Abortion Protesting

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 I.

Introduction

The Supreme Court in 1973 recognized abortion as an exercise of a fundamen tal privacy right grounded in the Constitution.[1] Abortion nevertheless remains controversial, surrounded by emotionally charged debates that combine political, gender, and healthcare issues.[2] on abor
Accordingly, people express their views
tion through various forms of advocacy and protest. The right to protest is at the core of free speech, protected by the First Amendment.[3] The 1960s civil rights movement used protest successfully to educate the public and ultimately bring about changes in the law.[4] Abortion protesting differs from other forms of pro testing, however, because of the competition between the decisional privacy rights guaranteed to abortion seekers and the free speech rights of abortion protesters.[5]

1. Roe v. Wade, 410 U.S. 113, 152, 154 (1973).
See Quinnipiac University Poll, Sept. 10-13, 2021, Polling Report, http://www.pollingreport. 2.

com/abortion.htm (last visited Jan. 24, 2022) (Of those polled, sixty-two percent believed abortion should be legal "in all" or "in most" cases, compared with thirty-two percent who believed it should be illegal in all or most cases.).

3. *See* U.S. Const. amend. I ("Congress shall make no law . . . abridging freedom of speech."). 4. The civil rights movement is referenced by both sides of the debate surrounding abortion protesting. On one side, abortion protesters argue that it is an example of the good that can come from protest movements challenging the government. On the other side, opponents characterize protests as a form of force

preventing women from getting abortions. The Freedom of Access to Clinic Entrances Act of 1994 was modeled after the Civil Rights Act of 1968 and was intended to prohibit the use of force against people exercising their constitutional rights. *See* Arianne K. Tepper, *In Your F.A.C.E.: Federal Enforcement of the Freedom of Access to Clinic Entrances Act of 1993*, 17 PACE L. REV. 489, 500–02 (1997).

5. *See Roe*, 410 U.S. at 152. Although the right to privacy is not explicitly stated in the Constitution, the Court has recognized a right to personal privacy, "or a guarantee of certain areas or zones of privacy," under the Constitution through a long line of decisions dating as far back as 1891. *Id.*

By linking abortion with fundamental constitutional rights,[6] *Roe v. Wade* set the stage for debate over access to abortion services and rights associated with abortion protesting. Since *Roe*, anti-abortion activists have organized efforts to protest the legality of abortion.[7] On occasion, abortion protestors have directly prevented women from obtaining abortion services.[8] Although the First Amendment protects an individual's right to protest,[9] anti-abortion protesters' actions exceeded the parameters of constitutionally protected free speech when those actions involved violence and threatening behavior.[10] In response, abortion rights supporters have developed an arsenal of legal tactics for confronting anti abortion protesting, ranging from general trespassing laws to federal legislation specifically protecting clinic access.[11]

This article provides an overview of abortion protesting, steps the federal gov ernment has taken to protect the rights and safety of patients and abortion pro viders, anti-abortion protesters' free speech rights, and the First Amendment debate surrounding abortion protest. Part II discusses federal legislative approaches upheld in abortion protesting cases, specifically the Freedom of Access to Clinic Entrances Act of 1994 and the constitutional challenges brought against the statute. Part III discusses state legislative approaches to ensuring access to clinic entrances.

II. THE CONGRESSIONAL RESPONSE TO CLINIC PROTESTS: FREEDOM OF ACCESS TO CLINIC ENTRANCES ACT OF 1994 (FACE)

Anti-abortion protesters have used a variety of tactics to discourage abortion. These tactics include "sidewalk counseling,"[12] pamphlet distribution outside

6. *Id.* at 164 ("A state criminal abortion statute . . . that excepts from criminality only a life-saving procedure on behalf of the mother, without regard to pregnancy stage and without recognition of the other interests involved, is violative of the Due Process Clause of the Fourteenth Amendment.").

7. For example, each year, on the Jan. 22 anniversary of *Roe*, anti-abortion and pro-choice groups alike rally outside the U.S. Supreme Court. *See* Karlyn Barker, *After 32 Years,* Roe *Remains a Lightning Rod*, WASH. POST (Jan. 23, 2005), http://www.washingtonpost.com/wp-dyn/articles/A29474-2005Jan22.html.

8. *See Violence Statistics & History*, NAT'L ABORTION FED'N, https://prochoice.org/naf-releases 2019-violence-disruption-statistics/ (last visited Jan. 24, 2022).

9. *See* U.S. Const. amend. I ("Congress shall make no law . . . abridging the freedom of speech.").

