No. 22-5915

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FEMHEALTH USA, INC., dba FemHealth USA, Inc., Carafem,

Plaintiff-Appellee

v.

RICKEY NELSON WILLIAMS, JR., *et al.*,

Defendants

OPERATION SAVE AMERICA; JASON STORMS; MATTHEW BROCK; COLEMAN BOYD; FRANK LINAM; BRENT BUCKLEY,

Defendants-Appellants

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PLAINTIFF-APPELLEE ON THE ISSUE ADDRESSED HEREIN

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INTEREST OF THE UNITED STATES

The United States has a strong interest in the legal issue presented in this case, which involves the interpretation of the Freedom of Access to Clinic Entrances (FACE) Act, 18 U.S.C. 248. The FACE Act authorizes the Attorney General to criminally prosecute persons who violate the Act and to bring civil suits against such persons when there is reasonable cause to believe that a person or

group of persons may suffer injury as a result of violations of the Act. 18 U.S.C. 248(b) and (c)(2). Because this case concerns the interpretation and scope of the Act's protections, the United States has a substantial interest in this appeal and files this brief under Federal Rule of Appellate Procedure 29(a) to aid this Court's review.

INTRODUCTION AND STATEMENT OF THE ISSUE

Defendant-appellants Operation Save America, Jason Storms, Coleman Boyd, Frank Linam, Matthew Brock, and Brent Buckley appeal an order from the United States District Court for the Middle District of Tennessee issuing a preliminary injunction against them under the FACE Act. The court found that plaintiff-appellee FemHealth USA, Inc., d/b/a carafem (carafem) was likely to succeed on the merits of its FACE Act claim and that the other equitable factors weighed in favor of granting a preliminary injunction.

The United States addresses the following question related to the assessment of plaintiff's likelihood of success on the merits and takes no position on any other issue involved in this appeal:

Whether the district court correctly ruled that the FACE Act's prohibition on the "physical obstruction" of clinic entrances includes partial obstructions, which are temporary physical obstructions that delay but do not fully prevent individuals from entering or exiting a reproductive health care facility.

STATEMENT OF THE CASE

1. The FACE Act

Congress enacted the FACE Act in 1994 to address escalating violence against reproductive healthcare providers and facilities and those seeking or using their services. Among other things, the statute makes it unlawful for any person to

> by force or threat of force or by physical obstruction, intentionally injure[], intimidate[] or interfere[] with or attempt[] to injure, intimidate, or interfere with any person because that person is or has been, or in order to intimidate such person or any other person or any class of persons from, obtaining or providing reproductive health services.

18 U.S.C. 248(a)(1).

As relevant here, the statute defines "physical obstruction" as "rendering impassable ingress to or egress from" a reproductive health care facility or "rendering passage to or from such a facility * * * unreasonably difficult or hazardous." 18 U.S.C. 248(e)(4). The Act defines "reproductive health services" to include "medical, surgical, counselling or referral services relating to the human reproductive system, including services relating to pregnancy or the termination of a pregnancy." 18 U.S.C. 248(e)(5). A covered "facility" includes "a hospital, clinic, physician's office, or other facility" providing such services "and includes the building or structure in which the facility is located." 18 U.S.C. 248(e)(1).

2. Procedural History

Plaintiff carafem, which operates a network of reproductive health care facilities, filed suit in the Middle District of Tennessee against defendants-appellants and several other private individuals for violating the FACE Act and sought a temporary restraining order in response to an incident outside of its Mount Juliet, Tennessee, facility on July 26, 2022. Original Compl., R. 1, Page ID ## 1-11; Emergency Mot. for Temporary Restraining Order, R. 2, Page ID ## 28-29. During the incident, approximately 150 members of Operation Save America gathered near the medical building housing carafem's facility. Preliminary Injunction Op. (Op.), R. 65, Page ID ## 497-499; see also Original Compl., R. 1, Page ID ## 5-7. A group of 10 to 20 men that included the individual defendants crowded the entrance to the medical building and refused to leave until police ordered them to move across the street. Op., R. 65, Page ID # 499.

