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Statement of Horatio G. Mihet of Liberty Counsel to

The Committee on the Judiciary

United States House of Representatives 113th Congress

April 16, 2013

"Mismanagement at the Civil Rights Division of the Department of Justice"

***

Chairman Goodlatte, Ranking Member Conyers and Members of the Judiciary Committee:

Thank you for inviting me to testify before you today regarding my recent experience with the Civil Rights Division of the Department of Justice, under the management (or mismanagement) of Attorney General Eric Holder and Assistant Attorney General Thomas E. Perez.

My name is Horatio Mihet, and I am Senior Litigation Counsel at Liberty Counsel, a nonprofit litigation, education, and policy organization dedicated to protecting our First Freedoms. I grew up in communist Romania, where I watched my dad and others like him constantly harassed and jailed by the government because of what they said and did in leading the Underground Church. Therefore, I know what happens when the very government agency charged with safeguarding the civil rights of its citizens becomes complicit in violating those rights.

Unfortunately, that is precisely what the DOJ Civil Rights Division has done with Liberty Counsel's client Susan Pine, a sixty-one-year-old American from West Palm Beach, Florida. Susan works for a charity that assists people with special needs, where she earns $10 per hour to support herself. She has for over 20 years spent her free time outside the Presidential Women's Center, an abortion clinic (the "Clinic"), where she peacefully exercises her First Amendment rights by counseling expectant mothers about alternatives to abortion.

The Clinic has long considered Susan's protected speech to be a thorn in its side, and for many years tried, unsuccessfully, to have her arrested, fined, jailed and permanently ejected from the public square outside its premises.[1] In 2009, after those efforts failed, the Clinic began to entreat Mr. Perez and his staff at the Civil Rights Division of the DOJ to assist them with their Pine problem.

Coincidentally, the DOJ, under the leadership of Messrs. Holder and Perez, had expressed an interest in increasing prosecutions of pro-life Americans under the Freedom of Access to Clinic Entrances Act, 18 U.S.C. § 248 ("FACE"). Indeed, a September 1, 2011 report of National Public Radio indicated that, within just the first two years of the first Obama Administration, FACE prosecutions increased an astounding 800% as compared to the entire eight-year span of the previous administration.[2]

By November 2009, Clinic personnel and DOJ officials had met, talked on the telephone and exchanged emails and written correspondence about Susan so frequently that they were on a first name basis.[3] The written communications and court testimony revealed that Mr. Perez' legal team and Clinic personnel planned a taxpayer-funded stakeout for November 19-21, 2009, whereby multiple DOJ lawyers would fly from Washington, D.C. to West Palm Beach and "just hang out outside the clinic and observe" Susan.[4]

By sheer Providence, or so the DOJ claimed, on November 19, 2009 – the exact same day that the DOJ lawyers were descending into West Palm Beach for this surreptitious surveillance – West Palm Beach police officer Sanjay Raja also took a detour from his "routine patrol," "hid" himself in "the bushes" outside the Clinic, and "took an opportunity to see" what Ms. Pine and her friends do when "they don't know that the police are watching." Officer Raja, who was himself on a first name basis with Clinic staff, then met with the just-arrived DOJ lawyers, and reported his observations of Ms. Pine. Importantly, **Officer Raja did not consider Susan's conduct that day to warrant arrest or even a citation.**[5]

Nevertheless, **nine months later**, the DOJ filed a federal lawsuit against Ms. Pine, alleging that she violated FACE **on a single occasion**, November 19, 2009, when she supposedly stepped out in front of a car in the Clinic's driveway, thereby blocking access.[6]

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[1] *See, e.g., Pine v. Presidential Women's Center, Inc., Mona Reis, et al.*; No. 9:04-cv-80123-WJZ (S.D. Fla. 2007); *Halfpap, et. al. v. City of West Palm Beach*, 9:05-cv-80900-DMM (S.D. Fla. 2008).

[2] *See Justice Department Tougher on Abortion Protesters*, NPR News, September 1, 2011, available at http://www.npr.org/2011/09/01/140094051/obama-takes-tougher-stance-on-abortion-protesters?ft=1&f=1001, last visited April 13, 2013.

[3] *See* e-mail from DOJ Sr. Trial Attorney Julie Abbate to Clinic President Mona Reis, November 4, 2009, copy attached hereto as **EXHIBIT A**.

[4] *See id.*

[5] *See* Deposition of Sanjay Raja, pp. 49, 69-70, 89-90, 94, excerpts attached hereto as **EXHIBIT B**.

[6] *Holder v. Pine*, Case No. 9:10-cv-80971-KLR (S.D. Fla.), Complaint attached hereto as **EXHIBIT C**.

The Clinic has an expensive surveillance system, with video cameras pointed at the exact spot where this violation supposedly took place. However, by the time the DOJ filed its suit, the videotapes had all been conveniently destroyed. Even though the DOJ lawyers were meeting with Clinic staff on the exact day when these tapes were being recorded, to discuss the filing of a lawsuit against Susan, not one of the DOJ lawyers advised the Clinic of the need to preserve that critical evidence. The Clinic had previously attempted to use videotapes from its surveillance system against other pro-life Americans, but on this occasion it did not think that evidence was good enough to warrant saving. The Court eventually found that the DOJ's astounding omission was "indeed negligent, and perhaps even grossly negligent."[7]

Without the videotapes that would have easily disproven Officer Raja's supposed observations from the bushes, the DOJ alleged in its initial Complaint that Susan "obstructed a car," "by stepping in front of the car as it was attempting to enter" the Clinic.[8] Conveniently, Officer Raja failed to record the license plate of this phantom vehicle, and he failed also to record the identity of the mysterious driver and occupants of the vehicle.[9] And, along with the surveillance videotapes, the Clinic had also conveniently destroyed the patient sign-in sheets, which might have identified this mystery driver, and his or her purpose in visiting the Clinic (*e.g.*, to deliver sandwiches, fix a leaky toilet, make a u-turn, or have an abortion).[10] Thus, since **no victim had ever come forward to complain** of being "obstructed," the DOJ had premised its entire case solely on Officer Raja's supposed observations of an unidentified vehicle, and his unconfirmed suspicion that an unidentified driver must have felt "obstructed" by Susan.[11]

Susan moved to dismiss the DOJ's Complaint. We argued that her alleged "stepping in front of the car" causing it to stop **momentarily**, even if it actually took place, which we vigorously disputed, could not violate FACE as a matter of law. Susan was in a marked pedestrian crosswalk. Her alleged interaction with this vehicle would have been no different than millions of other pedestrians who take the right of way at crosswalks every day in this country.

Undeterred, the DOJ's response was to voluntarily amend its Complaint on the eve of the hearing on our motion to dismiss. In its Amended Complaint, the DOJ now claimed that Susan didn't merely step out in front of a vehicle in a marked, public, pedestrian crosswalk, but rather that she "**stopped and stood in front of the car** as it was attempting to enter the driveway."[12] The Court accepted the DOJ's newly invented factual allegation as true, as it was required to do on a motion to dismiss. On the basis of this new allegation, the Court denied our renewed motion to dismiss, and allowed the case to proceed to discovery.

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[7] *See Order Granting Defendant's Motion for Summary Judgment, Holder v. Pine* dkt. no. 96, pp. 5, 9-10, attached hereto as **EXHIBIT D**.

[8] Exhibit C, p. 2, ¶ 10.

[9] Exhibit D, p. 5.

[10] *Id.*

[11] *Id.* at pp. 5-6.

[12] *Holder v. Pine*, Amd. Compl., dkt. no. 30, p. 2, ¶ 12 (emphasis added), attached hereto as **EXHIBIT E**.

The extensive discovery that followed revealed that the DOJ did not have a basis for its newfound factual allegation. Specifically, Officer Raja, **the DOJ's sole eyewitness**, testified under oath at his deposition that Susan did **not** "stop and stand" in front of the phantom vehicle. Instead, Officer Raja testified that "**once** the car stopped, she **immediately** went to the driver's door and window." Officer Raja consistently and repeatedly refuted any notion that Susan "stood" in front of any vehicle, testifying numerous times that she "quickly darted" out of the way.[13]

Officer Raja obviously had all of these observations at the time he initially met with the DOJ's lawyers, nine months before the lawsuit was filed, so he must have shared them with the DOJ when the alleged events were still fresh in his mind. Furthermore, the conveniently destroyed videotapes would have settled beyond any doubt whether the DOJ's new version of the facts had any merit. But rather than accept and disclose this evidence, which would have dismantled its case out of the starting gate, the DOJ manufactured a new set of facts out of whole cloth, and used them to defeat Susan's motion to dismiss, forcing her to engage in protracted litigation.

Despite the dearth of facts to substantiate its political persecution, or perhaps because of it, the DOJ spared no expense in prosecuting Susan, assigning no fewer than **seven** of its top attorneys to her case. In addition to Mr. Perez himself – who led the charge and headlined every signature page of every pleading filed with the Court – the DOJ's litigation dream team also included the Chief and Deputy Chief of the "Special Litigation Section" within its Civil Rights Division, two additional Trial Attorneys from Washington, D.C., and the U.S. Attorney and Assistant U.S. Attorney from Miami, Florida.[14] Indeed, so impressive was the DOJ's show of force against Susan, that its attorneys' signatures sometimes could not even fit on a single signature page. And, while the winter weather differential may have accounted for at least some of the eagerness of multiple Washington, D.C. attorneys to attend depositions and hearings in West Palm Beach (at taxpayer expense), that fact was easily lost upon Susan, while her freedom and fortune were imperiled by the most powerful government on Earth.

Ultimately, after almost two years of litigation, the DOJ's tour de force was not enough to overcome the Constitution and the law. Based in part upon the unequivocal testimony of Officer Raja – the DOJ's own witness – the Court determined that the case did not even warrant a trial, and instead granted summary judgment to Susan. The Court specifically found that Susan did not block any vehicle, and then methodically dismantled the DOJ's "case" piece by piece, holding that:

- "The Government has failed to create a genuine issue for trial on all three elements of its FACE claim";
- "The [DOJ's] evidence could not lead a rational jury to find that Ms. Pine's conduct constituted a physical obstruction within the meaning of FACE";

[13] Exhibit B, pp. 32, 35, 39, 59.

