Written Testimony of Jessica L. Waters, J.D.,[1] before the House Judiciary Committee

Subcommittee on the Constitution and Limited Government

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Chairman Roy, Ranking Member Scanlon, and members of the Subcommittee on the Constitution and Limited Government of the Committee on the Judiciary, thank you for the invitation to provide testimony about the constitutionality of the Freedom of Access to Clinic Entrances Act.

FACE Provisions[2]

The Freedom of Access to Clinic Entrances Act (FACE)[3] was enacted in 1994 with strong bipartisan support. Broadly, FACE authorizes both civil remedies and criminal penalties against a person who engages in violent or obstructive conduct intended to interfere with people seeking or providing reproductive health services or seeking to exercise religious freedom at houses of worship.[4]

FACE protects both people and places from unlawful conduct while explicitly excluding protected speech from its purview. Below I note four important FACE provisions.

First, FACE protects people seeking or providing reproductive health services at reproductive health facilities, and people exercising or seeking to exercise religious freedom at places of religious worship. More specifically, it prohibits anyone from, by force or threat of force or by physical obstruction, intentionally "injur[ing], intimidat[ing] or interfer[ing] with" any person

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[2] The information in this section substantially mirrors the written testimony I authored and provided to this committee for the December 18, 2024, Hearing on "Revisiting the Implications of the FACE Act Part II."
[3] 18 U.S.C. 248.
[4] 18 U.S.C. 248.

because that person is seeking or has sought to provide or obtain reproductive health services.[5] The term "reproductive health services" is defined as "reproductive health services provided in a hospital, clinic, physician's office, or other facility, and includes medical, surgical, counselling or referral services relating to the human reproductive system, including services relating to pregnancy or the termination of a pregnancy."[6] FACE likewise prohibits this same conduct against a person who is "lawfully exercising or seeking to exercise the First Amendment right of religious freedom at a place of religious worship."[7] Finally, FACE also prohibits attempts to engage in the conduct outlined above.[8]

Second, FACE protects against intentional damage to or destruction of reproductive health facilities because that facility provides reproductive health services and to places of religious worship (and attempts at the same).[9] "Facility" is defined as a "hospital, clinic, physician's office, or other facility that provides reproductive health services, and includes the building or structure in which the facility is located."[10]

Third, FACE explicitly distinguishes between protected expressive speech and unlawful conduct. Expressive non-obstructive speech activities such as "peaceful picketing or other peaceful demonstration" are excluded from FACE's purview.[11] In contrast, unlawful conduct, such as obstruction or violence, is prohibited by FACE.[12]

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[5] 18 U.S.C. 248 (a)(1).
[6] 18 U.S.C. 248 (e)(5).
[7] 18 U.S.C. 248 (a)(2).
[8] 18 U.S.C. 248 (a)(1) and (a)(2).
[9] 18 U.S.C (a)(3).
[10] 18 U.S.C. 248 (e)(1).
[11] 18 U.S.C. 248 (d)(1).
[12] 18 U.S.C. 248(a)(1)-(a)(3).

Fourth, FACE's prohibitions do not distinguish based on an actor's viewpoint. Rather, FACE's protections target unlawful *conduct*, regardless of the types of reproductive health services one may seek or provide, the type of reproductive health care facility, the views of the actor engaging in prohibited conduct, or the basis of one's religious belief when seeking to exercise religious beliefs at houses of worship.

The Need for Federal Legislation

I will briefly address why a federal law—FACE—was and is needed to combat nationwide violence and obstruction at reproductive health clinics. FACE's extensive legislative history speaks directly to this question.

The October 1993 House Judiciary Committee Report regarding HR 796 (FACE)[13] documented the impetus for FACE, finding: "A nationwide campaign of blockades, invasions, vandalism, threats and other violence is barring access to facilities that provide reproductive health services including services arising from the constitutionally protected right to choose. This dramatically escalating violence is endangering the lives and well being of patients, providers, and their respective families."[14] The report goes on to explain that from "1977 to April 1993, more than 1,000 acts of violence against providers of reproductive health services were reported in the United States. These acts included at least 36 bombings, 81 arsons, 131 death threats, 84 assaults, two kidnappings, 327 clinic 'invasions,' and one murder. In addition, over 6,000 clinic blockades and other disruptions have been reported since 1977."[15] The Senate Committee on Labor and Human Resources made similar findings, specifically noting an increase in both scope and