The district court granted carafem's motion for a temporary restraining order, and carafem subsequently moved for a preliminary injunction. Temp. Restraining Order, R. 9, Page ID ## 75-78; Mot. for Prelim. Inj., R. 13, Page ID ## 84-87. The court extended the temporary restraining order while it considered carafem's motion for a preliminary injunction. Op., R. 65, Page ID # 498.

a. Defendants opposed plaintiff's motion for preliminary relief, arguing in part that temporary obstructions of a clinic entrance that do not prevent anyone

from accessing the clinic cannot violate the FACE Act. Defs. Resp. to Mot. for Prelim. Inj. (Defs. Resp.), R. 42, Page ID ## 281-282, 284. They also contested carafem's irreparable harm, suggesting that the FACE Act is unconstitutional and unenforceable following the Supreme Court's decision in *Dobbs* v. *Jackson Women's Health Organization*, 142 S. Ct. 2228 (2022). Defs. Resp., R. 42, Page ID ## 284-286. Defendants did not, however, raise a constitutional challenge or file a notice of constitutional question pursuant to Federal Rule of Civil Procedure 5.1. Defs. Resp., R. 42, Page ID ## 284-286.

The United States filed a statement of interest in support of carafem's motion to "make clear that the FACE Act prohibits temporary physical obstructions or incomplete blockages of clinic access to reproductive health facilities." U.S. Statement of Interest (SOI), R. 48, Page ID # 360. The United States also argued that neither *Dobbs* nor Tennessee's near-total ban on abortion, which took effect a month after the events in this case, had any "impact whatsoever on the legality—or the necessity—of the FACE Act." SOI, R. 48, Page ID # 367. The United States took no position on the overall merits. SOI, R. 48, Page ID # 363.

b. The district court granted carafem's motion and issued a preliminary injunction. Op., R. 65, Page ID ## 497-504; Prelim. Inj., R. 66, Page ID ## 505-506. In so doing, the court recognized, consistent with the federal government's

position, that the FACE Act's prohibition on physical obstruction "is broadly phrased to prohibit any act rendering passage to the facility unreasonably difficult." Op., R. 65, Page ID # 501 (citation omitted). The court also stated that the Act's definition of physical obstruction "covers temporary obstruction." Op., R. 65, Page ID # 501.

After interpreting the statute, the district court concluded that carafem was likely to succeed on the merits of its FACE Act claim because, "[a]lthough several people were able to enter and exit the building" during the disputed incident, defendants' presence "interfered with persons attempting to access the building" and defendants "attempted to interfere with persons obtaining or providing reproductive health services." Op., R. 65, Page ID ## 502-503. The court also found that the remaining factors weighed in favor of a preliminary injunction. Op., R. 65, Page ID ## 502-504. The court prohibited defendants from engaging in conduct that violates the FACE Act and enjoined them from entering the medical building in which carafem is located, its parking lot, and a court-specified perimeter around the building during designated hours. Prelim. Inj., R. 66, Page ID # 505. The court did not address defendants' suggestion that *Dobbs* casts doubt on the FACE Act's validity.

c. Defendants filed a timely notice of appeal. Notice of Appeal, R. 68, Page ID ## 511-512.

SUMMARY OF ARGUMENT

The district court correctly ruled that physically obstructing the entrance to a reproductive health care facility, even when that obstruction is partial, may violate the FACE Act. The statute expressly prohibits two types of physical obstructions: those that render access "impassable" or those that merely render access "unreasonably difficult or hazardous." As a result, complete obstruction is not necessary for a physical obstruction to violate the Act. For this reason, courts have repeatedly found violations of the FACE Act where physical obstructions do not render access to a facility "impassable," including, for example, where the obstructive conduct at issue merely delays a person's access to the facility or blocks one of several entrances. Indeed, if the FACE Act were to reach only obstructions that completely block access to a reproductive health care facility, not only would the second type of physical obstruction in the statute be superfluous, but the Act's prohibitions could be easily evaded.

Moreover, contrary to defendants' suggestion, there is no reason to revisit the FACE Act's continued enforceability post-*Dobbs*. The statute reaches a whole array of "reproductive health services," not simply services related to the termination of a pregnancy. Nor does the Act's legality rest on a constitutional right to abortion. Numerous courts of appeals, including this one, have upheld the statute as valid Commerce Clause legislation. Simply put, the Act protects the

provision of reproductive health services nationwide, not simply abortion services, and remains valid federal law.