[14] *See, e.g.*, Exhibit C, p. 4; Exhibit E, p. 5; Exhibit F, p. 2.

- "The Government has ... failed to set forth sufficient evidence that Ms. Pine intended to restrict the passenger's freedom of movement";

- The DOJ's interpretation that FACE prohibits a pedestrian from walking in front of a vehicle in a marked crosswalk is **inconceivable**, **defies "common sense,"** and **"yields an absurd result"**; and

- The DOJ's "absurd" interpretation of FACE, and the manner in which it sought to apply it against Susan, "would violate Ms. Pine's right to free speech guaranteed by the First Amendment of the United States Constitution."[15]

In light of these deficiencies, the Court declared that the DOJ lacked **any** justification to bring and maintain the action against Susan: "**The Court is at a loss as to why the Government chose to prosecute this particular case in the first place.**"[16] Indeed, the DOJ's lack of any evidence, coupled with its "grossly negligent" failure to preserve critical evidence, the lack of a "victim," and its "curious" meetings with "[Clinic] staff and police officers the very next day after the alleged violation occurred," caused the Court to suspect a conspiracy between the DOJ and the Clinic to deprive Ms. Pine of her First Amendment rights:

> "The Court can only wonder whether this action was the product of a concerted effort between the Government and [the Clinic], which began well before the incident at issue, to quell Ms. Pine's activities rather than to vindicate the rights of those allegedly aggrieved by Ms. Pine's conduct."[17]

Based upon the Court's findings, Liberty Counsel asked the Court to impose a fee and cost sanction upon the DOJ, for filing a federal lawsuit without justification. Rather than await the Court's ruling on this motion, the DOJ agreed to pay (with taxpayer funds) $120,000 to partially reimburse Liberty Counsel for its fees and costs in the litigation.[18]

Some might point to the final outcome, and conclude that no further action is necessary because the system of justice worked as designed. Such conclusion would miss the point entirely. The Civil Rights Division of the DOJ is charged with the critical task of safeguarding the civil rights of all Americans, not concocting political prosecutions against those who peacefully exercise their First Amendment rights. When the Department of Justice targets a United States citizen and brings the full weight of the federal government against her, it must have a solid case based on the facts and the law. The DOJ must not allow ideology to bias its prosecutorial judgment. From the moment this case against Susan was filed, until it was concluded, it was clear to all objective observers that the Civil Rights Division was motivated by pure ideology, and that its absurd position was not supported by either the law or the facts.

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[15] *Order Granting Summary Judgment*, Exhibit D, pp. 17-20 (emphasis added).

[16] *Id.* at p. 20 (emphasis added).

[17] *Id.* at p. 10, n.6.

[18] *Joint Notice and Stipulation, Holder v. Pine*, dkt. no. 106, attached hereto as **EXHIBIT F**.

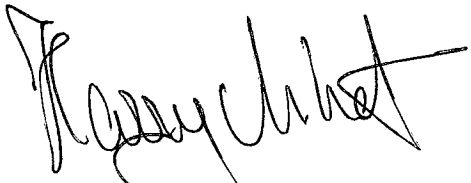
As the Ninth Circuit has recently pointed out in another case involving similar misconduct, the Department of Justice under its current leadership has seemingly forgotten its *raison d'être*:

> "The Department of Justice has an obligation to its lawyers and to the public to prevent prosecutorial misconduct. Prosecutors, as servants of the law, are subject to constraints and responsibilities that do not apply to other lawyers; **they must serve truth and justice first. Their job is not just to win, but to win fairly, staying within the rules**. That did not happen here."[19]

We welcome this Committee's oversight into the misconduct and mismanagement of the Civil Rights Division of the Department of Justice, and pledge our full support in taking whatever steps are necessary to restore the public's trust and confidence in the institution charged with safeguarding constitutional rights.

I look forward to answering any questions you might have, and thank you again for the opportunity to appear before you today.

Very Truly Yours,



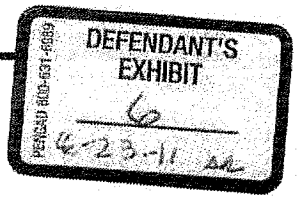
Horatio G. Mihet
Senior Litigation Counsel
Liberty Counsel

[19] *United States v. Lopez-Avila*, 11-10013, 2012 WL 450314, *9 (9th Cir. Feb. 14, 2012) (emphasis added).

EXHIBIT A

E-mail from DOJ Sr. Trial Attorney Julie Abbate to Presidential Women's Center President Mona Reis, November 4, 2009.

Abbate, Julie (CRT)



From: Mona Reis [[redacted]]
Sent: Thursday, November 05, 2009 10:41 AM
To: Abbate, Julie (CRT)
Cc: Trainor, Cathleen (CRT)
Subject: RE: Tentative plans

Below are links to the two local ordinances related to protecting access and reducing harassment at our Center:

Sec. 34-38. SOUND LIMITATIONS FOR HEALTH CARE FACILITIES.

http://library8.municode.com:80/default-test/template.htm?view=browse&doc_action=setdoc&doc_keytype=tocid&doc_key=44c37df1b9481685780ef6f6a686a4e5&infobase=10017

ARTICLE XIV. OBSTRUCTION OF PUBLIC STREETS, HIGHWAYS AND ROADS

http://library8.municode.com:80/default-test/template.htm?view=browse&doc_action=setdoc&doc_keytype=tocid&doc_key=5171b1238ed4739b66525b5b672e6d2b&infobase=10017

-----Original Message-----
From: Abbate, Julie (CRT) [mailto:Julie.Abbate@usdoj.gov]
Sent: Wednesday, November 04, 2009 2:16 PM
To: Mona Reis
Cc: Trainor, Cathleen (CRT)
Subject: Tentative plans

Hi, Mona – I just wanted to follow up on our discussions today – As I said, we're hoping to be able to come visit your center on Friday, November 20 and Saturday, November 21, and I just wanted to give you an idea of what to expect if we do. We would arrive in West Palm Beach on Thursday evening, so we would be able to meet at the center as early as you would like on Friday. We would be happy to meet with you and anyone else for a general informational meeting to let you know who we are, what we do, what we're looking for, etc., as well as to answer any questions anyone may have. After that, we'd like to interview any staff or volunteers to discuss their observations of the protesters to get an idea of what's going on there, as well as to gauge our pool of potential witnesses if we file a FACE case. We can be at the center as long as we need to on Friday. On Saturday, we'd plan to observe the protesters. Usually, we just hang out outside the clinic and observe, as well as chat with the escorts. We'd plan to leave on Saturday afternoon.

Also, as I mentioned, I will be out of the office for the rest of the week and all of next week, and will likely not have access to email. My next day in the office will be Monday, November 16. I'll give you a call early that week as soon as I know whether we'll be able to travel as planned. Cathy Trainor, another attorney in our office, will likely accompany me on any trip to your center, and she may contact you next week if there are any questions about anything. Also, feel free to contact Cathy at (202) 616-9009 next week if you need to.

And, finally, I have a copy of the court decision regarding the buffer zone, so no need to send that.

And I think that's it . . .

We'll talk soon!

Julie

Julie Abbate
Senior Trial Attorney
U.S. Department of Justice
Civil Rights Division
Special Litigation Section
(202) 353-4637

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EXHIBIT B

Excerpts from sworn deposition testimony of West Palm Beach Police Officer Sanjay Raja, taken on June 22, 2011.

1 IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA
2 WEST PALM BEACH DIVISION

3

4

5 ERIC H. HOLDER,)
Attorney General of the)
6 United States of America) CIVIL ACTION
)
7 Plaintiff,)
)
8 vs.) No. 9:10-cv-80971-KLR
)
9 MARY SUSAN PINE,)
)
10 Defendant.)
_____)
11

12

13

14

15

16 DEPOSITION OF

17 OFFICER SANJAY RAJA

18

19

20

21 Wednesday, June 22, 2011
West Palm Beach, Florida
22 8:48 a.m. - 11:32 a.m.

23

24

25

1 APPEARANCES:

2

3 ON BEHALF OF THE PLAINTIFF:

4 U. S. DEPARTMENT OF JUSTICE
Civil Rights Division
5 950 Pennsylvania Avenue, NW
Washington, D.C. 20530
6 202/616-9009
BY: CATHLEEN TRAINOR, ESQ.
7

8 U.S. DEPARTMENT OF JUSTICE
UNITED STATES ATTORNEY'S OFFICE
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Miami, Florida 33132
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BY: VERONICA HARRELL-JAMES, ESQ.
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ON BEHALF OF THE DEFENDANT:
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LIBERTY COUNSEL
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BY: CYNTHIA N. DUNBAR, ESQ.
16

17
ON BEHALF OF THE WITNESS:
18
CLAUDIA M. McKENNA, CITY ATTORNEY
19 CITY OF WEST PALM BEACH
401 Clematis Street
20 West Palm Beach, Florida 33401
561/832-1350
21 BY: KIMBERLY L. ROTHENBURG, ESQ.

22

23 ALSO PRESENT: Mary Susan Pine
Mona Reis
24

25

1 so big -- and was trying to make a right-hand turn into
2 this complex, into the parking lot when Ms. Pine was
3 pacing back and forth previously throughout her time
4 there.
5 And as the car was approaching and she noticed
6 the car was turning, she quickly started to walk faster
7 towards the car to impede its flow so to cause it to
8 stop. Once the car stopped, she immediately went to the
9 driver's door and window and was giving a pamphlet and
10 soliciting the occupants.
11 Q And just to clarify, you showed the car was
12 traveling east or moving to the right on your sketch on
13 Northpoint Parkway and was attempting at that time,
14 according to your testimony, to turn right into what is
15 marked as the exit on the sketch. And when you said it
16 stopped, where woula the car have been located in
17 relation to Northpoint Parkway and the exit?
18 A Three-quarters of the vehicle was sticking out
19 into Northpoint Parkway, and the rest of the nose of the
20 vehicle was almost up to the sidewalk to enter into the
21 Women's Center. So it was blocking the flow of traffic.
22 In fact, it did stop a vehicle that was behind it and
23 had to go around it.
24 Q It stopped one vehicle, and that vehicle went
25 around. How many lanes are on Northpoint Parkway?