[13] U.S. House of Representatives Committee on the Judiciary Report 103-306, Freedom of Access to Clinic Entrances (October 1993) [hereinafter House Judiciary Report].
[14] House Judiciary Report at page 6.
[15] House Judiciary Report at page 6-7 (quoting National Abortion Federation statistics).

severity of a "nationwide pattern" of incidents of murder, assaults, blockades, arson, firebombings, and threats of force.[16]

Both chambers also noted the need for a new federal law to provide a remedy for this nationwide violence, because, prior to the enactment of FACE, "the laws currently in place at the Federal, state, and local level have proven inadequate to prevent the violent conduct described above."[17] Indeed, the Senate Report concluded, "the national scope of the offensive conduct, and the fact that much of the activity has been orchestrated by groups functioning across State lines, means that the problem transcends the ability of any single local jurisdiction to address it."[18] The Senate report made several key findings about the need for a federal remedy:[19]

- "[E]xisting criminal laws at the State and local levels have failed to provide the certainty of prosecution, conviction and punishment necessary to deter these activities on a nationwide scale."
- "State and local law enforcement authorities have failed to effectively address the systemic and nationwide assault that is being waged against health care providers and patients. Enforcement of applicable local laws, such as those against trespass, vandalism, and assault, has proved inadequate for several reasons. …[I]n some localities, local officials have willfully refused to act in response to anti-abortion violence and blockades. In some instances, the lack of response by local law enforcement authorities appears to be a result of sympathy by local officials for the objectives of the blockades."

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[16] U.S. Senate Committee on Labor and Human Resources Report 103-117 (July 1993) at pages 3-12 [hereinafter Senate Report].
[17] House Report at pages 3,10; Senate Report at pages 17-21.
[18] Senate Report at 21 (internal quotations omitted).
[19] The quoted findings are from Senate Report at pages 17-21.

- "[E]ven where local authorities are willing to conscientiously enforce the applicable State and local laws, they are often unable to do so effectively. One reason is that a patchwork of State and local laws is inherently inadequate to address what is a nation-wide, interstate phenomenon. State court injunction powers end at State lines, and a State cannot easily reach persons in other States who may have planned the illegal acts…local law enforcement efforts in different regions are impeded by difficulties in sharing information and coordinating responses."
- "In addition, local law enforcement authorities are frequently overwhelmed by the sheer numbers of the blockaders."

Based on this well-documented need for federal legislation in this area, Congress enacted FACE pursuant to its delegated powers under Article I, section 8, clause 3 of the Constitution (the Commerce Clause) and section 5 of the Fourteenth Amendment. In the next section I turn to the controlling case law regarding FACE's constitutionality.[20]

The Constitutionality of FACE

In short, every federal court to consider the constitutionality of FACE--and there have been ample opportunities to do so--has upheld FACE. This is true whether the challenge to FACE has rested on Commerce Clause grounds, First Amendment speech grounds, First Amendment free exercise grounds, or Tenth Amendment grounds. Given the committee's focus on questions of federalism, I briefly summarize the controlling authority regarding FACE's constitutionality under the Commerce Clause and under the Tenth Amendment.[21]

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[20] Senate Report at 30.

[21] It is, however, critical to note that just as Commerce Clause and Tenth Amendment challenges to FACE have failed, so too has every First Amendment challenge. In U*nited States v. Gregg,* the Third Circuit

Commerce Clause

Article I, § 8, cl. 3. of the U.S. Constitution--the "Commerce Clause"-- delegates to Congress the authority to regulate commerce "among the several states" -- that is, to regulate interstate commerce. The FACE legislative history makes clear that

> [c]linics and other abortion service providers clearly are involved in interstate commerce, both directly and indirectly. They purchase medicine, medical supplies, surgical instruments and other necessary medical products, often from other States; they employ staff; they own and lease office space; they generate income… In addition, many of the patients who seek services from these facilities engage in interstate commerce by traveling from one state to obtain services in another…Clinic employees sometimes travel across State lines to work as well…the types of activities that would be prohibited by [FACE] have a negative effect on interstate commerce. As the record before the Committee demonstrates, clinics have been closed because of blockades and sabotage and have been rendered unable to provide services. Abortion providers have been intimidated and frightened into ceasing to perform abortions.[22]

