 3580-3583). However, there is no support for defendants' apparent view that an internal analysis prepared months before the initiation of a lawsuit reflected the official legal position of the Attorney

General. In any event, "occasional differences in theoretical interpretation will not render a [statute] facially unconstitutional." *Taylor v. Roswell Indep. Sch. Dist.*, 713 F.3d 25, 51 (10th Cir. 2013) (citing *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 445 U.S. 489, 497-98 (1982)).

Finally, defendants suggest that the follow-and-harass provision is vague because they purportedly "ha[ve] a legitimate purpose for their sidewalk advocacy." Griepp Br. at 66. But the legitimacy (or not) of defendants' conduct goes to the merits of the Attorney General's follow-and-harass claim; it has no bearing on the statute's vagueness.

Likewise, none of defendants' arguments support their First Amendment overbreadth challenge. "A clear and precise enactment may nevertheless be 'overbroad' if in its reach it prohibits constitutionally protected conduct." *Grayned v. City of Rockford*, 408 U.S. 104, 114 (1972). However, defendants' overbreadth arguments are based exclusively on the purported vagueness of the term "harass." *See* Griepp Br. at 59-66. Defendants do not argue—nor could they—that in the absence of vagueness, the provision would reach constitutionally protected conduct in a manner that is not only "real, but substantial as well, judged in

relation to the statute's plainly legitimate sweep." *Hill*, 530 U.S. at 732 (quotation marks omitted).

b. NYCCAA's incorporation of the Penal Law's definition of harassment does not create other constitutional defects.

In the alternative, defendants argue that the follow-and-harass provision would be constitutionally infirm even if it were construed to adopt the definitions of harassment set forth in Penal Law §§ 240.25 and 240.26. *See* Griepp Br. at 61-62. These arguments also fail.

First, defendants contend that sections 220.25 and 220.26 impermissibly exempt "'activities regulated by the national labor relations act, as amended, the railway labor act, as amended, or the federal employment labor management act, as amended.'" Griepp Br. at 61 (quoting Penal Law §§ 240.25 and 240.26). As New York City explains in its amicus brief (NYC Br. at 28 n.13), those exceptions were added to recognize that, under well-established preemption doctrines, the state's harassment laws could not proscribe "lawful activities regulated under federal [labor] statute[s]." Governor's Program Bill Memorandum (1994), *reprinted in* Bill Jacket for ch. 109 (1994), at 6; *see also Chamber of Commerce of the United States v. Brown*, 554 U.S. 60, 65 (2008)

(discussing scope of preemption under the National Labor Relations Act); *Hawaiian Airlines, Inc. v. Norris*, 512 U.S. 246, 252-63 (1994) (discussing scope of preemption under Railway Labor Act); *Local 174, Teamsters v. Lucas Flour Co.*, 369 U.S. 95, 103 (1962) (discussing scope of preemption under the Labor Management Relations Act).

Defendants are thus simply wrong to characterize the Penal Law's exemptions as creating a content-based preference for labor-related speech; to the contrary, these exemptions were arguably compelled by federal labor law. No similar concerns about federal preemption were present in the two cases cited by defendants, *Police Department of Chicago v. Mosley* and *Carey v. Brown*. *See* Griepp Br. at 61-62. Rather, those cases involved statutory preferences for certain forms of expressive conduct based on subject matter alone. *See Mosley*, 408 U.S. 92, 92-93 (1972) (prohibiting picketing within 150 feet of a school, except "the peaceful picketing of any school involved in a labor dispute"); *Carey*, 447 U.S. 455, 457 (1980) (barring picketing outside of residential properties except "the peaceful picketing of a place of employment involved in a labor dispute").

Second, defendants contend that incorporating the definition of harassment from Penal Law §§ 240.25 and 240.26 would create vagueness simply because those statutes enumerate multiple categories of prohibited conduct, rather than one category. *See* Griepp Br. at 62-63. Defendants offer no support for this proposition.