1 Pine immediately went to the driver's side. Did you
2 witness her, according to your testimony, having
3 conversation with the driver?
4 A Yes, saw them talking.
5 Q And where was she standing when they were
6 talking?
7 A At the window, with her hand in the window.
8 Q So what was her movement as you were -- what
9 point did you first notice this interaction? Where was
10 the car when you first noticed Ms. Pine, watching the
11 interaction between the car and Ms. Pine?
12 A I noticed the car coming towards the
13 intersection. It slowed down and started to make a
14 right-hand turn, at which time Ms. Pine was only at this
15 edge, and she was at her normal pace that she does back
16 and forth.
17 As soon as she saw the car turning, she did a
18 quick pace towards -- on the sidewalk towards the
19 vehicle, at which time the car stopped because obviously
20 it would have hit her. As soon as the car stopped, she
21 quickly darted to the driver's door. And at the
22 driver's door, she engaged in dialogue. I saw her
23 talking, and the male driver and the female passenger
24 were looking at her, and she had her hand in the window
25 with paperwork.

1 going back, she saw the car coming, and as it was making
2 a turn, she was basically at this corner where the
3 asterisk is. Once when she saw the car coming, she
4 paced, had a quicker pace, a faster walk down the
5 sidewalk, forcing the car to stop. Then once when the
6 car stopped, this is when she darted to the driver.
7 Q And just to clarify for the record, you
8 started at the asterisk which is furthest to the right,
9 following the arrows to the left on the sidewalk. And
10 then the last arrow takes her to the driver's side and
11 puts her actually in Northpoint Parkway. So is that an
12 accurate reflection then at the time you approached her
13 where she was standing --
14 A In the street.
15 MS. HARRELL-JAMES: Objection.
16 MS. DUNBAR: You want to clarify your
17 objection?
18 MS. HARRELL-JAMES: (Shakes head.)
19 BY MS. DUNBAR:
20 Q So she was standing in the street. And in
21 looking at this, is there any possibility from your
22 drawing that she could have been in some other location
23 than what you saw, or do you feel this is an accurate
24 reflection of her route and where she ended up?
25 A That's the best I can do.

1 Q But your recollection at this time is that you
2 were just doing a directed patrol under your own
3 initiative?
4 A Yes.
5 Q In your report you also say "from a distance."
6 I think you've somewhat clarified, but could you confirm
7 again about how far away you were in your hidden
8 location?
9 A Approximately two to 300 feet.
10 Q If you were hidden, what was it that was
11 hiding your location?
12 A Cars and bushes.
13 Q Would any of that have impeded your view of
14 that intersection?
15 A No.
16 Q And you also state that "caused the car to
17 block the driveway," meaning Ms. Pine's actions caused
18 the car to block the driveway, "as well as traffic." So
19 just to clarify, your picture that you drew on Exhibit
20 2, Defendant's Exhibit 2, shows the extent that she
21 would have been -- the car would have been blocking the
22 driveway?
23 A Yes.
24 Q And when you say traffic, can you confirm from
25 your previous testimony how many cars that constituted

1 Q And from this sketch, you do not show her ever
2 standing in front of the front part of the vehicle.
3 A Directly in front, no.
4 Q So before, after or during. You don't have
5 her there before, and then you show her moving to the
6 driver. Was there any point after that where she moved
7 in front of the car?
8 A No.
9 Q And you said immediately. I need you to
10 define what immediately is, that as soon as the car
11 stopped, she immediately went to the driver's side. How
12 quickly would immediately be?
13 A Immediately.
14 Q So no delay of time. What would your
15 understanding be? I know you're saying immediately is
16 immediately, but any delay of time? What would
17 constitute immediate?
18 MS. HARRELL-JAMES: Objection.
19 THE WITNESS: As soon as the car stopped, the
20 eye contact was already there. Went straight to the
21 door to talk to him.
22 BY MS. DUNBAR:
23 Q All right. How long had you been in the
24 location where you were witnessing the vehicle prior to
25 this incident taking place?

1 violation of the -- the pedestrian violation and the
2 ordinance chapters. She acknowledged that, and she just
3 went on with her yelling at me and yelling at the young
4 male, asking if he got that.
5 Q So when you said she acknowledged that,
6 what --
7 A "Yes, I know," she said.
8 Q And when you said she was yelling at you and
9 the young man, explain yelling. How would you define
10 that?
11 A A loud tone of voice.
12 Q Whom have you talked to in relation to this
13 case?
14 A Who have I talked to in relation to this case?
15 Q In relation to this incident report, who are
16 the persons with whom you've discussed it?
17 A These women here, and Mona as well.
18 Q So you're referencing Ms. Trainor,
19 Ms. Harrell, H-a-r-r-e-l-l --
20 MS. HARRELL-JAMES: Harrell.
21 BY MS. DUNBAR:
22 Q -- and Ms. Reis have been noted for the
23 record. Anyone else?
24 A I believe I spoke to my sergeant about it.
25 Q Sergeant Olsen?

1 A Correct.
2 Q Anyone else?
3 A Not that I recall.
4 Q Has anyone provided you with additional
5 information pertaining to this incident beyond what
6 you've given me in the sketch and in this deposition?
7 A No.
8 Q Now, you stated in your report that you then
9 contacted Mona.
10 A Yes.
11 Q What type of normal procedure do you do after
12 an incident like one of these areas where you talked
13 about directed patrol and all of that? Is it routine
14 after you have noticed some kind of suspicious behavior
15 in relation to the actual location?
16 A You document it with a report.
17 Q And do you normally contact someone outside of
18 the Police Department to advise them of the activity?
19 Do you have any kind of obligation, and if so, what kind
20 of obligation do you have in relation to the directed
21 patrol area?
22 A Because the Women's Center has always been a
23 directed patrol issue, so therefore, I gave it a case
24 number. And that's why I notified Mona, to let her know
25 that there is a case, an information, a report for the

car and go over and intervene?

A At the time?

Q At some point while you were observing Ms. Pine's activities in the driveway, did you make a decision to get out of the car and go intervene?

MS. DUNBAR: Objection as to form.

THE WITNESS: Yes.

BY MS. TRAINOR:

Q And how long did you observe her before you got out of the car?

A How long did I observe her as she was talking to the person in the car?

Q No. From the minute you -- I'm asking from the time you were parked there and started looking at her, how long did it take for you to get out of the car?

A It wasn't long. I wasn't there for a significant amount of time, as I explained to her. It was maybe not more than 15 minutes.

Q And why did you decide to get out of the car and go over there?

A To keep the peace in that area, because Mona always has -- you know, she has complaints of them coming onto the property when we're not there and so on and so forth. So I just took an opportunity to see for myself if I'm not seen, rather than -- if I'm in an

1 obscure area where I'm not seen, to see what happens
2 when the police are not there, they don't know that the
3 police are watching.
4 Q And then what happened?
5 A I just saw her, what she was doing, her
6 pacing. As a car was coming, she presented herself in a
7 situation to check the vehicles out so maybe she could
8 engage in conversation.
9 Q Then what did she do?
10 A In front of me, then I explained to her I had
11 the chapters of the violations. And there was the
12 person hiding in the bushes. So then I decided, because
13 of the situation, I didn't want anything else to
14 escalate, so let me just show some presence at this time
15 for things to calm down and make sure no one goes on the
16 property, and also for their safety as well.
17 Q I just wanted to ask you: Do you have any
18 artistic background or --
19 A As in drawing?
20 Q Yes.
21 A No.
22 Q You haven't taken any drafting classes or any
23 other --
24 A No.
25 MS. DUNBAR: Objection as to relevance.

1 Q Was it hazardous to Ms. Pine or --
2 A Yes, I put that as well. It was all aspects.
3 It could be for her, it could be for the vehicle. You
4 know, in my work a lot of things have happened.
5 Anything could happen, from a speeding motorcycle, a
6 speeding car, even to the protesters across the street.
7 They're in the swale. To avoid the car, it could swerve
8 and go into the swale and hit the crowd of people.
9 Q Do you know how many other protesters were
10 present at the time of this incident?
11 A I don't recall. I just knew that it was about
12 average; it was either average to a little bit above
13 average that's normally there, which would consist of,
14 average, I would say, would be ten. That would be the
15 average. So it could have been anywhere from 10 to 15
16 on that day.
17 Q You say you didn't issue any citations in this
18 case.
19 A Yes.
20 Q Why not?
21 A I thought that the best way for me to handle
22 the situation is by writing an informational report
23 rather than giving her a citation. One thing, I have
24 come across her before, but it's always been just on a
25 cordial, this is a warning; both sides just keep the

1 CERTIFICATE OF ADMINISTRATION OF OATH

2

3

4 THE STATE OF FLORIDA)
)
5 COUNTY OF PALM BEACH)

6

7

8

9 I, Susan S. Kruger, the undersigned
10 authority, hereby certify that OFFICER SANJAY RAJA
11 personally appeared before me and was duly sworn.
12 WITNESS my hand and official seal this
13 27th day of June, 2011.

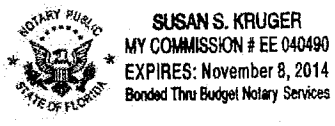
14

15

16

17

18



19 Susan S. Kruger
Notary Public, State of Florida
Commission Number: EE040490
20 Expires: November 8, 2014

21

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23

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25

1 C E R T I F I C A T E

2

3 THE STATE OF FLORIDA)
4)
COUNTY OF PALM BEACH)
5

6

7 I, Susan S. Kruger, do hereby certify that I
8 was authorized to and did stenographically report the
9 foregoing deposition, and that the transcript is a true
10 and correct transcription of the testimony given by the
11 witness.
12 I further certify that I am not a relative,
13 employee, attorney or counsel of any of the parties,
14 nor am I a relative or employee of any of the parties'
15 attorney or counsel connected with the action, nor am
16 I financially interested in the action.
17 Dated this 27th day of June, 2011.
18
19
20 Susan S. Kruger
21
22
23
24
25

EXHIBIT C

Initial Complaint filed against Susan Pine on August 18, 2010 by DOJ Civil Rights Division in *Holder v. Pine*, Case No. 9:10-cv-80971-KLR (S.D. Fla.).