10. Virginia v. Black, 538 U.S. 343, 359 (2003) ("'True threats' encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular group or group of individuals." True threats are not protected by the First Amendment.); *See NAF Violence and Disruption Statistics: Incidents of Violence and Disruption Against Abortion Providers*, NAT'L ABORTION FED'N, https://5aa1b2xfmfh2e2mk03kk8rsx-wpengine.netdna-ssl.com/wp-content/uploads/NAF-2019-Violence-and-Disruption-Stats-Final.pdf (last visited Jan. 24, 2022) (564,562 reported instances of violence and disruption of abortion providers between 2010-2019).

11. *See* Steven Soule & Karen Weinstein, *Racketeering, Anti-Abortion Protesters, and the First Amendment*, 4 UCLA WOMEN'S L.J. 365, 367–69 (1994) (evaluating tactics for prosecution and suit of anti-abortion protesters); Dana S. Gershon, *Stalking Statutes: A New Vehicle to Curb the New Violence of the Radical Anti-Abortion Movement*, 26 COLUM. HUM. RTS. L. REV. 215, 220 (1994).

12. "Sidewalk counseling," in the context of abortion protesting, describes the practice of protestors approaching individuals outside abortion clinics to dissuade them from having abortions. *See* Operation Rescue-Nat'l v. Planned Parenthood of Hous. and Se. Tex., Inc., 975 S.W.2d 546, 562 (Tex. 1998).

clinics, gathering in groups outside abortion clinics, attempting to dissuade poten tial patients from having abortions, and blocking the entrances of clinics and health centers that offer abortions. A minority of extreme anti-abortion activists have also stalked, threatened, and used violence against abortion providers and women seeking abortions.[13] murdered abortion Notably, anti-abortion activists provider Dr. Barnett Slepian in 1998, abortion provider Dr. George Tiller in 2009,[14] outside a Planned Parenthood clinic and a police officer and two civilians in Colorado in 2015.[15]

Anti-abortion protesters have found a new medium for protest on the Internet; for example, publishing the names and addresses of abortion providers and photo graphs of patients at clinics.[16] group Center Recently, the anti-abortion activist for Medical Progress began releasing a series of controversial "sting" videos—highly edited videos taken undercover that falsely suggest Planned Parenthood illegally profits from fetal tissue donation.[17]

Federal action concerning abortion protesting took place in the early 1990s, amid a dramatic increase in violent acts by abortion opponents. Attorney General Janet Reno established the National Task Force on Violence Against Reproductive Health Care Providers, charged with determining whether there was a nationwide conspiracy to commit acts of violence against reproductive health care providers.[18] concluded that anyone Legislatively, Congress, which working in or visiting a reproductive health services clinic faced a daily risk to their safety,[19] enacted the Freedom of Access to Clinic Entrances Act of 1994 (FACE)[20] to regulate abortion protesting. FACE provides a right of action against anyone who:

> by threat of force or by physical obstruction, intentionally injures, intimidates or interferes with, or attempts to injure, intimidate or

13. *See* Alanna Vagianos, *Threats and Targeted Intimidation Against Abortion Clinic Staff Have Significantly Increased Since 2010*, HUFFINGTON POST (Feb. 10, 2015), http://www.huffingtonpost.com/2015/02/09/threats-against-abortion-clinics-increased-2015_n_6581536.html.

14. *See, e.g.*, Jim Yardley & David Rohde, *Abortion Doctor in Buffalo Slain; Sniper Attack Fits Violent Pattern*, N.Y. TIMES (Oct. 25, 1998), http://www.nytimes.com/1998/10/25/nyregion/abortion doctor-in-buffalo-slain-sniper-attack-fits-violent-pattern.html?pagewanted=all; ASSOCIATED PRESS, *Kansas: Guilty Verdict Upheld in Doctor's Killing,* N.Y. TIMES (Oct. 24, 2014), http://www.nytimes.com/2014/10/25/us/kansas-guilty-verdict-upheld-in-doctors-killing.html?_r=0.

15. *See* Paul Vercammen & Holly Yan, *Planned Parenthood Shooting Suspect Robert Dear Has Outbursts at Hearing*, CNN (Dec. 9, 2015), http://www.cnn.com/2015/12/09/us/colorado-planned parenthood-shooting/.

16. *See, e.g.*, Sue Chan, *Abortion Cams*, C.B.S. NEWS (Aug. 22, 2002), https://www.cbsnews.com/news/abortion-webcam/.