Finally, defendants argue that incorporating one of the Penal Law's proscribed categories of "harassment"—"following a person in or about a public place or places" with the requisite intent—would render the follow-and-harass provision vague and overbroad by prohibiting "following and following." *Id.* at 63 (emphasis, alteration, and quotation marks omitted). But NYCCAA's incorporation of this language is straightforwardly understood as prohibiting the following of another person with the requisite intent within fifteen feet of a reproductive health care facility. If the Penal Law's prohibition is not itself vague, there is no reason that NYCCAA's incorporation of that prohibition would be impossible to understand. In any event, defendants fail to explain why their concern about one discrete portion of the Penal Law provisions renders the application of the remainder of the statutes unconstitutionally vague. *See also* NYC Br. at 20-21.

c. Defendants' challenge to NYCCAA's prohibition on "knowingly interfering" with clinic operations is unpreserved and, in any event, baseless.

Section 10-1003(a)(6) makes it

> unlawful for any person . . . [t]o knowingly interfere with the operation of a reproductive health care facility, or to attempt to do the same, by activities that include, but are not limited to, interfering with, or attempting to interfere with (i) medical procedures being performed at such facility or (ii) the delivery of goods to such facility.

N.Y.C. Admin. Code § 10-1003(a)(6). Defendants wrongly contend that the provision is unconstitutionally vague and overbroad because it does not define the term "interfere." *See* Griepp Br. at 66-68.

As an initial matter, defendants failed to challenge the clinic interference provision below and so may not do so for the first time on appeal. Defendants' challenge to the clinic interference provision also fails on the merits because the provision gives more than sufficient guidance about the nature and scope of its prohibition.

First, the clinic interference provision applies only to "knowing[]" interference. Where "defendants must have the requisite scienter in order to violate" a statute, that law "poses no trap for the innocent." *United States v. Schneiderman*, 968 F.2d 1564, 1568 (2d Cir. 1992).

Second, the clinic interference provision is limited to "interfere[nce] with the operation of a reproductive health care facility." N.Y.C. Admin. Code § 10-1003(a)(6). This Court has previously rejected vagueness challenges to an analogous policy proscribing "interfere[nce] with the proper and orderly operation and discipline of" schools. *Eisner v. Stamford Bd. of Educ.*, 440 F.2d 803, 805, 808 (2d Cir. 1971). Third, NYCCAA aims to address any concerns about vagueness by providing illustrative examples of the type of interference that would be impermissible (i.e., interfering with medical procedures or the delivery of goods). *See* N.Y.C. Admin. Code § 10-1003(a)(6); *see also* 4/1/09 Report at 10-11.

None of these features were present in the chief case cited by defendants, this Court's decision in *Dorman*. This Court found the statute at issue in *Dorman* vague not because it used the word "interference," but because it prohibited interference with "acts of preparation," an undefined and potentially limitless universe of activities. *See* 862 F.2d at 437. In striking that law, however, *Dorman* favorably cited by comparison to *State v. Williams*, a case that had upheld a "state statute proscribing interference with [a] police officer in the

performance of his duties."[17] *Id.* (citing 205 Conn. 456, 471 (1987) (emphasis omitted)). Because NYCCAA bears a far greater resemblance to the statute in *Williams* that this Court approved than to the statute that was struck in *Dorman*, defendants' reliance on *Dorman* is misplaced.

C. Binding Precedent Forecloses Defendants' Challenge to the FACE Act.

The Griepp Defendants assert that the FACE Act is "unconstitutional in that it imposes a content-based constraint on speech and cannot survive strict scrutiny."[18] Griepp Br. at 55. The district court

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[17] Defendants cite two out-of-circuit district court decisions suggesting that "performance of duties" is impermissibly vague or overbroad, but these cases are neither binding nor persuasive in light of *Dorman*'s express approval of *Williams*. *See* Griepp Br. at 67 (citing *Landry v. Daley*, 280 F. Supp. 968, 973 (N.D. Ill. 1968); *Baker v. Lieutenant Grant Cannon*, No. 15-cv-01471, 2016 WL 5402860 at *6 (D.S.C. Sept. 28, 2016).)