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

ERIC H. HOLDER, JR., ATTORNEY GENERAL OF THE UNITED STATES OF AMERICA,	:	CIVIL ACTION
Plaintiff,	:	
v.	:	
MARY SUSAN PINE,	:	No.
Defendant.	:	

COMPLAINT

Eric H. Holder, Jr., Attorney General of the United States of America (the "United States Attorney General"), by the undersigned attorneys, asserts a civil cause of action under the Freedom of Access to Clinic Entrances Act ("FACE"), 18 U.S.C. § 248 (1994), enacted into law May 26, 1994, as follows:

1. In bringing this action, the United States Attorney General has reasonable cause to believe: (1) Defendant, Mary Susan Pine, has committed, and is likely to continue to commit, violations of FACE; and (2) various persons are being, have been, and will continue to be injured by Defendant's conduct.

JURISDICTION, STANDING, AND VENUE

2. This Court has jurisdiction over this action pursuant to FACE, 18 U.S.C. § 248(c)(2), and 28 U.S.C. § 1345.

3. The United States Attorney General has standing to bring this action pursuant to FACE, 18 U.S.C. § 248(c)(2).

4. Venue is proper in this judicial district pursuant to 28 U.S.C. §§ 1391(b)(1) and (b)(2), in that Defendant resides in this judicial district, and all the events giving rise to this complaint occurred in this judicial district.

DEFENDANT

5. Defendant, Mary Susan Pine, is a regular and vocal anti-abortion protester at the Presidential Women's Center, located at 100 Northpoint Parkway in West Palm Beach, Florida.

6. On information and belief, Defendant resides in West Palm Beach, Florida.

FACTUAL BACKGROUND

7. The Presidential Women's Center provides women's reproductive healthcare services.

8. Defendant has engaged in anti-abortion protest activity outside the Presidential Women's Center for several years.

9. Defendant is one of two protesters who typically conducts her protest activity on the south side of Northpoint Parkway, which includes walking back and forth in the Presidential Women's Center's driveway.

10. On November 19, 2009, Defendant physically obstructed a car by stepping in front of the car as it was attempting to enter the driveway to the Presidential Women's Center to access the parking lot.

11. The driver of the approaching car stopped to avoid striking Defendant.

12. Defendant attempted to, and did, interfere with the driver's access to the Presidential Women's Center.

CAUSE OF ACTION UNDER 18 U.S.C. § 248

13. The United States incorporates herein the averments of paragraphs 1 through 12 hereof.

14. Defendant's conduct as described in paragraphs 10 through 12 hereof constitute a physical obstruction which interfered with a person who had been seeking reproductive health services.

15. On information and belief, unless Defendant is restrained by this Court, Defendant will continue to engage in the illegal conduct averred herein.

16. The United States Attorney General is authorized under 18 U.S.C. § 248(c)(2)(B) to seek and obtain temporary, preliminary, and/or permanent injunctive relief from this Court for Defendant's violation of FACE.

17. The United States Attorney General is further authorized under 18 U.S.C. § 248(c)(2)(B)(i) to assess a civil penalty against a respondent no greater than $10,000.00 for a nonviolent physical obstruction.

WHEREFORE, the United States Attorney General respectfully requests judgment in his favor and against Defendant, Mary Susan Pine, in the form of:

A. An Order prohibiting Defendant, Mary Susan Pine, from entering any driveway leading into the Presidential Women's Center parking lot;

B. An Order prohibiting Defendant, Mary Susan Pine, and her representatives, agents, employees and any others acting in concert or participation with her, from violating the Freedom of Access to Clinic Entrances Act; and

C. A civil penalty assessment in the amount of $10,000.00.

Respectfully submitted,

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Southern District of Florida

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EXHIBIT D

***Order Granting Defendant's Motion for Summary Judgment*, *Holder v. Pine*, Case No. 9:10-cv-80971-KLR (S.D. Fla.), dkt. no. 96, entered on January 13, 2012.**

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
WEST PALM BEACH DIVISION

Case No.: 10-CV-80971-RYSKAMP/VITUNAC

UNITED STATES ATTORNEY
GENERAL *Eric H. Holder, Jr.*,

Plaintiff,

v.

MARY SUSAN PINE,

Defendant.
_____/

ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

THIS CAUSE comes before the Court on defendant Mary Susan Pine's motion for summary judgment **[DE 66]** filed on September 9, 2011. The Attorney General filed a response in opposition **[DE 75]** on October 7, 2011. Ms. Pine replied **[DE 82]** on October 24, 2011. A hearing was held on November 8, 2011. This matter is ripe for adjudication.

I. Facts

United States Attorney General Eric H. Holder, Jr. initiated the instant action against Ms. Pine on August 18, 2010. *See* **[DE 1]**. The amended complaint **[DE 30]** asserts a civil cause of action under the Freedom of Access to Clinic Entrances Act ("FACE"), 18 U.S.C. § 248, based on events which occurred on November 19, 2009. The relevant facts are summarized as follows:

A. Background

Ms. Pine is a pro-life advocate who believes, based on her past unfortunate experience with abortion, that women who are considering abortion should be made aware of the available alternatives and assistance programs. *See* Pine Dep. **[DE 66-1]** at 5-14. In order to accomplish

her mission, Ms. Pine founded a non-profit organization called "F.A.C.E." which stands for Faith, Action, Counseling and Education.[1] *Id.* at 5. Ms. Pine, through F.A.C.E., organizes and participates in pro-life demonstrations and projects such as setting up "truth booths" which show the different stages of a child's development. F.A.C.E. also offers services such as free pregnancy testing and sonograms, as well as post-pregnancy assistance to mothers. *Id.* at 5-13, 19. Ms. Pine also engages in what she refers to as "sidewalk counseling" at the Presidential Women's Center (the "PWC") located in West Palm Beach, Florida. *Id.* at 16-17, 20-21. The PWC is a clinic which provides reproductive health services to women, including abortions, gynecological exams, sterilization procedures, and pregnancy testing. Reis Dep. **[DE 66-5]** at 20-21. The PWC also provides non-pregnancy related services such as HIV testing. *Id.* Additionally, women often enter the PWC to obtain information about the services available to pregnant women in the community. *Id.* at 42-43.

Ms. Pine has consistently conducted her sidewalk counseling on the public sidewalk in front of the PWC every week since it moved to its current location on Northpoint Parkway in or about 2001. **[DE 66-1]** at 16, 34. Ms. Pine's sidewalk counseling generally consists of approaching vehicles and pedestrians entering and exiting the PWC's parking lot, engaging in conversations about abortion, and offering information and literature about "life-affirming" alternatives to abortion and the resources available to pregnant women. *Id.* at 19, 21-25. Ms. Pine uses this method instead of holding up protest signs because she believes that being friendly and offering help to people is a more effective means of changing people's minds about abortion. *Id.* at 18. Sometimes people stop and accept her literature; many people do not. *Id.* at 21, 30. Vehicle passengers who do not wish to receive Ms. Pine's literature generally continue to drive

[1] According to Ms. Pine, the name "F.A.C.E." is merely coincidental and has nothing to do with the FACE legislation. *Id.* at 10.

past her without stopping. *Id.* at 18-19, 21, 33, 35. According to Ms. Pine, aside from holding out literature in her hand and motioning vehicles toward her, she does not attempt to stop oncoming vehicles, and she ceases her efforts once the person indicates he or she does not wish to receive Ms. Pine's information. *Id.* at 18-23. It is undisputed that Ms. Pine has never used obscenities or physical threats while conducting sidewalk counseling at the PWC. **[DE 66-5]** at 22-23.

Vehicles are able to enter and exit the PWC's parking lot through two driveways. *See* Pine Decl. **[DE 66-6]**. The designated entrance, which is marked with an "Entrance" sign, is accessible from a private service road which also services other businesses such as restaurants and stores. *See id.*; Pleasant Dep. **[DE 66-12]** at 5. Sidewalk counseling is not permitted at this entrance because the access road is private property. Ms. Pine therefore conducts her counseling activities on the public sidewalks near the PWC's designated exit driveway which leads onto Northpoint Parkway. **[DE 66-1]** at 21, 22, 37. Despite the fact that the exit driveway, which is approximately thirty-six feet wide, is clearly marked with a "Do Not Enter" sign and a sign directing drivers to the designated entrance, drivers sometimes use the exit as an entrance. *Id.* at 38; **[DE 66-12]** at 5; **[DE 66-8, DE 66-9]**. Ms. Pine is thus able to approach vehicles both entering and exiting the PWC from this location.

In addition to those seeking services at the PWC, the exit driveway is also used by people delivering food and mail, as well as people seeking directions to other businesses. *Id.* at 29-30, 35; Willoughby Dep. **[DE 66-13]** at 2. According to Ms. Pine, she approaches and solicits all vehicles which pass through, regardless of their purpose, including police officers and the food delivery man. **[DE 66-1]** at 27-28, 35-36; **[DE 66-13]** at 4-6. She does this because "she does

not always know why they are there but she wants everyone to know about the life-affirming resources and information she offers." **[DE 66]** at 9.

B. The Conduct at Issue

On November 19, 2009, Ms. Pine was engaged in sidewalk counseling at the PWC. **[DE 66-1]** at 33. This day was significant to Ms. Pine because it marked the anniversary of the abortion she had many years ago. *Id.* West Palm Beach Police Officer Sanjay Raja was on patrol that day, and he had positioned himself so that he could observe Ms. Pine from a distance of approximately 200-300 feet. Raja Dep. **[DE 66-14]** at 6, 10. According to Officer Raja's deposition testimony and his written investigation report **[DE 66-15]**, a green sedan began to enter the PWC premises through the exit driveway. As soon as Ms. Pine noticed the sedan, she "quickly started to walk faster towards the car" and stopped at the front side, causing the vehicle to stop. **[DE 66-14]** at 2-3; **[DE 66-15]** at 3. Immediately after the vehicle came to a stop, Ms. Pine approached the driver's window. The driver rolled the window down, and Ms. Pine proceeded to solicit the male driver and the female passenger. **[DE 66-15]** at 3. At some point during the conversation, Ms. Pine handed the passengers a pamphlet through the open driver's side window. **[DE 66-14]** at 3, 23. Although Officer Raja could see that Ms. Pine was speaking to the passengers, he could not hear what she was saying. *Id.* at 16.