17. *See* Jackie Calmes, *Planned Parenthood Videos Were Altered, Analysis Finds*, N.Y. TIMES (Aug. 27, 2015), http://www.nytimes.com/2015/08/28/us/abortion-planned-parenthood-videos.html.

18. *See* U.S Dep't of Just., *National Task Force on Violence Against Reproductive Health Care Providers*, https://www.justice.gov/crt/national-task-force-violence-against-reproductive-health-care providers (last updated Sept. 17, 2021).

19. 140 Cong. Rec. S5595-03, 1994 WL 183852 (Statement of Sen. Ted Kennedy).

20. 18 U.S.C. § 248 (1994).

> 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 per sons from, obtaining or providing reproductive health services.[21]

FACE also prohibits activity that "intentionally damages or destroys a facility because it is used to provide reproductive health services."[22] The statute provides criminal and civil penalties, and states that anyone aggrieved by conduct prohib ited by FACE may commence a civil action.[23] Furthermore, the statute allows for the U.S. and state attorneys general to commence civil actions when there is "rea sonable cause to believe that any person or group of persons is being, has been or may be injured by conduct constituting a violation of" FACE.[24] The govern ment's suit is thus brought not "on behalf of a particular citizen" but rather "as *parens patriae* on behalf of citizens generally."[25] Parents or legal guardians of minors are exempt from FACE when their activities are directed exclusively at their children or wards,[26] and the statute explicitly says that nothing within it shall be construed to prohibit First Amendment protected conduct.[27] Remedies under FACE include injunctive, compensatory, or punitive relief, and attorneys'

fees.[28] Courts assess injunctions issued in response to FACE violations in accordance with the same common law standards used for other injunctions against protesters in general.[29]

Since its passage in 1994, FACE has faced several constitutional challenges alleging that the Act violates the First Amendment. Several circuits have rejected First Amendment challenges to FACE based on the understanding that any "threat of force" falls outside the scope of the First Amendment's protection.[30] Other circuits have determined that because FACE is content neutral, and does

21. 18 U.S.C. § 248(a)(1).
22. *Id.* § 248(a)(3).
23. *Id.* § 248(c).
24. *Id.* §§ 248(c)(2)(A), (c)(3)(A).
25. Spitzer v. Cain, 418 F. Supp. 2d 457, 470 (S.D.N.Y. 2006).
26. 18 U.S.C. § 248(a).
27. *Id.* § 248(d)(1).
28. *Id.* § 248(c)(1)(B).
29. *E.g.*, United States v. Scott, 187 F.3d 282, 287 (2d Cir. 1999) ("In evaluating the constitutionality of a[n] . . . injunction, we apply the test that the Supreme Court articulated in *Madsen*: 'whether the challenged provisions of the injunction burden no more speech than necessary to serve a significant government interest.'" (citing Madsen v. Women's Health Center, Inc., 512 U.S. 753, 765 (1994)).
30. *See* Planned Parenthood of Columbia/Willamette, Inc. v. Am. Coal. of Life Activists, 290 F.3d 1058, 1070 (9th Cir. 2002) (holding that criminalization of threats of force as described in FACE does not violate First Amendment); United States v. Gregg, 226 F.3d 253, 267 (3d Cir. 2000) ("FACE does not regulate speech and expression protected by the First Amendment."); United States v. Soderna, 82 F.3d 1370, 1379 (7th Cir. 1996) (holding that FACE did not infringe the First Amendment because it regulates with adequate clarity and precision injurious conduct that is not purely symbolic, but rather conduct that uses threats of force and violence); United States v. Dinwiddie, 76 F.3d 913, 919 (8th Cir. 1996) (holding that FACE was not facially inconsistent with the First Amendment); Am. Life League, Inc. v. Reno, 47 F.3d 642, 648–52 (4th Cir. 1995) (finding no First Amendment violation when FACE primarily targets unprotected activities and, to the extent that it does affect expression, passes all tests for content neutrality and legitimate government interests); Cheffer v. Reno, 55 F.3d 1517, 1521 (11th

not unnecessarily burden expression, it withstands First Amendment chal lenges.[31] Some petitioners have alleged that Congress lacked authority to pass the Act under the Commerce Clause, but every circuit has disagreed.[32]

Other challenges to FACE have also been rejected. For example, courts found that FACE complied with the Tenth Amendment[33] and that prison terms desig nated under FACE did not violate the Eighth Amendment.[34] Most consideration of the constitutionality of FACE, however, has centered on Commerce Clause and First Amendment challenges.