[18] Defendants make this challenge only as to the FACE Act. *See* Griepp Br. at 55-59; Br. for Fitchett at 2. Although the Griepp Defendants hint that this argument should also apply to the state and city laws (*see* Griepp Br. at 4, 55, 61), fleeting references in the statement of issues, a point heading, and a sentence in an unrelated section of the brief are insufficient to preserve any such contention. *See United States v. Restrepo*, 986 F.2d 1462, 1463 (2d Cir. 1993). In any event, defendants' argument that the FACE Act is an unlawful content-based regulation fails as to all three statutes for substantially similar reasons. (*See* SPA 63 n.18; *see also* NYC Br. at 25-34 (discussing constitutionality of

correctly rejected this argument (SPA 63) as foreclosed by this Court's decision in *United States v. Weslin*, 156 F.3d 292, 296-98 (2d Cir. 1998), *cert. denied*, 525 U.S. 1071 (1999). In *Weslin*, this Court held that the FACE Act is not a speech regulation based on viewpoint or content, but rather an appropriate and narrowly tailored regulation of conduct. *Id.* Every other court of appeals to consider a facial First Amendment challenge to the FACE Act has also rejected it.[19]

A panel of this court has no authority to overrule *Weslin*, and defendants have provided no reason to do so in any event. *See United States v. Wilkerson*, 361 F.3d 717, 732 (2d Cir. 2004). As this Court

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NYCCAA's follow-and-harass provision as a content-neutral time, place, and manner restriction.)

[19] *Norton v. Ashcroft*, 298 F.3d 547, 552-553 (6th Cir. 2002), *cert. denied*, 537 U.S. 1172 (2003); *United States v. Gregg*, 226 F.3d 253, 267 (3d Cir. 2000), *cert. denied*, 532 U.S. 971 (2001); *Hoffman v. Hunt*, 126 F.3d 575, 588-89 (4th Cir. 1997), *cert. denied*, 523 U.S. 1136 (1998); *United States v. Bird*, 124 F.3d 667, 683 (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, 1374-76 (7th Cir.), *cert. denied*, 519 U.S. 1006 (1996); *United States v. Dinwiddie*, 76 F.3d 913, 921-24 (8th Cir.), *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.), *cert. denied*, 516 U.S. 809 (1995); *see also Planned Parenthood of the Columbia/Willamette, Inc. v. American Coal. of Life Activists*, 290 F.3d 1058, 1079 (9th Cir. 2002) (en banc), *cert. denied*, 539 U.S. 958 (2003).

correctly explained, the FACE Act "does not govern speech as such, but, instead, is concerned with conduct." *Weslin*, 156 F.3d at 297. Specifically, the law prohibits the use of force, the threat of force, and physical obstruction, none of which are "protected by the First Amendment." *Norton v. Ashcroft*, 298 F.3d 547, 552 (6th Cir. 2002). While those activities may have some "expressive aspects," that fact alone "does not exempt them from governmental prohibition." *Weslin*, 156 F.3d at 297. Expressive conduct may be regulated so long as such regulation serves "an important or substantial governmental interest" that is "unrelated to the suppression of free expression," and "the incidental restriction on alleged First Amendment freedoms is no greater than essential to the furtherance of that interest." *United States v. O'Brien*, 391 U.S. 367, 377 (1968).

This Court has already concluded that the FACE Act satisfies *O'Brien*. "[T]he government's interests in ensuring public safety and order, promoting the free flow of traffic on streets and sidewalks, protecting property rights, and protecting a woman's freedom to seek pregnancy-related services" are substantial. *Weslin*, 156 F.3d at 297 (quotation marks omitted); *see also McCullen v. Coakley*, 134 S. Ct. 2518, 2535 (2014). The FACE Act's prohibitions are "unrelated to the

suppression of free expression" because they bar obstructive conduct "regardless of whether the obstruction is or is not motivated by opposition to abortion." *Weslin*, 156 F.3d at 296. And the FACE Act is narrowly tailored because it "proscribes no more expressive conduct than necessary to protect safe and reliable access to reproductive health services," while "leav[ing] open ample alternative means for communication." *American Life League, Inc. v. Reno*, 47 F.3d 642, 652 (4th Cir. 1995); *see also Weslin*, 156 F.3d at 298.