According to Officer Raja, the stopped sedan was blocking the flow of traffic on the exit driveway as well as traffic traveling on Northpoint Parkway. *Id.* at 2-3. Officer Raja noticed one vehicle which had to drive around the sedan in order to continue on Northpoint Parkway. *Id.* at 2, 12. Officer Raja approached the sedan and instructed the driver to proceed into the parking lot.[2] *Id.* at 12-14, 23. The driver immediately took the pamphlet from Ms. Pine and proceeded

[2] Officer Raja did not specify how long Ms. Pine spoke with the passengers before he intervened. He merely testified that the conversation was "not long," and that "[i]t wasn't a significant amount of time." *Id.* at 16.

to park. *Id.* at 12-14, 23. Ms. Pine yelled at Officer Raja, insisting that she was within her rights. *Id.* at 14. Officer Raja responded by informing Ms. Pine she was violating city and state traffic laws which prohibit impeding traffic entering a medical facility. *Id.* No citations were issued to either Ms. Pine or the driver. **[DE 66-14]** at 19. Rather, Officer Raja wrote an incident/investigation report and informed the President of the PWC, Mona Reiss, of the situation. *Id.* at 20-22; **[DE 66-5]** at 35; **[DE-66-15]**. Officer Raja did not obtain the identities of the passengers or note the vehicle's license plate number in his report, and neither Ms. Pine nor Officer Raja noticed whether the passengers actually entered the PWC building.

The PWC is equipped with a video surveillance system which covers the exit driveway area where the incident occurred. **[DE 66-5]** at 35. The PWC's patient records consists of a computer database which stores information for patients who have undergone surgery, as well as a daily sign-in sheet for patients who have scheduled appointments to receive services. *Id.* at 31-33. However, certain patients such as those seeking only information or pregnancy testing are not required to sign in. *Id.* The sign-in sheets are destroyed each week, and the video surveillance tapes are destroyed every three weeks pursuant to PWC policy. *Id.* at 29, 31-32.

The day after the incident, November 20, 2009, representatives from the Department of Justice met with the PWC staff, Officer Raja, and another police officer to discuss the incident and determine whether Ms. Pine was in violation of FACE. **[DE 66-5]** at 26-27. The Government concedes that at no time during or after this meeting did it request the PWC to produce any documents or preserve evidence. *Id.* at 26-27; Ford Dep. **[DE 66-17]** at 3. The sign-in sheets and video surveillance tapes from date of the incident were thus destroyed pursuant to the PWC's document maintenance policy, making Officer Raja the only witness

(aside from Ms. Pine) to the events at issue. The passengers' identities and their purpose for entering the PWC premises remain unknown.

II. Standard on Motion for Summary Judgment

"The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). The movant "always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,' which it believes demonstrate the absence of a genuine issue of material fact." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986) (quoting Fed. R. Civ. P. 56(c)(1)(A)). Where the non-moving party bears the burden of proof on an issue at trial, the movant may meet its burden by "pointing out to the district court that there is an absence of evidence to support the nonmoving party's case." *Id.* at 325.

After the movant has met its burden under Rule 56(c), the burden shifts to the non-moving party to establish that there is a genuine issue of material fact. *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 585 (1986). Although all reasonable inferences are to be drawn in favor of the non-moving party, *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986), he "must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita*, 475 U.S. at 586. The non-moving party may not rest upon the mere allegations or denials of the adverse party's pleadings, but instead must come forward with "specific facts showing that there is a *genuine issue for trial*." *Id.* at 587 (citing Fed. R. Civ. P. 56(e)). "Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no 'genuine issue for trial.'" *Id.* "A mere scintilla of evidence

supporting the opposing party's position will not suffice; there must be a sufficient showing that the jury could reasonably find for that party." *Walker v. Darby*, 911 F.2d 1573, 1577 (11th Cir. 1990). If the non-moving party fails to make a sufficient showing on an essential element of his case on which he has the burden of proof, the moving party is entitled to a judgment as a matter of law. *Celotex Corp.*, 477 U.S. at 323.

III. Analysis

FACE was enacted by Congress in 1993 as a response to nationwide violence arising from protests and demonstrations on the highly controversial topic of abortion. S. Rep. No. 103-117, at 3-12 (1993), *available at* 1993 WL 286699; H.R. Rep. No. 103-306, at 2-3 (1993), *reprinted in* 1994 U.S.C.C.A.N. 699, *available at* 1993 WL 465093; *Cheffer v. Reno*, 55 F.3d 1517, 1518 (11th Cir. 1995). FACE protects a person's right to obtain or provide "reproductive health services," including abortions, by providing civil and criminal remedies to those who have been aggrieved by the prohibited conduct. 18 U.S.C. § 248. To prevail on a FACE claim, the plaintiff must prove that the defendant (1) by force or threat of force or by physical obstruction; (2) intentionally injured, intimidated or interfered with or attempted to injure, intimidate or interfere with any person; (3) because that person is or has been obtaining or providing reproductive health services, or in order to intimidate such person or any other person or any class of persons from obtaining or providing reproductive health services.[3] *Roe v. Aware Woman Ctr. for Choice, Inc.*, 253 F.3d 678, 680-81 (11th Cir. 2001) (quoting 18 U.S.C. §§ 248(a)(1)[4]).

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[3] Other cases separate FACE into four elements by splitting the second element in two. *See, e.g., Lotierzo v. Woman's World Med. Ctr., Inc.*, 278 F.3d 1180, 1182 (11th Cir. 2002) (FACE plaintiff must prove (1) force, threat of force, or physical obstruction; (2) done with the intent to; (3) injure, intimidate, or interfere with a person or attempt to do so; (4) because that person has sought or provided, or is seeking or providing, or will seek or provide, reproductive health services.). *See also United States v. Mahoney*, 247 F.3d 279, 282 (D.C. Cir. 2001).

[4] FACE provides civil remedies and criminal penalties against anyone who "by force or threat of force or by physical obstruction, intentionally injures, intimidates or interferes with or attempts to injure, intimidate or

Ms. Pine argues that summary judgment should be granted in her favor on grounds that the Government has not met its burden of proving: (1) that Ms. Pine physically obstructed or interfered with the passengers in the sedan; and (2) that the passengers were seeking reproductive health services at the PWC. With respect to the latter argument, the parties vehemently disagree as to whether a FACE claim requires such proof at all. According to the Government, it is only required to prove that Ms. Pine, the accused, acted with the requisite intent; whether or not the passengers were in fact seeking reproductive health services is irrelevant. Ms. Pine argues that a valid FACE claim exists only upon proof that the persons allegedly aggrieved are members of the statute's protected class.

Ms. Pine further argues for an adverse inference against the Government for violating its duty to preserve critical evidence relating to this case, namely the PWC's video surveillance tapes and sign-in sheets from the date of the incident. Finally, Ms. Pine argues that FACE's civil penalties are unconstitutional on its face, and that FACE as applied to the facts of this case violates the First Amendment of the United States Constitution. The Court will address each argument in turn.

A. Spoliation of Evidence

District courts have considerable discretion in imposing sanctions based on a spoliation theory. *Flury v. Daimler Chrysler Corp.*, 427 F.3d 939, 943 (11th Cir.2005). A party seeking sanctions "must establish ... that the destroyed evidence was relevant to a claim or defense such that the destruction of that evidence resulted in prejudice." *Eli Lilly and Co. v. Air Exp. Intern. USA, Inc.*, 615 F.3d 1305, 1318 (11th Cir. 2010) (citing *Flury*). In order to obtain an adverse inference, the moving party must also "establish that the missing evidence is *crucial* to their

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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[.]" 18 U.S.C. § 248(a)(1).

ability to prove their prima facie case," *Point Blank Solutions, Inc. v. Toyobo Am., Inc.*, No. 09-61166-CIV, 2011 WL 1456029, at *1 (S.D. Fla. Apr. 5, 2011), and that the opposing party's failure to preserve the evidence was "predicated on bad faith." *Bashir v. Amtrak*, 119 F.3d 929, 931 (11th Cir. 1997). Mere negligence is insufficient. *Id.*

In this case, the surveillance tapes and the sign-in sheets were destroyed pursuant to the PWC's routine document maintenance policies. Even assuming that the Government had a duty to preserve the evidence at issue, which was created and controlled solely by the PWC,[5] Ms. Pine has not set forth evidence establishing that the Government was aware of the PWC's policies, or that the evidence even existed prior to its destruction. Although one might suspect that the Government was in fact aware of such facts, and that it purposely neglected to prevent destruction of the sign-in sheets and surveillance tapes because they were detrimental to its FACE claim, mere speculation is insufficient to support a finding of bad faith. The Government's failure to take the necessary steps to prevent the destruction of potentially critical evidence was indeed negligent, and perhaps even grossly negligent. Absent a showing of bad faith, however, an adverse inference is not warranted.

Furthermore, Ms. Pine has failed to demonstrate that the missing evidence was necessary to her case. With respect to the surveillance tapes, assuming the cameras actually captured the incident in question, the videotapes would not have provided much information beyond what is already in the record. At most, they would have revealed exactly where Ms. Pine's body was located with respect to the vehicle, how long the vehicle was stopped before she approached the driver to initiate conversation, and how long the conversation lasted before she was interrupted

[5] It is well-established that parties have a duty to preserve evidence upon anticipation of litigation. For evidence which is owned or controlled by a third party, some circuits impose a duty to give the opposing party notice of access to the evidence or of its possible destruction. *See, e.g., Silvestri v. General Motors Corp.*, 271 F.3d 583, 591 (4th Cir. 2001). Ms. Pine has not provided, nor is the Court aware of, any authority indicating that this Circuit imposes such a duty.

by Officer Raja. As discussed in further detail *infra*, these facts, though relevant, are not determinative. With respect to the PWC sign-in sheets, the absence of the passengers' names would not necessarily prove that they were not seeking reproductive health services at the PWC. The passengers very well could have been seeking reproductive health services which do not require sign-in, such as pregnancy testing. In any event, as discussed at length *infra*, the Government is not required to prove that the passengers were in fact seeking reproductive health services. Although such proof may have relieved the Court from its lengthy discussion of this issue, it is not necessary to Ms. Pine's case. Based on the foregoin reasons, the Court denies Ms. Pine's request for an adverse inference.[6]

B. Standing

The parties' disagreement about whether the Government is required to prove that the passengers entered the PWC premises in order to obtain reproductive health services, though couched in terms of the Government's *prima facie* case, also implicates issues with respect to standing. The question arises as to whether a valid FACE claim presupposes a victim who is a member of the statute's protected class, *i.e.* whether the Government's standing depends on proof that aggrieved person is a provider or obtainer of reproductive health services. In light of the various other reasons the passengers may have had for entering the PWC premises (e.g. to ask for directions), if the Court finds that such proof is required then the Government lacks standing and the remaining issues become moot.