ARGUMENT

THE DISTRICT COURT CORRECTLY HELD THAT A PARTIAL PHYSICAL OBSTRUCTION OF A REPRODUCTIVE HEALTH CARE FACILITY CAN VIOLATE THE FACE ACT

A. The Statutory Text And Case Law Make Clear That Partial Obstructions May Violate The FACE Act

1. The statutory definition of physical obstruction includes partial obstructions of entrances to reproductive health care facilities. The statute defines "physical obstruction" as "rendering impassable ingress to or egress from" a reproductive health care facility or "rendering passage to or from such a facility * * * unreasonably difficult or hazardous." 18 U.S.C. 248(e)(4).

The statutory definition plainly describes two different ways that conduct can constitute a physical obstruction. The first way involves complete obstruction: to render a facility "impassable" means that no one can enter or exit. The second way concerns only whether passage is made "unreasonably difficult or hazardous." Given that the first way requires complete obstruction, the second way must encompass obstructions that allow people some access to a facility, *i.e.*, partial obstructions, provided they render access "unreasonably hazardous or difficult."

Indeed, interpreting the Act to reach only those circumstances that render a facility completely inaccessible would make the "unreasonably difficult or

hazardous" language superfluous and significantly undermine the purpose of the Act. Such an interpretation would mean that if a group of individuals crowded the entrance of a reproductive health care facility with the intent to interfere with the provision of reproductive health services, that conduct would not violate the FACE Act so long as just one person managed to squeeze past them to obtain services. That cannot be right, and the plain text of the statute confirms that is not what Congress intended.

2. Case law interpreting the statutory text further supports the conclusion that the Act reaches partial physical obstructions.

Although no court of appeals has squarely addressed the question, several have recognized that the FACE Act prohibits physical obstructions that do not render a reproductive health care facility inaccessible. The Second Circuit, for example, held that individuals walking across driveways to slow the progress of oncoming cars in reaching a clinic "ma[de] egress and ingress unreasonably difficult" and thus violated the FACE Act. *New York ex rel. Spitzer* v. *Operation Rescue Nat'l*, 273 F.3d 184, 194-195 (2001) (involving individual dropping items on the ground and retrieving them "in slow motion" to block the driveway). Similarly, the D.C. Circuit held that participation in a demonstration within a few feet of a clinic's primary entrance that compelled patients to use a "crowded and chaotic" rear entrance was a physical obstruction under the Act. *United States* v.

Mahoney, 247 F.3d 279, 284 (2001) (citation omitted). In reaching this conclusion, the court recognized that the definition of physical obstruction is "broadly phrased to prohibit *any act* rendering passage to [a] facility unreasonably difficult." *Ibid.* (emphasis added).

Courts have also found that other actions that do not completely block access to a reproductive health care facility, like standing, sitting, kneeling, or lying in front of a doorway, can constitute a physical obstruction under the Act even though patients and providers still may be able to access the facility. See, *e.g.*, *United States* v. *Dugan*, 450 F. App'x 20, 22 (2d Cir. 2011), cert. denied, 566 U.S. 949 (2012); *United States* v. *Alaw*, 327 F.3d 1217, 1218-1219 (D.C. Cir. 2003). As the Seventh Circuit aptly reasoned in rejecting a vagueness challenge to the FACE Act, the Act's prohibitions "would be easily evaded" if physical obstructions were limited to "*complete* blockages of clinic entrances." *United States* v. *Soderna*, 82 F.3d 1370, 1377, cert. denied, 519 U.S. 1006 (1996).