Defendants' arguments to the contrary are based on a fundamental misunderstanding of the FACE Act. First, defendants assert that the law is content based because "it aims only at speech about abortion or 'reproductive health services.'" Griepp Br. at 56. But the FACE Act's "unambiguous provisions do not target any message based on content or viewpoint." *American Life League*, 47 F.3d at 649. The law applies to anyone who interferes with a person's access to reproductive health care, "regardless of the message expressed" by the interferer. *United States v. Dinwiddie*, 76 F.3d 913, 923 (8th Cir. 1996). And while the FACE Act's specific intent element requires that the offender act "because [a] person is or has been . . . obtaining or providing reproductive health services," or

"in order to intimidate" any person from obtaining or providing such services, 18 U.S.C. § 248(a)(1), that limitation is not an expression of hostility toward a particular message, but rather "the perfectly constitutional task of filtering out conduct that Congress believes need not be covered by a federal statute." *Dinwiddie*, 76 F.3d at 923; *see also American Life League*, 47 F.3d at 650-51; *Terry v. Reno*, 101 F.3d 1412, 1419-21 (D.C. Cir. 1996).

Second, defendants assert that the FACE Act "regulat[es] expression in front of abortion facilities differently depending on its purpose: speech intended for the purpose of deterring women from procuring reproductive health services is proscribed, while other speech, *e.g.*, speech encouraging women to procure such services is permitted." Griepp Br. at 56-57. This assertion is simply false. The FACE Act "prohibits interference with a variety of 'reproductive health services,' including all 'medical, surgical, counseling or referral services relating to the human reproductive system." *Norton*, 298 F.3d at 553 (quotation marks omitted). Therefore, the law "prohibits interference with not only abortion-related services," but also with "counseling regarding abortion alternatives." *Id.* As *Weslin* noted, "at least one pro-choice activist has, in fact, been prosecuted for violating"

the FACE Act. 156 F.3d at 297. And although, "in practice, most of those prosecuted under [the law] are anti-abortion protestors," a law does not become content based merely because one group "violat[es] a statute more frequently than any other group." *Id.* (quotation marks omitted). "First Amendment law does not recognize disparate impact claims." *Id.*

Finally, defendants assert that *Weslin* is no longer good law because the Supreme Court's decision in *Reed v. Town of Gilbert* "set forth a new analytical framework for determining whether a law is content based." Griepp Br. at 55-56 (citing 135 S. Ct. 2218 (2015)). The district court correctly rejected this argument. (SPA 64-65.) At issue in *Reed* was a local code that imposed different size, placement, and timing restrictions on outdoor signs based on the type of information that the signs conveyed.[20] *See* 135 S. Ct. at 2224-26. The Supreme Court held that the code was

[20] For example, "ideological signs" conveying noncommercial speech could be up to twenty square feet in size and were allowed to be placed in all zoning districts without time limits. *Reed*, 135 S. Ct. at 2224. By contrast, "political signs" had a smaller maximum size and could be placed only in certain zones and during certain times around elections. *Id.* at 2224-25. And "temporary directional signs relating to a qualifying event"—that is, signs directing pedestrians and motorists to a particular gathering—could be no more than six square feet in size and were subject to highly stringent placement and time restrictions. *Id.* at 2225.

"content based on its face" because its restrictions "depend entirely on the communicative content of the sign." *Id.* at 2227. The Court further explained that a legislative body's "benign motive, content-neutral justification, or lack of animus toward the ideas contained" is irrelevant to constitutional analysis when a statute is "facially content-based." *Id.* at 2228 (quotation marks omitted).

Nothing in *Reed* supports defendants' argument that *Weslin* requires revisiting. As one district court recently explained, *Reed* "does not change" the analysis of a statute which, by its terms, "does not advantage one message over another based upon content," but rather prohibits certain conduct in a nondiscriminatory way. *Bruni v. City of Pittsburgh*, 283 F. Supp. 3d 357, 367-68 (W.D. Pa. 2017) (upholding buffer-zone ordinance). And consistent with *Reed*'s textual focus, *Weslin* determined that the FACE Act was content- and viewpoint-neutral based on the language of the statute. *See* 156 F.3d at 296-98.