[6] It is rather curious that the Department of Justice was able to meet with the PWC staff and police officers the very next day after the alleged violation occurred. It is also curious that the Government failed to make any efforts to obtain the identities of the passengers who are the alleged victims in this case—the Court finds it hard to believe that the Government was completely unaware of the existence of the sign-in sheets and video surveillance system. The Court can only wonder whether this action was the product of a concerted effort between the Government and the PWC, which began well before the date of the incident at issue, to quell Ms. Pine's activities rather than to vindicate the rights of those allegedly aggrieved by Ms. Pine's conduct. If this is the case, the Court would be inclined to sanction the Government with, at a minimum, an adverse inference. Given the absence of further evidence substantiating the Court's suspicions, the Court is not authorized to do so.

The general rule is that an individual seeking protection under federal civil rights laws must allege and prove that he is a member of the statute's protected class. *See, e.g.,* App. to 29 C.F.R. Pt. 1630, App. ("As with other civil rights laws, individuals seeking protection under these anti-discrimination provisions of the ADA generally must allege and prove that they are members of the 'protected class,'" which typically means they must meet the statutory definition of "disability.") There are, however, exceptions to this general rule. For example, the Fair Housing Act ("FHA"), 42 U.S.C. §§ 3601 *et seq.*, one of the statutes on which FACE was modeled,[7] provides a private right of action to an "aggrieved person." *See* 42 U.S.C. § 3613. "Rather than define 'aggrieved person' as a protected class under the act, the statute defines 'aggrieved person' as 'any person who—(1) claims to have been injured by a discriminatory housing practice; or (2) believes that such person will be injured by a discriminatory housing practice that is about to occur.'" *Wasserman v. Three Seasons Ass'n No. 1, Inc.*, 998 F. Supp. 1445, 1447 (S.D. Fla. 1998) (quoting 42 U.S.C. § 3602(i)). Any person who fits within this definition has standing to bring a FHA claim regardless of whether that person is a member of the statute's protected class. *Id.*

FACE's legislative history reveals that not only was it was designed to protect patients and physicians directly involved in the provision of reproductive health services, but it was also was also intended to protect clinic staff, persons assisting patients or staff, family members of patients, physicians, and clinic staff, as well as mere bystanders. S. Rep. No. 103-117, at 26. Unlike the FHA, however, FACE carves out from the general category of aggrieved persons a subcategory of those entitled to initiate a private action. Private rights of action under FACE are

[7] FACE was modeled after several existing civil rights laws, including section 3631 of the FHA which prohibits the use of force or threats of force to willfully injure, intimidate, or interfere with a person's housing opportunities because of his or her race, color, religion, sex or national origin. H. Rep. No. 103-306, at 10.

limited to those "involved in providing or seeking to provide, or obtaining or seeking to obtain, services in a facility that provides reproductive health services."[8] 18 U.S.C. § 248(c)(1)(A). It is clear that if the passengers had initiated the instant action against Ms. Pine, they would in fact have to prove that they were involved in seeking or providing reproductive health services.

This action, however, was initiated by the United States Attorney General, in which case FACE provides different requirements for standing. The Attorney General has standing to bring a civil action under FACE where he 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." *Id.* § 248(c)(2)(A). Noticeably absent from this section is the limiting language contained within the section regarding private rights of action. The Attorney General may bring a FACE claim on behalf of any aggrieved person, regardless of whether such person is involved in providing or seeking reproductive health services. As such, the Government has standing in this case despite its lack of evidence regarding whether the passengers were seeking abortion services at the PWC.

C. The Government's *Prima Facie* Case

1. Motive

The question remains as to whether the Government must prove that the passengers were involved in seeking or proving reproductive health services as part of its *prima facie* case. Motive is covered by the final element of a FACE claim, which courts consistently refer to as that of the *defendant's* motive. *See, e.g., Roe*, 253 F.3d at 681. This element is satisfied upon proof that the defendant was "motivated by a desire to 'prevent [a person] from obtaining reproductive health services.'" *Id.* "That is all the intent that the statute requires." *United States*

[8] This limitation applies only to actions such as this which are brought under subsection (a)(1). 18 U.S.C. § 248(c)(1)(A).

v. Weslin, 156 F.3d 292, 298 (2d Cir. 1998). *See also United States v. Balint*, 201 F.3d 928, 932 (7th Cir. 2000); *United States v. Lynch*, 104 F.3d 357 (2d Cir. 1996). This interpretation is also consistent with FACE's legislative history,[9] as well as other civil rights laws which focus solely on the motive of the defendant. *See, e.g., Latrece Lockett v. Choice Hotels Int'l, Inc.*, 315 F. App'x 862, 868-69 (11th Cir. 2009) (focus of Title VII retaliation claim is on the beliefs of the defendant/employer rather than that of the plaintiff/employee); *Fogleman v. Mercy Hosp., Inc.*, 283 F.3d 561, 565 (3d Cir. 2002) (Because Title VII forbids an employer from "taking adverse action against an employee for discriminatory reasons, it does not matter whether the factual basis for the employer's discriminatory animus was correct and that, so long as the employer's specific intent was discriminatory, the retaliation is actionable."). Where the defendant acted with the requisite motive, a FACE violation may occur regardless of whether the offending conduct was directed toward a person seeking or providing reproductive health services. For claims involving physical obstruction, as is the case here, there need not even be a victim at all. *See Balint*, 201 F.3d at 933.

Though the viability of a FACE claim ultimately depends on the motive of the defendant, under certain circumstances the Court may also consider the motive of the aggrieved person. For example, in *Roe v. Aware Woman Ctr. for Choice, Inc.*, *supra*, one of the issues before the Eleventh Circuit was whether the plaintiff, a patient at a reproductive health clinic, adequately pleaded the motive element of her FACE claim.[10] The plaintiff's claim was based on allegations that the defendant physicians refused her requests to stop her abortion and call an ambulance,

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[9] *See* H.R. Rep. No. 103-306, at 11 ("[FACE] requires that the offender be motivated by the involvement of the victim or others in obtaining or providing reproductive health services"); S. Rep. No. 103-117, at 24 (a FACE violation occurs "only if the offender has acted with the requisite motive").

[10] The facts of *Roe* are decidedly unique and inapplicable to the instant case. However, the Court would be remiss not to discuss *Roe* as it is one of the few Eleventh Circuit cases which discuss the motive element of FACE and is heavily relied on by both Ms. Pine and the Government.

and instead restrained her in order to complete the procedure. The court considered both of the plaintiff's possible reasons for wanting to leave the clinic, either to save the pregnancy or to have the abortion completed at a hospital, and found that if the physicians restrained plaintiff to prevent her from seeking either of these services, then they had acted with the requisite motive because both services are "reproductive health services." *Roe*, 253 F.3d at 682. However, the court declined to draw this inference and upheld the dismissal of the plaintiff's complaint because it was also possible that the physicians were motivated by a desire to protect the plaintiff's life and health and to prevent further injury. *Id.* at 682-84.

Contrary to Ms. Pine's interpretation, *Roe* does not hold that proof of the aggrieved person's motive or intent is a separate element of a FACE claim. Rather, *Roe*'s holding demonstrates that the failure to include specific allegations regarding the defendant's motive is fatal, which lends further support to the principle that a FACE claim ultimately depends on the motive of the defendant rather than the aggrieved person.[11] The Court does not necessarily disagree that requiring proof of aggrieved person's motive or intent would serve to more narrowly tailor the statute to achieve its purpose of protecting women's right to obtain reproductive health services. However, the Court is not authorized to impose requirements beyond those contained within the statutory text. The Court need only determine whether the Government has set forth sufficient evidence that Ms. Pine, the accused, acted with the requisite intent.

[11] Ms. Pine also relies on *United States v. Dinwiddie*, 76 F.3d 913 (8th Cir. 1996), wherein the Eighth Circuit, in dicta, concluded that the defendant's physical assault of a clinic's maintenance supervisor constituted a FACE violation. The court based its conclusion on the finding that a maintenance supervisor is a provider of reproductive health services within the meaning of FACE. Ms. Pine argues that the fact that the *Dinwiddie* court found it necessary to determine this issue means that a FACE claim requires proof that the aggrieved person is a member of the statute's protected class. However, *Dinwiddie* involves allegations of force and threats of force which require an actual victim, whereas this case involves a claim of physical obstruction. In any event, *Dinwiddie* is not conclusive on this issue, nor does its dicta outweigh the significant authority, including that of the Eleventh Circuit, demonstrating that a FACE claim requires proof of only the defendant's motive.

It is undisputed that Ms. Pine holds deeply-rooted personal beliefs against abortion, and that her mission is to provide women with information about the available pro-life alternatives to abortion and pregnancy assistance programs. Although Ms. Pine also concedes that she was conducting sidewalk counseling at the PWC on the day of the incident, the Government has offered no evidence regarding the actual contents of Ms. Pine's conversation with the passengers. In fact, Ms. Pine's deposition transcript reveals that the Government did not even bother to ask what was said. The record merely reveals that Ms. Pine's sidewalk counseling generally consists of attempts to provide "life-affirming" information to anyone willing to receive it, including the mailman, delivery men, police officers, and others who obviously are not seeking abortion services, and that Ms. Pine does not press on once she realizes her solicitation efforts are not welcome. It is evident from these facts that Ms. Pine's ultimate goal is to change the minds of women considering abortion. However, attempting to influence people by peacefully sharing information about abortion alternatives with the general public hardly amounts to a desire to stand in the way of a person from obtaining reproductive health services, and the Court is not authorized to make any assumptions which are not substantiated by evidence in the record. The Court thus finds that the Government has failed to provide evidence sufficient to prove that Ms. Pine acted with the requisite motive.