District courts have expressly concluded that physical obstruction under the FACE Act encompasses partial obstructions. Relying on the "unreasonably difficult" language in the statutory definition of "physical obstruction," courts have held that a "physical obstruction is not limited to instances in which individuals completely block entrances and exits." *New Beginnings Ministries* v. *George*, No. 2:15-cv-2781, 2018 WL 11378829, at *13 (S.D. Ohio Sept. 28, 2018); see also

New York ex rel. Spitzer v. *Cain*, 418 F. Supp. 2d 457, 480 n.18 (S.D.N.Y. 2006) (finding "the obstruction need not be permanent or entirely successful" in preventing anyone from accessing the clinic). Other courts have similarly stated that a plaintiff need not show that the conduct "actually prevented any person from entering or leaving that clinic" to render the conduct a "physical obstruction." *United States* v. *Operation Rescue Nat'l*, 111 F. Supp. 2d 948, 955 (S.D. Ohio 1999); *United States* v. *Gregg*, 32 F. Supp. 2d 151, 156 (D.N.J. 1998) ("[I]t is not necessary to establish there was absolutely no way to enter an abortion facility in order prove a violation of the Act.").

B. Defendants-Appellants' Arguments To The Contrary Are Meritless

1. Defendants-appellants argue that partial obstructions cannot violate the FACE Act because the Act's prohibition on physical obstruction requires an "actual" rather than "constructive" obstruction. See Br. 26-30 (quoting *New York by Underwood* v. *Griepp*, No. 17-CV-3706, 2018 WL 3518527, at *42 (E.D.N.Y. July 20, 2018), aff'd sub. nom., *New York by James* v. *Griepp*, 11 F.4th 174 (2d Cir. 2021); *New York ex rel. Spitzer*, 273 F.3d at 195)). They incorrectly assert that *Griepp* and *New York ex rel. Spitzer* stand for the proposition that a group's "'presence' near an entrance and its 'interference' with persons attempting to access a facility" cannot constitute a physical obstruction under the Act. Br. 30.

But ingress to and egress from a reproductive health care facility can be "unreasonably hazardous or difficult" even where it does not completely prevent access to the facility. Indeed, in *Griepp*, the district court recognized that an individual who is standing or pacing with a sign, but not blocking a clinic entrance, can violate the FACE Act if they "interfere with another person's passage to or from the facility." 2018 WL 3518527, at *42; see also *New York ex rel. Spitzer*, 273 F.3d at 194-195 (finding individual using her body to slow, but not block, access violated the FACE Act). Furthermore, the case law is clear that whether conduct renders access to a clinic "unreasonably difficult or hazardous" is a fact-intensive inquiry. See *Griepp*, 2018 WL 3518527, at *8-24; *New York ex rel. Spitzer*, 273 F.3d at 194-195. Thus, the fact that patients or providers may have been able to enter and exit the building at the time of the challenged conduct is not dispositive as a matter of law.

Finally, to the extent defendants-appellants' "constructive" obstruction argument rests on First Amendment concerns (Br. 25), the FACE Act plainly distinguishes between unlawful physical obstructions undertaken with the intent to injure, intimidate, or interfere with persons obtaining or providing reproductive health services, on the one hand, and constitutionally protected protest activity, on the other. The Act ensures that "[n]othing in this section shall be construed * * *

to prohibit any expressive conduct" protected by the First Amendment, including "peaceful picketing or other peaceful demonstration." 18 U.S.C. 248(d)(1).

2. Defendants-appellants suggest in passing that the FACE Act is legally invalid post-*Dobbs*. Br. 41-42. This Court can easily dispose of that argument, both because defendants-appellants did not squarely raise any constitutional challenge and because, in any event, the FACE Act remains valid federal law.

As an initial matter, defendants-appellants do not formally assert a constitutional challenge to the FACE Act in this appeal and have not filed any notice that this private litigation involves a constitutional question. Fed. R. App. P. 44(a). This Court should decline to consider this argument where it has not been properly raised and is asserted in only a "perfunctory manner, unaccompanied by some effort at developed argumentation." *Buetenmiller* v. *Macomb Cnty. Jail*, 53 F.4th 939, 946 (6th Cir. 2022) (deeming such arguments "forfeited"). The United States reserves the right to respond to any constitutional challenge to the statute, if one is made and certified.