Defendants also ignore the Supreme Court's far more relevant discussion of content neutrality in *McCullen*, a case involving a statute that regulates conduct outside of reproductive health care clinics. *See* 134 S. Ct. at 2534. In *McCullen*, the Court concluded that a Massachusetts

law creating a 35-foot buffer zone around such clinics was content neutral because the law did "not draw content-based distinctions on its face." *Id.* at 2531. Indeed, someone could "violate the Act merely by standing in a buffer zone, without displaying a sign or uttering a word." *Id.* The Court also rejected the proposition that the location of the buffer zone "has the 'inevitable effect' of restricting abortion-related speech more than speech on other subjects." *Id.* As the Court explained, "a facially neutral law does not become content based simply because it may disproportionately affect speech on certain topics." *Id.* Accordingly, *McCullen* rejected the very same arguments that defendants raise here, on largely the same grounds this Court articulated in *Weslin*.[21]

[21] Moreover, *McCullen* observed that the FACE Act is more narrowly tailored to the relevant governmental interests in public safety and access to reproductive health services than the Massachusetts statute on review. 134 S. Ct. at 2537-38.

CONCLUSION

This Court should reverse the district court's denial of the Attorney General's motion for a preliminary injunction.

Dated: New York, New York
May 6, 2019

Respectfully submitted,

LETITIA JAMES
Attorney General
State of New York

By: /s/ Ester Murdukhayeva
ESTER MURDUKHAYEVA
Assistant Solicitor General

28 Liberty Street
New York, NY 10005
(212) 416-6279

BARBARA D. UNDERWOOD
Solicitor General
STEVEN C. WU
Deputy Solicitor General
ESTER MURDUKHAYEVA
Assistant Solicitor General
of Counsel

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a) of the Federal Rules of Appellate Procedure, Will Sager, an employee in the Office of the Attorney General of the State of New York, hereby certifies that according to the word count feature of the word processing program used to prepare this brief, the brief contains 11,540 words and complies with the typeface requirements and length limits of Rule 32(a)(5)-(7).

/s/ Will Sager

Addendum

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Title 18. Crimes and Criminal Procedure (Refs & Annos)
Part I. Crimes (Refs & Annos)
Chapter 13. Civil Rights

18 U.S.C.A. § 248

§ 248. Freedom of access to clinic entrances

Currentness

(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, or in order to intimidate such person or any other person or any class of persons from, obtaining or providing reproductive health services;

(2) 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 lawfully exercising or seeking to exercise the First Amendment right of religious freedom at a place of religious worship; or

(3) intentionally damages or destroys the property of a facility, or attempts to do so, because such facility provides reproductive health services, or intentionally damages or destroys the property of a place of religious worship,

shall be subject to the penalties provided in subsection (b) and the civil remedies provided in subsection (c), except that a parent or legal guardian of a minor shall not be subject to any penalties or civil remedies under this section for such activities insofar as they are directed exclusively at that minor.

(b) Penalties.--Whoever violates this section shall--

(1) in the case of a first offense, be fined in accordance with this title, or imprisoned not more than one year, or both; and

(2) in the case of a second or subsequent offense after a prior conviction under this section, be fined in accordance with this title, or imprisoned not more than 3 years, or both;

except that for an offense involving exclusively a nonviolent physical obstruction, the fine shall be not more than $10,000 and the length of imprisonment shall be not more than six months, or both, for the first offense; and the fine shall, notwithstanding section 3571, be not more than $25,000 and the length of imprisonment shall be not more than 18 months, or both, for a subsequent offense; and except that if bodily injury results, the length of imprisonment shall be not more than 10 years, and if death results, it shall be for any term of years or for life.

(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), except that such an action may be brought under subsection (a)(1) only by a person involved in providing or seeking to provide, or obtaining or seeking to obtain, services in a facility that provides reproductive health services, and such an action may be brought under subsection (a)(2) only by a person lawfully exercising or seeking to exercise the First Amendment right of religious freedom at a place of religious worship or by the entity that owns or operates such place of religious worship.

(B) Relief.--In any action under subparagraph (A), the court may award appropriate relief, including temporary, preliminary or permanent injunctive relief and compensatory and punitive damages, as well as the costs of suit and reasonable fees for attorneys and expert witnesses. With 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.