2. Physical Obstruction[12]

With respect to the first element of a FACE claim, Ms. Pine asserts several arguments that her actions do not constitute a physical obstruction as a matter of law, none of which have been squarely dealt with in this Circuit. First, Ms. Pine asserts that the passengers did not have a

[12] It is undisputed that Ms. Pine did not use either force or threat of force against the passengers. It is also undisputed that Ms. Pine neither injured nor intimidated the passengers. The issue is whether Ms. Pine's conduct constitutes an interfering "physical obstruction."

legal right to enter the PWC parking lot through the exit driveway, citing certain provisions under Florida state traffic law which makes it a non-criminal moving violation for a driver to disobey a traffic control device such as an "Exit only" sign. Ms. Pine further asserts that the passengers could have entered the PWC through the designated entrance rather than the exit driveway. Finally, Ms. Pine argues that her actions cannot constitute a physical obstruction because her interaction with the occupants of the sedan was "consensual."

FACE provides that "[t]he term 'physical obstruction' means rendering impassable ingress to or egress from a facility that provides reproductive health services..., or rendering passage to or from such a facility...unreasonably difficult or hazardous." 18 U.S.C. § 248(e)(4). When interpreting a statute, the Court "must always yield to plain and unambiguous statutory text," *Polkey v. Transtecs Corp.*, 404 F.3d 1264, 1268 (11th Cir. 2005), which reveals that FACE contains no exception for ingress or egress constituting a moving violation under state law or where alternate methods of ingress or egress are available. Neither does FACE contemplate the subjective mind state of the persons allegedly obstructed. Rather, the physical obstruction element requires an objective analysis of the defendant's conduct and its effects on the alleged victims. *See* 18 U.S.C. § 248(e)(4); *New York ex rel. Spitzer v. Operation Rescue Nat'l*, 273 F.3d 184, 194 (2d Cir. 2001). Furthermore, other courts have declined to read additional limitations or exceptions into to the definition of physical obstruction. *See, e.g., Mahoney*, 247 F.3d at 284 ("The statute does not distinguish between frequently used and infrequently used means of egress, and we decline to write in such a distinction."); *United States v. Soderna*, 82 F.3d 1370, 1377 (7th Cir.1996) (broadly construing FACE so as to preclude arguments that a physical obstruction cannot occur where only one entrance is blocked). Based on these principles, the fact that the passengers sought entry through the PWC's exit driveway rather than

the designated entrance, and the fact that the passengers were not upset by or may have even been receptive to Ms. Pine's solicitation, does not defeat the Government's FACE claim as a matter of law. These facts are merely relevant to overall determination of whether the passengers' ingress was rendered unreasonably difficult or hazardous.[13]

The Government primarily relies on the Second Circuit case *Spitzer v. Operation Rescue National* in support of its argument that Ms. Pine's temporary stoppage of the sedan is sufficient constitute a physical obstruction under FACE. This case is analogous only to the extent that the protestors in *Spitzer* walked across driveways in order to stop the progress of oncoming cars. Unlike Ms. Pine, the *Spitzer* defendants engaged in other protest activities such as shouting at and standing in front of pedestrians approaching clinics, standing directly in front of clinic doors in order to block entry and communicate with patients entering and exiting the building, and threatening clinic workers, including one defendant who told clinic employees that they would die before the day ended. In upholding the preliminary injunction issued against the defendants, the court noted that their behavior was apparently "so extensive that it rendered building access unreasonably difficult." *Spitzer*, 273 F.3d at 194.

Here, although the parties dispute the exact location of Ms. Pine's body with respect to the vehicle, the record reveals that Ms. Pine approached the driver side window *immediately* after the vehicle stopped, and engaged the passengers in a seemingly consensual conversation. Within a matter of seconds, Officer Raja intervened and the driver was able to immediately proceed through the PWC driveway. This hardly rises to the level of extensive conduct engaged in by the *Spitzer* defendants. Ms. Pine's conduct was no more obstructive than if Officer Raja

[13] The Court also rejects Ms. Pine's argument that her actions do not constitute a physical obstruction because other vehicles had room to drive around the stopped sedan. The relevant issue in this case is whether Ms. Pine's actions physically obstructed the passengers of the sedan, and not anyone else.

himself had stopped the sedan and instructed the driver to turn around and enter through the designated entrance rather than the exit driveway. Moreover, the Court cannot conceive that such an innocuous incident is the type of obstruction Congress had in mind when it enacted FACE. The Court's interpretation of the law is guided "not just by a single sentence or sentence fragment, but by the language of the whole law, and its object and policy." *Balint*, 201 F.3d at 933. Moreover, courts must use common sense and should not interpret the law in a way which yields an absurd result. *See United States v. Haun*, 494 F.3d 1006, 1010 n.3 (11th Cir. 2007). Based on these principles, the Court finds that the evidence could not lead a rational jury to find that Ms. Pine's conduct constituted a physical obstruction within the meaning of FACE.

3. Interference

To the extent that Ms. Pine's arguments with respect to the physical obstruction element also apply to the second element of the Government's FACE claim (whether Ms. Pine intentionally interfered with a person), the Court finds that her arguments fail for the same reasons. FACE provides that the term "interfere with" means "to restrict a person's freedom of movement." 18 U.S.C. § 248(e)(2). Just as with physical obstruction, FACE's definition of interference does not provide for any exceptions, nor does it require evidence related to the subjective mental state of the person interfered with.[14] A FACE plaintiff need only prove that the "defendant intended to restrict the person or persons' freedom of movement." *Roe,* 253 F.3d at 681. In fact, the defendant's efforts do not even need to be successful, as FACE also prohibits attempts to interfere with a person. 18 U.S.C. § 248(a)(1).

[14] Unlike cases such as this which are based on allegations of interference by means of physical obstruction, FACE claims based on allegations that the defendant either injured or intimidated a person through force or threats of force generally require evidence of the aggrieved person's subjective mental state. *See Spitzer*, 273 F.3d at 196 (proof of statement's effect on its recipient is relevant to determining whether the statement is a threat); *Dinwiddie*, 76 F.3d 913 (considering testimony regarding victims' reaction to defendant's statements in order to determine whether they were intimidated). *See also* 18 U.S.C. § 248(e)(3).

In this case, it is undisputed that Ms. Pine approached the sedan in order to speak with and provide information about pro-life abortion alternatives to the passengers, and that the sedan stopped. Ms. Pine has provided testimony that she does not try to stop vehicles or pedestrians who are not interested in receiving her information, and the Government has not provided any evidence to the contrary. The Government has therefore failed to set forth sufficient evidence that Ms. Pine intended to restrict the passengers' freedom of movement, and the interference element of its FACE claim fails as well.

In sum, the record almost entirely devoid of evidence that Ms. Pine acted with the prohibited motive and intent or that Ms. Pine engaged in any unlawful conduct. The Government has failed to create a genuine issue for trial on all three elements of its FACE claim, and Ms. Pine is entitled to judgment as a matter of law.

D. Consitutional Implications

The Court further finds that a contrary holding would violate Ms. Pine's right to free speech guaranteed by the First Amendment of the United States Constitution. Congress, undoubtedly aware of FACE's potential First Amendment implications, specifically provided that FACE shall not be construed "to prohibit any expressive conduct (including peaceful picketing or other peaceful demonstration) protected from legal prohibition by the First Amendment to the Constitution." 18 U.S.C. § 248(d)(1). The legislation has been upheld in spite of its incidental burdens on expressive conduct because it furthers the important government interest of protecting a woman's constitutional right to obtain reproductive health services such as abortion.[15] *Dinwiddie*, 76 F.3d at 923-24. Although facially constitutional,

[15] Intermediate scrutiny applies to a content-neutral law which incidentally burdens expressive conduct. *Dinwiddie*, 76 F.3d at 923. "A statute survives intermediate scrutiny 'if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that

Courts must remain mindful of the fact that an "erroneous application of [FACE] threatens to impinge legitimate First Amendment activity," which may even include aggressive forms of protest activity such as yelling and approaching persons. *Spitzer*, 273 F.3d at 195. A person is entitled to express his or her views on abortion so long as by doing it does not interfere with another's right to obtain an abortion.

In this case, Ms. Pine was on a public driveway conducting a peaceful demonstration on an important topic of public concern, which is precisely the type of conduct Congress excepted from FACE's reach. Stretching the terms of FACE to apply to this case so that delaying a vehicle for a matter of seconds constitutes an unlawful physical obstruction, or so that a desire to provide people with information about alternatives to abortion constitutes an unlawful motive, would unjustifiably impinge on Ms. Pine's First Amendment rights. This is especially true in light of the complete absence of evidence that the passengers, who were seemingly receptive to Ms. Pine's solicitation, were seeking reproductive health services at the PWC. There is thus no competing constitutional right to justify the burden placed on Ms. Pine's right of expression and hold her liable for a hefty civil penalty of up to $10,000.[16] The Court is at a loss as to why the Government chose to prosecute this particular case in the first place.

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interest.'" *Id.* at 923-24 (quoting *United States v. O'Brien*, 391 U.S. 367, 377 (1968)). "FACE easily passes this test," *id.* at 924, and has survived numerous First Amendment challenges. *See, e.g., U.S. v. Wilson*, 154 F.3d 658, 662 (7th Cir. 1998) ("the conduct prohibited by FACE is not protected by the First Amendment"); *Unterburger*, 97 F.3d 1413; *Cheffer*, 55 F.3d 1517; *Soderna*, 82 F.3d 1370; *Am. Life League, Inc. v. Reno*, 47 F.3d 642 (4th Cir. 1995); *Planned Parenthood of Columbia/Willamette, Inc. v. American Coalition of Life Activists*, 290 F.3d 1058 (9th Cir. 2002).