Two U.S. Supreme Court cases provide the framework for deciding whether Congress has acted within the bounds of its Commerce Clause authority: *United States v Lopez* (1995)[23] and *United States v Morrison* (2000).[24] *Lopez* held that Congress has the authority to regulate (1) the channels of interstate commerce; (2) the instrumentalities of interstate commerce, or persons or

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noted that it was joining the uncontroverted decisions of the other courts of appeal in upholding FACE against First Amendment Speech challenges and concluded that "FACE does not regulate speech and expression protected by the First Amendment." *See* 226 F.3d 253 (3d Cir. 2000) (citing Hart, 212 F.3d at 1071-73; United States v. Balint, 201 F.3d 928, 934-36 (7th Cir. 2000); Weslin, 156 F.3d at 296-98; United States v. Wilson, 154 F.3d 658, 662-64 (7th Cir. 1998), cert. denied, 525 U.S. 1081, 119 S.Ct. 824, 142 L.Ed.2d 681 (1999); Hoffman, 126 F.3d at 588-89; Bird, 124 F.3d at 683-84; Terry, 101 F.3d at 1418-22; Soderna, 82 F.3d at 1374-77; Dinwiddle, 76 F.3d at 921-24; Cheffer, 55 F.3d at 1521-22). Likewise, the courts that have addressed First Amendment Free Exercise challenges to FACE have found that FACE also survives this this additional lens of scrutiny, as FACE "punishes conduct for the harm it causes, not because the conduct is religiously motivated," *American Life League, Inc. v. Reno*, 47 F.3d 642 (4th Cir. 1995), and FACE is "generally applicable and neutral toward religion and, therefore, does not offend the First Amendment's Free Exercise Clause." *Cheffer v. Reno*, 55 F.3d 1517 (11th Cir. 1995).

[22] Senate Report at 31.
[23] 514 U.S. 549 (1995).
[24] 529 U.S. 598, 601(2000).

things in interstate commerce; and (3) activities that substantially affect interstate commerce.[25] *Morrison* affirmed *Lopez* and further clarified the "substantially affects" test, noting that factors courts should consider include 1) whether the activity "has anything to do with commerce or any sort of economic enterprise, however broadly one might define those terms"; (2) "whether the statute in question contains an express jurisdictional element"; (3) "whether there are express congressional findings or legislative history regarding the effects upon interstate commerce of the regulated activity"; and (4) "whether the relationship between the regulated activity and interstate commerce is too attenuated to be regarded as substantial."[26]

Every federal court (pre- and post-*Lopez* and *Morrison*) to reach the question of whether Congress had the authority to enact FACE under its Commerce Clause power has affirmed that it did. One of the last Circuit courts to consider the question, the Third Circuit, explicitly noted and relied on the unanimity among the other circuit courts (citing the Second, Fourth, Fifth, Seventh, Eighth, Eleventh, and D.C. Circuit decisions)[27] and held that "FACE is a proper exercise of Congress's Commerce Clause power." Summarizing its reasoning, the Third Circuit echoed its sister Circuit courts in finding

> [D]ue to the acute shortage of abortion-related services in this country and the resulting national market for abortion-related services, the conduct proscribed by

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[25] *Lopez*, 514 U.S. 549 (1995).
[26] *Morrison*, 529 U.S. 598 (2000).
[27]The Third Circuit collected, cited, and relied on these cases: *United States v. Hart*, 212 F.3d 1067, 1074 (8th Cir. 2000); *United States v. Weslin*, 156 F.3d 292, 296 (2d Cir. 1998), cert. denied, 525 U.S. 1071, 119 S.Ct. 804, 142 L.Ed.2d 665 (1999); *Hoffman v. Hunt*, 126 F.3d 575, 582-88 (4th Cir. 1997), cert. denied, 523 U.S. 1136, 118 S.Ct. 1838, 140 L.Ed.2d 1089 (1998); *United States v. Bird*, 124 F.3d 667, 672-82 (5th Cir. 1997), cert. denied, 523 U.S. 1006, 118 S.Ct. 1189, 140 L.Ed.2d 320 (1998); T*erry v. Reno*, 101 F.3d 1412, 1415-18 (D.C.Cir. 1996), cert. denied, 520 U.S. 1264, 117 S.Ct. 2431, 138 L.Ed.2d 193 (1997); *United States v. Soderna*, 82 F.3d 1370, 1373-74 (7th Cir.), cert. denied, 519 U.S. 1006, 117 S.Ct. 507, 136 L.Ed.2d 398 (1996); *United States v. Dinwiddie*, 76 F.3d 913, 919-21 (8th Cir.), cert. denied, 519 U.S. 1043, 117 S.Ct. 613, 136 L.Ed.2d 538 (1996); *United States v. Wilson*, 73 F.3d 675, 679-88 (7th Cir. 1995), cert. denied, 519 U.S. 806, 117 S.Ct. 47, 136 L.Ed.2d 12 (1996); *Cheffer v. Reno*, 55 F.3d 1517, 1519-22 (11th Cir. 1995).