(2) Action by Attorney General of the United States.--

(A) In general.--If the Attorney General of the United States has reasonable cause to believe that any person or group of persons is being, has been, or may be injured by conduct constituting a violation of this section, the Attorney General may commence a civil action in any appropriate United States District Court.

(B) Relief.--In any action under subparagraph (A), the court may award appropriate relief, including temporary, preliminary or permanent injunctive relief, and compensatory damages to persons aggrieved as described in paragraph (1)(B). The court, to vindicate the public interest, may also assess a civil penalty against each respondent--

(i) in an amount not exceeding $10,000 for a nonviolent physical obstruction and $15,000 for other first violations; and

(ii) in an amount not exceeding $15,000 for a nonviolent physical obstruction and $25,000 for any other subsequent violation.

(3) Actions by State Attorneys General.--

(A) In general.--If the Attorney General of a State has reasonable cause to believe that any person or group of persons is being, has been, or may be injured by conduct constituting a violation of this section, such Attorney General may commence a civil action in the name of such State, as parens patriae on behalf of natural persons residing in such State, in any appropriate United States District Court.

(B) Relief.--In any action under subparagraph (A), the court may award appropriate relief, including temporary, preliminary or permanent injunctive relief, compensatory damages, and civil penalties as described in paragraph (2)(B).

(d) Rules of construction.--Nothing in this section shall be construed--

(1) to prohibit any expressive conduct (including peaceful picketing or other peaceful demonstration) protected from legal prohibition by the First Amendment to the Constitution;

(2) to create new remedies for interference with activities protected by the free speech or free exercise clauses of the First Amendment to the Constitution, occurring outside a facility, regardless of the point of view expressed, or to limit any existing legal remedies for such interference;

(3) to provide exclusive criminal penalties or civil remedies with respect to the conduct prohibited by this section, or to preempt State or local laws that may provide such penalties or remedies; or

(4) to interfere with the enforcement of State or local laws regulating the performance of abortions or other reproductive health services.

(e) Definitions.--As used in this section:

(1) Facility.--The term "facility" includes a hospital, clinic, physician's office, or other facility that provides reproductive health services, and includes the building or structure in which the facility is located.

(2) Interfere with.--The term "interfere with" means to restrict a person's freedom of movement.

(3) Intimidate.--The term "intimidate" means to place a person in reasonable apprehension of bodily harm to him- or herself or to another.

(4) Physical obstruction.--The term "physical obstruction" means rendering impassable ingress to or egress from a facility that provides reproductive health services or to or from a place of religious worship, or rendering passage to or from such a facility or place of religious worship unreasonably difficult or hazardous.

(5) Reproductive health services.--The term "reproductive health services" means 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.

(6) State.--The term "State" includes a State of the United States, the District of Columbia, and any commonwealth, territory, or possession of the United States.

CREDIT(S)

(Added Pub.L. 103-259, § 3, May 26, 1994, 108 Stat. 694; amended Pub.L. 103-322, Title XXXIII, § 330023(a)(2), (3), Sept. 13, 1994, 108 Stat. 2150.)

18 U.S.C.A. § 248, 18 USCA § 248
Current through P.L. 116-16.

End of Document

McKinney's Consolidated Laws of New York Annotated
Civil Rights Law (Refs & Annos)
Chapter 6. Of the Consolidated Laws
Article 7. Miscellaneous Rights and Immunities

McKinney's Civil Rights Law § 79-m

§ 79-m. Criminal interference with health care services, religious worship, funeral, burial or memorial service; injunction

Effective: September 25, 2008
Currentness

Whenever the attorney general or district attorney of the county where the affected health care facility, place of religious worship, or site of a funeral, burial or memorial service is located has reasonable cause to believe that any person or group of persons is being, has been, or may be injured by conduct constituting a violation of section 240.21, 240.70 or 240.71 of the penal law, the attorney general or district attorney may bring an action in the name of the people of the state of New York to permanently enjoin such violation. In such action preliminary and temporary relief may be granted under article sixty-three of the civil practice law and rules.