[16] Ms. Pine also argues that the civil penalties authorized under 18 U.S.C. § 248(c)(2)(B) are facially unconstitutional because they criminal rather than civil in nature, and therefore deprive individuals of the constitutional protections afforded to criminal defendants. Having already concluded that the Government has failed to establish its *prima facie* case, and that FACE as applied would violate Ms. Pine's First Amendment rights, the Court declines to analyze the constitutionality of FACE's civil penalties.

IV. Conclusion

In conclusion, the Court finds that the Government has failed to set forth *prima facie* evidence on all three elements of its FACE claim—that Ms. Pine's conduct created a physical obstruction, that Ms. Pine intended to interfere with the passengers' freedom of movement, and that Ms. Pine was motivated by a desire to prevent a person from obtaining reproductive health services. Further, imposing liability upon Ms. Pine under the circumstances of this case would unjustifiably burden Ms. Pine's rights under First Amendment of the United States Constitution. For these reasons, Ms. Pine is entitled to judgment as a matter of law.

The Court has carefully considered the motion, response, reply, applicable law, and pertinent portions of the record. For the foregoing reasons, it is hereby

ORDERED AND ADJUDGED that defendant Mary Susan Pine's motion for summary judgment **[DE 66]** is **GRANTED**. Final judgment will be entered by separate order.

DONE AND ORDERED in Chambers at West Palm Beach, Florida this 13 day of January, 2012.

/s/ Kenneth L. Ryskamp
KENNETH L. RYSKAMP
UNITED STATES DISTRICT JUDGE

EXHIBIT E

Amended Complaint filed against Susan Pine on November 8, 2010 by DOJ Civil Rights Division in *Holder v. Pine*, Case No. 9:10-cv-80971-KLR (S.D. Fla.), dkt. no. 30.

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

ERIC H. HOLDER, JR., ATTORNEY GENERAL OF THE UNITED STATES OF AMERICA,	:	CIVIL ACTION
Plaintiff,	:	
v.	:	
MARY SUSAN PINE,	:	No. 9:10-cv-80971-KLR
Defendant.	:	

AMENDED COMPLAINT

Eric H. Holder, Jr., Attorney General of the United States of America (the "United States Attorney General"), by the undersigned attorneys, asserts a civil cause of action under the Freedom of Access to Clinic Entrances Act ("FACE"), 18 U.S.C. § 248 (1994), enacted into law May 26, 1994, as follows:

1. In bringing this action, the United States Attorney General has reasonable cause to believe: (1) Defendant, Mary Susan Pine, has committed, and is likely to continue to commit, violations of FACE; and (2) various persons are being, have been, and will continue to be injured by Defendant's conduct.

JURISDICTION, STANDING, AND VENUE

2. This Court has jurisdiction over this action pursuant to FACE, 18 U.S.C. § 248(c)(2), and 28 U.S.C. § 1345.

3. The United States Attorney General has standing to bring this action pursuant to FACE, 18 U.S.C. § 248(c)(2).

4. Venue is proper in this judicial district pursuant to 28 U.S.C. §§ 1391(b)(1) and (b)(2), in that Defendant resides in this judicial district, and all the events giving rise to this complaint occurred in this judicial district.

DEFENDANT

5. Defendant, Mary Susan Pine, is a regular and vocal anti-abortion protester at the Presidential Women's Center, located at 100 Northpoint Parkway in West Palm Beach, Florida.

6. On information and belief, Defendant resides in West Palm Beach, Florida.

FACTUAL BACKGROUND

7. The Presidential Women's Center provides women's reproductive healthcare services.

8. Defendant has engaged in anti-abortion protest activity outside the Presidential Women's Center for several years.

9. Defendant is one of two protesters who typically conducts her protest activity on the south side of Northpoint Parkway, which includes walking back and forth in the Presidential Women's Center's driveway.

10. Defendant has also intentionally stepped in front of cars as the drivers attempt to enter the driveway to the Presidential Women's Center to access the parking lot.

11. On November 19, 2009, Defendant physically obstructed a car by stepping in front of the car as it was attempting to enter the driveway to the Presidential Women's Center to access the parking lot.

12. Defendant then stopped and stood in front of the car as it was attempting to enter the driveway to the Presidential Women's Center to access the parking lot.

13. The driver of the approaching car stopped to avoid striking Defendant.

14. A West Palm Beach Police Officer, who was in his vehicle conducting routine patrol in the area, observed Ms. Pine step in front of the car and stop, blocking it from entering the clinic parking lot.

15. During the time the car was standing still, in the driveway, no other cars could enter the driveway, and other cars on Northpoint Parkway had to drive around it, into the oncoming lane, to be able to proceed down the street.

16. When it became apparent to the police officer that the defendant was not going to move out of the driveway, the police officer parked his vehicle, got out, approached the driveway, and intervened so that the driver could enter the Presidential Women's Center parking lot.

17. The vehicle then proceeded into the Presidential Women's Center parking lot.

18. Ms. Pine then yelled at the officer, and told him "it was her right to do what she is doing."

19. The officer told Ms. Pine that she was in violation of Florida State Statute 316.2045(1)(2) (obstructing public, streets, and road) and of City Ordinance Chapter 78-1 and 78-427 (prohibiting impeding traffic flow entering a medical facility).

20. Defendant intentionally attempted to, and did, interfere with access to the Presidential Women's Center, by interfering with the driver's freedom of movement and making access to the clinic unreasonably difficult.

21. Defendant intentionally attempted to, and did, interfere with access to the

Presidential Women's Center, by making the driver's access to the clinic hazardous.

22. Defendant intentionally attempted to, and did, interfere with access to the Presidential Women's Center by causing the car to stop in the clinic driveway, which blocked the driveway to any other cars whose drivers or passengers may have wished to enter the clinic driveway or parking lot.

CAUSE OF ACTION UNDER 18 U.S.C. § 248

23. The United States incorporates herein the averments of paragraphs 11 through 22 hereof.

24. Defendant's conduct as described in paragraphs 11 through 22 hereof constitute a physical obstruction which interfered with a person who had been seeking reproductive health services.

25. On information and belief, unless Defendant is restrained by this Court, Defendant will continue to engage in the illegal conduct averred herein.

26. The United States Attorney General is authorized under 18 U.S.C. § 248(c)(2)(B) to seek and obtain temporary, preliminary, and/or permanent injunctive relief from this Court for Defendant's violation of FACE.

27. The United States Attorney General is further authorized under 18 U.S.C. § 248(c)(2)(B)(i) to assess a civil penalty against a respondent no greater than $10,000.00 for a nonviolent physical obstruction.

WHEREFORE, the United States Attorney General respectfully requests judgment in his favor and against Defendant, Mary Susan Pine, in the form of:

A. An Order prohibiting Defendant, Mary Susan Pine, from entering any driveway leading into the Presidential Women's Center parking lot;

B. An Order prohibiting Defendant, Mary Susan Pine, and her representatives, agents, employees and any others acting in concert or participation with her, from violating the Freedom of Access to Clinic Entrances Act; and

C. A civil penalty assessment in the amount of $10,000.00.

Respectfully submitted,

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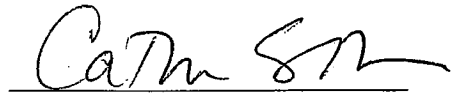

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CERTIFICATE OF SERVICE

I hereby certify that on November 3, 2010, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record, either via transmission of Notices of Electronic Filing generated by CM/ECF or in some other authorized manner for those counsel or parties who are not authorized to receive electronically Notices of Electronic Filing.

/s/ Veronica Harrell-James

Veronica Harrell-James

SERVICE LIST

ERIC H. HOLDER, Jr., ATTORNEY GENERAL OF THE UNITED STATES
v.
MARY SUSAN PINE
Case No. 9:10-CV-80971-klr
United States District Court, Southern District of Florida

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EXHIBIT F

***Joint Notice of Withdrawal of Fee Petition and Stipulation for Resolution of all Pending Matters, Holder v. Pine*, Case No. 9:10-cv-80971-KLR (S.D. Fla.), dkt. no. 106, filed March 23, 2012.**

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA
WEST PALM BEACH DIVISION

HOLDER, ERIC H., JR., U.S. ATTORNEY GENERAL,	:	**CIVIL ACTION**
Plaintiff,	:	**9:10-cv-80971-KLR**
v.	:	**JUDGE KENNETH L. RYSKAMP**
MARY SUSAN PINE,	:	
Defendant.	:	

JOINT NOTICE OF WITHDRAWAL OF FEE PETITION AND
STIPULATION FOR RESOLUTION OF ALL PENDING MATTERS

The parties hereby notify the Court that they have reached a compromise of all pending matters in this litigation, as follows:

1) Defendant Mary Susan Pine ("Defendant") hereby withdraws her Fee Petition (dkt. 102), without prejudice of the right to re-file in the event the United States does not perform its obligations set forth in paragraphs 2 and 3.

2) Within sixty (60) days of the filing of this Stipulation, the United States shall deliver to Defendant, c/o Liberty Counsel, P.O. Box 540774, Orlando, FL 32854, the sum of $120,000.00 (one hundred twenty thousand dollars and no cents), via check, electronic funds transfer, or bank draft payable to "Liberty Counsel, Inc.," as and for reasonable attorneys fees and costs incurred by Defendant in this action. This payment shall fully resolve and settle all of Defendant's claims for attorney's fees and non-taxable costs in connection with this case. The United States enters into this Stipulation as an expedient and cost-effective alternative to continued costly litigation, and thus makes no admission of liability.

3) On today's date, the United States shall withdraw and/or dismiss, with prejudice, its appeal of this matter now pending at the Eleventh Circuit Court of Appeals, via stipulation filed in this Court pursuant to Fed. R. App. P. 42(a).

4) This Stipulation reflects the parties' entire agreement on this subject matter, and replaces all prior discussions and agreements.

Respectfully submitted,

/s/ Samantha K. Trepel

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was filed electronically with the Court on March 23, 2012. Service will be effectuated by the Court's electronic notification system upon all counsel or parties of record.

/s/ Horatio G. Mihet
HORATIO G. MIHET
One of the attorneys for Defendant