Defendants-appellants also misunderstand the law. *Dobbs* does not undermine the enforceability of the FACE Act, which applies to many reproductive health services that remain legal in all States, and that in any event constitutes a valid exercise of Congress's Commerce Clause power. The Act protects access to all kinds of "reproductive health services," 18 U.S.C. 248(a)(1),

which encompass "services provided [by] 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," 18 U.S.C. 248(e)(5). Accordingly, the FACE Act reaches a whole array of care, including pregnancy counseling regarding alternatives to abortion. *Greenhut* v. *Hand*, 996 F. Supp. 372, 375-376 (D.N.J. 1998). And here, although Tennessee now has a near-total ban on abortion, carafem's Mount Juliet office continues to provide reproductive health services in the form of screenings for sexually transmitted infections and care related to birth control. Transcript of Prelim. Inj. Hearing, R. 89, Page ID # 694.

Finally, the Act does not rely on Congress's authority to enforce the Fourteenth Amendment or on the existence of a constitutional right to abortion. Rather, Congress enacted the FACE Act under the Commerce Clause to protect the market in reproductive health care services from violent and physical interference. This Court and others uniformly have upheld the statute's prohibitions against violent and physical interference with obtaining or providing reproductive-health services as constitutional under the Commerce Clause and have found them to

raise no First Amendment concerns. See, *e.g.*, *Norton* v. *Ashcroft*, 298 F.3d 547, 552-553, 555-559 (6th Cir. 2002), cert. denied, 537 U.S. 1172 (2003).[1]

In sum, *Dobbs* has no effect on the enforceability of the FACE Act, which remains valid federal law.

[1] See also *United States* v. *Weslin*, 156 F.3d 292, 295-298 (2d Cir. 1998), cert. denied, 525 U.S. 1071 (1999); *United States* v. *Gregg*, 226 F.3d 253, 261-268 (3d Cir. 2000), cert. denied, 532 U.S. 971 (2001); *Hoffman* v. *Hunt*, 126 F.3d 575, 582-589 (4th Cir. 1997), cert. denied, 523 U.S. 1136 (1998); *United States* v. *Bird (I)*, 124 F.3d 667, 683-684 (5th Cir. 1997), cert. denied, 523 U.S. 1006 (1998); *United States* v. *Bird (II)*, 401 F.3d 633, 634 (5th Cir.), cert. denied, 546 U.S. 864 (2005); *United States* v. *Soderna*, 82 F.3d 1370, 1373-1376 (7th Cir.), cert. denied, 519 U.S. 1006 (1996); *United States* v. *Wilson*, 73 F.3d 675, 679-687 (7th Cir. 1995), cert. denied, 519 U.S. 806 (1996); *United States* v. *Hart*, 212 F.3d 1067, 1073-1074 (8th Cir. 2000), cert. denied, 531 U.S. 1114 (2001); *United States* v. *Dinwiddie*, 76 F.3d 913, 920-924 (8th Cir.), cert. denied, 519 U.S. 1043 (1996); *United States* v. *Dillard*, 795 F.3d 1191 (10th Cir. 2015), on remand, 184 F. Supp. 3d 999, 1000-1002 (D. Kan. 2016); *Cheffer* v. *Reno*, 55 F.3d 1517, 1519-1521 (11th Cir. 1995); *Terry* v. *Reno*, 101 F.3d 1412, 1415-1421 (D.C. Cir. 1996), cert. denied, 520 U.S. 1264 (1997).

CONCLUSION

The United States respectfully urges this Court to uphold the district court's determination that partial physical obstructions may violate the FACE Act and to reiterate that the FACE Act remains enforceable federal law.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the attached BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PLAINTIFF-APPELLEE ON THE ISSUE ADDRESSED HEREIN:

(1) complies with the type-volume limitation of Federal Rules of Appellate Procedure 29(a)(5) and 32(a)(7)(B) because it contains 3273 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f); and

(2) complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface using Word 2019, in 14-point Times New Roman font.

s/ Barbara A. Schwabauer
BARBARA A. SCHWABAUER
Attorney

Date: March 20, 2023

CERTIFICATE OF SERVICE

I hereby certify that on March 20, 2023, I electronically filed the foregoing BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PLAINTIFF-APPELLEE ON THE ISSUE ADDRESSED HEREIN with the Clerk of the Court for the United States Court of Appeals for the Sixth Circuit by using the appellate CM/ECF system.

I certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

s/ Barbara A. Schwabauer
BARBARA A. SCHWABAUER
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ADDENDUM

DESIGNATION OF RELEVANT DISTRICT COURT DOCUMENTS

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