Credits
(Added L.1999, c. 635, § 16, eff. Dec. 1, 1999. Amended L.2008, c. 566, § 2, eff. Sept. 25, 2008.)

McKinney's Civil Rights Law § 79-m, NY CIV RTS § 79-m
Current through L.2019, chapter 29. Some statute sections may be more current, see credits for details.

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McKinney's Consolidated Laws of New York Annotated
Penal Law (Refs & Annos)
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Title N. Offenses Against Public Order, Public Sensibilities and the Right to Privacy
Article 240. Offenses Against Public Order (Refs & Annos)

McKinney's Penal Law § 240.70

§ 240.70 Criminal interference with health care services or religious worship in the second degree

Effective: December 1, 1999
Currentness

1. A person is guilty of criminal interference with health services or religious worship in the second degree when:

(a) by force or threat of force or by physical obstruction, he or she intentionally injures, intimidates or interferes with, or attempts to injure, intimidate or interfere with, another person because such other person was or is obtaining or providing reproductive health services; or

(b) by force or threat of force or by physical obstruction, he or she intentionally injures, intimidates or interferes with, or attempts to injure, intimidate or interfere with, another person in order to discourage such other person or any other person or persons from obtaining or providing reproductive health services; or

(c) by force or threat of force or by physical obstruction, he or she intentionally injures, intimidates or interferes with, or attempts to injure, intimidate or interfere with, another person because such person was or is seeking to exercise the right of religious freedom at a place of religious worship; or

(d) he or she intentionally damages the property of a health care facility, or attempts to do so, because such facility provides reproductive health services, or intentionally damages the property of a place of religious worship.

2. A parent or legal guardian of a minor shall not be subject to prosecution for conduct otherwise prohibited by paragraph (a) or (b) of subdivision one of this section which is directed exclusively at such minor.

3. For purposes of this section:

(a) the term “health care facility” means a hospital, clinic, physician's office or other facility that provides reproductive health services, and includes the building or structure in which the facility is located;

(b) the term “interferes with” means to restrict a person's freedom of movement;

(c) the term "intimidates" means to place a person in reasonable apprehension of physical injury to himself or herself or to another person;

(d) the term "physical obstruction" means rendering impassable ingress to or egress from a facility that provides reproductive health services or to or from a place of religious worship, or rendering passage to or from such a facility or place of religious worship unreasonably difficult or hazardous; and

(e) the term "reproductive health services" means health care services provided in a hospital, clinic, physician's office or other facility and includes medical, surgical, counseling or referral services relating to the human reproductive system, including services relating to pregnancy or the termination of a pregnancy.

Criminal interference with health care services or religious worship in the second degree is a class A misdemeanor.

Credits
(Added L.1999, c. 635, § 14, eff. Dec. 1, 1999.)

McKinney's Penal Law § 240.70, NY PENAL § 240.70
Current through L.2019, chapter 29. Some statute sections may be more current, see credits for details.

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McKinney's Penal Law § 240.71

§ 240.71 Criminal interference with health care services or religious worship in the first degree

Effective: January 26, 2010
Currentness

A person is guilty of criminal interference with health care services or religious worship in the first degree when he or she commits the crime of criminal interference with health care services or religious worship in the second degree and has been previously convicted of the crime of criminal interference with health care services or religious worship in the first or second degree or aggravated interference with health care services in the first or second degree.

Criminal interference with health care services or religious worship in the first degree is a class E felony.

Credits
(Added L.1999, c. 635, § 14, eff. Dec. 1, 1999. Amended L.2009, c. 493, § 1, eff. Jan. 26, 2010.)

McKinney's Penal Law § 240.71, NY PENAL § 240.71
Current through L.2019, chapter 29. Some statute sections may be more current, see credits for details.

Chapter 10: Prevention of Interference With Reproductive Health Services

Editor's note: *This chapter was formerly designated as Chapter 8 of Title 8.*

§ 10-1001 Short title.

This chapter shall be known and may be cited as the "access to reproductive health care facilities law".

(Am. L.L. 2018/063, 1/19/2018, eff. 10/16/2018)

§ 10-1002 Definitions.

As used in this chapter, the following terms have the following meanings:

Person. The term "person" means an individual, corporation, not-for-profit organization, partnership, association, group or any other entity.