> FACE — the commission of blockades and other acts of violence — has a substantial effect on the availability in interstate commerce of reproductive health services. The effect of the misconduct is to deter physicians from providing further services and temporarily and permanently to shut down reproductive health clinics, thus forcing large numbers of women to travel across state lines to obtain services.[28]

In short, each federal court to consider Congress's authority to enact FACE under the Commerce Clause has credited the extensive legislative history findings regarding the substantial impact of clinic blockades and violence on interstate commerce and thus found Congress's enactment of FACE to be well within its powers.

Tenth Amendment

Given Congress's clear authority to enact FACE pursuant to its Commerce Clause power, courts have also quickly dispensed with arguments that FACE usurped state authority under the Tenth Amendment. Indeed, the 11th Circuit -- in a challenge to the constitutionality of FACE -- squarely held that because Congress acted pursuant to clearly delegated powers under Article I (the commerce power), "Congress' valid exercise of authority [in enacting FACE] delegated to it under the Constitution does not violate the Tenth Amendment."[29]

Post Dobbs v. Jackson Cases

Importantly, the federal courts have come to these same conclusions about FACE's constitutionality after the Supreme Court's decision in *Dobbs v. Jackson* (2022). In *United States v. Zastrow,* the Sixth Circuit squarely confronted the question of whether FACE's long-affirmed constitutionality was impacted by the *Dobbs d*ecision. The Sixth Circuit held that *Dobbs* had no effect on FACE's constitutionality, finding that FACE "reaches well beyond abortion related

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[28] *Id.*
[29] *Cheffer v. Reno*, 55 F.3d 1517 (11th Cir. 1995).

reproductive health services health services" and that the "Supreme Court's decision in *Dobbs* provides no basis to reconsider" prior holdings that FACE is a "constitutional exercise of Congress's power under the Commerce Clause."[30] The Sixth Circuit also affirmed that its prior decisions holding that FACE did not run afoul of the First Amendment speech or free exercise protections continued to stand.[31] Other federal courts to consider this same question agreed:

- In 2023 a Tennessee federal district court found "no court has held that *Dobbs* did away with the FACE Act."[32] Relying on the extensive precedent discussed *supra,* the Tennessee district court similarly rejected arguments that FACE enactment exceeded Congress's power under the Commerce Clause or the First Amendment.[33]
- In 2023 a New York district court found: "Nothing in *Dobbs* calls the constitutionality of the FACE Act into question. *Dobbs* does not address the FACE Act. It does not consider Congress's power to enact legislation under the Commerce Clause. Nor does it diminish the interstate economic nature of the reproductive health field."[34]
- In 2023, the D.C. District Court found "[n]othing in *Dobbs* put the existing Commerce Clause jurisprudence and Congress's power to protect abortion access into question." [35]

Thank you for the opportunity to testify about this important topic. I look forward to a conversation with the Subcommittee.

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[30] *U.S v. Zastrow* (6th Cir. 2025) available at https://www.justice.gov/crt/media/1383876/dl?inline (collecting cases).
[31] *Id.* at pages 3-4.
[32] *United States v. Gallagher*, 680 F. Supp. 3d 886 (M.D. Tenn. 2023).
[33] *United States v. Gallagher,* 680 F. Supp. 3d 886, 906 (M.D. Tenn. 2023) ("What did the holding and essential reasoning of *Dobbs* change about Commerce Clause jurisprudence? Nothing. What did the holding and essential reasoning of *Dobbs* change about the interstate nature of the reproductive health field? Nothing. Those issues were not even remotely raised by the case, which involved a state statute.").
[34] *United States v. Williams*, 701 F.Supp.3d 257 (S.D. N.Y. 2023).
[35] *United States v. Handy*, 2023 WL 4744057, at *2 (D.D.C. July 25, 2023).