Premises of a reproductive health care facility. The term "premises of a reproductive health care facility" means the driveway, entrance, entryway, or exit of a reproductive health care facility and the building in which such facility is located and any parking lot in which the facility has an ownership or leasehold interest.

Reproductive health care facility. The term "reproductive health care facility" means any building, structure or place, or any portion thereof, at which licensed, certified or otherwise legally authorized persons provide health care services or health care counseling relating to the human reproductive system.

(Am. L.L. 2018/063, 1/19/2018, eff. 10/16/2018)

§ 10-1003 Prohibition of activities to prevent access to reproductive health care facilities.

a. *Unlawful conduct.* It is unlawful for any person:

1. To knowingly physically obstruct or block another person from entering into or exiting from the premises of a reproductive health care facility by physically striking, shoving, restraining, grabbing, or otherwise subjecting a person to unwanted physical contact, or attempting to do the same;

2. To knowingly obstruct or block the premises of a reproductive health care facility, so as to impede access to or from the facility, or to attempt to do the same;

3. To follow and harass another person within 15 feet of the premises of a reproductive health care facility;

4. To engage in a course of conduct or repeatedly commit acts within 15 feet of the premises of a reproductive health care facility when such behavior places another person in reasonable fear of physical harm, or to attempt to do the same;

5. To physically damage a reproductive health care facility so as to interfere with its operation, or to attempt to do the same; or

6. To knowingly interfere with the operation of a reproductive health care facility, or to attempt to do the same, by activities that include, but are not limited to, interfering with, or attempting to interfere with (i) medical procedures being performed at such facility or (ii) the delivery of goods to such facility.

b. *Violations.* Any person who violates any provision of subdivision a of this section is guilty of a misdemeanor punishable by a fine not to exceed $1,000 or imprisonment not to exceed six months, or both, for a first conviction under this section. For a second and each subsequent conviction under this section, the penalty shall be a fine not to exceed $5,000 or imprisonment not to exceed one year, or both.

(Am. L.L. 2018/063, 1/19/2018, eff. 10/16/2018)

§ 10-1004 Civil cause of action.

Where there has been a violation of subdivision a of section 10-1003, any person whose ability to access a reproductive health care facility has been interfered with, and any owner or operator of a reproductive health care facility or owner of a building in which such a facility is located, may bring a civil action in any court of competent jurisdiction for any or all of the following relief:

a. Injunctive relief;

b. Treble the amount of actual damages suffered as a result of such violation, including, where applicable, damages for pain and suffering and emotional distress, or damages in the amount of $5,000, whichever is greater; and

c. Attorney's fees and costs.

(Am. L.L. 2018/063, 1/19/2018, eff. 10/16/2018)

§ 10-1005 Civil action by city to enjoin interference with access to reproductive health care facilities.

The corporation counsel may bring a civil action on behalf of the city in any court of competent jurisdiction for injunctive and other appropriate equitable relief in order to prevent or cure a violation of subdivision a of section 10-1003.

(Am. L.L. 2018/063, 1/19/2018, eff. 10/16/2018)

§ 10-1006 Joint and several liability.

If it is found, in any action brought pursuant to the provisions of this chapter, that two or more of the named defendants acted in concert pursuant to a common plan or design to violate any provision of subdivision a of section 10-1003, such defendants shall be held jointly and severally liable for any fines or penalties imposed or any damages awarded.

(Am. L.L. 2018/063, 1/19/2018, eff. 10/16/2018)

§ 10-1007 Construction.

a. This chapter does not limit the right of any person or entity to seek other available criminal penalties or civil remedies. The penalties and remedies provided under this chapter are cumulative and are not exclusive.

b. This chapter does not prohibit expression protected by the first amendment of the constitution of the United States or section 8 of article 1 of the constitution of the state of New York.

c. This chapter does not limit the lawful exercise of any authority vested in the owner or operator of a reproductive health care facility, the owner of the premises in which such a facility is located, or a law enforcement officer of the city, the state of New York or the United States acting within the scope of such person's official duties.

(Am. L.L. 2018/063, 1/19/2018, eff. 10/16/2018)