A. Commerce Clause Challenges to FACE

FACE has repeatedly survived constitutional challenges alleging the act exceeded limits of Congress' power under the Commerce Clause.[35] Congress jus tified its passage of FACE based on abortion protesting's impact on interstate commerce: "Based on an extensive legislative record, Congress rationally con cluded that violence, threats of force, and physical obstructions aimed at persons

seeking or providing reproductive health services affect interstate commerce."[36] The Commerce Clause grants Congress extensive, but not unlimited author ity.[37] For example, the Supreme Court has found that Congress exceeded its authority in *United States v. Lopez*[38] and *United States v. Morrison*.[39] In *Lopez*, the Court found that Congress could use the Commerce Clause to regulate three

Cir. 1995) (following *American Life League* in holding FACE did not violate the First Amendment because it is not content- or viewpoint-based).

31. *Compare Dinwiddie*, 76 F.3d at 919 (FACE is not facially inconsistent with the First Amendment), *with* United States v. Weslin, 156 F.3d 292, 296–98 (2d Cir. 1998) (per curiam) (holding that FACE does not violate the First Amendment because it is not viewpoint- or content-based and it passes the three-prong test for the constitutionality of laws that burden expression while restricting proscribable conduct).

32. *See, e.g.*, *Weslin*, 156 F.3d at 296 (holding FACE to be a valid exercise of Commerce Clause because Congress found specific evidence that activities governed by FACE affect interstate commerce).

33. United States v. Unterburger, 97 F.3d 1413, 1415 (11th Cir. 1996).

34. *See* Planned Parenthood Ass'n of Se. Pa., Inc. v. Walton, 949 F. Supp. 290, 294 (E.D. Pa. 1996).

35. *See* Norton v. Ashcroft, 298 F.3d 547, 559 (6th Cir. 2002) ("Given the detailed congressional record, we are satisfied that Congress had a rational basis to conclude that the activities prohibited by the Act disrupted the national market for abortion-related services and decreased the availability of such services. Considered along with the other *Morrison* factors, we hold that Congress validly enacted the Act pursuant to its Commerce Clause power."); Hoffman v. Hunt, 126 F.3d 575, 588 (4th Cir. 1997) ("Because FACE regulates an activity that has a close connection with commercial activity and has a substantial effect on interstate commerce, we conclude that Congress possesses authority under the Commerce Clause to enact it."); United States v. Hill, 893 F. Supp. 1034, 1037 (N.D. Fla. 1994). 36. Am. Life League, Inc. v. Reno, 47 F.3d 642, 647 (4th Cir. 1995).

37. *See, e.g.*, Gonzales v. Raich, 545 U.S. 1 (2005) (upholding Commerce Clause power to regulate intrastate marijuana growers and users).

38. United States v. Lopez, 514 U.S. 549 (1995) (holding that Gun-Free School Zones Act exceeded Congressional Commerce Clause power because possessing a gun in a local school zone is not economic activity with a substantial effect on interstate commerce).

39. United States v. Morrison, 529 U.S. 598 (2000) (holding that Congress exceeded its Commerce Clause authority in passing the Violence Against Women Act because the regulated activity did not substantially affect interstate commerce).

categories of activity: "the use of the channels of interstate commerce"; "the instrumentalities of interstate commerce, or persons or things in interstate com merce"; and "activities that substantially affect interstate commerce."[40] In *Morrison* the Court refined the criteria for determining what activities "substan tially affect interstate commerce," creating precedent for further scrutiny as to whether Congress passed FACE within the scope of its authority.[41] Since *Morrison* and *Lopez*, circuit courts have upheld FACE's constitutionality under the Commerce Clause.[42] In *United States v. Bird* (*Bird III*),[43] the defendant acted with threats and violence outside a Planned Parenthood clinic in Houston.[44] The Fifth Circuit reversed a district court opinion that had found FACE unconsti tutional,[45] and did not find "that the U.S. Supreme Court's decision in *Morrison* materially affects [the] holding in *Bird I*," which upheld FACE's constitutionality under the Commerce Clause.[46] Thus, the Fifth Circuit upheld its 1997 analysis that FACE regulates activity with a substantial effect on interstate commerce.[47]

The Supreme Court did not grant certiorari.[48]

FACE has withstood all Commerce Clause challenges thus far. Because the Supreme Court decided in 2005 not to limit the authority of the Commerce Clause as it applies to intrastate marijuana growers,[49] it seems unlikely that the Court would choose to apply the reasoning of *Morrison* to destroy the constitu tionality of FACE.

40. *Lopez*, 514 U.S. at 558–59.

41. *Morrison*, 529 U.S. at 610–12.

42. *See, e.g.*, Norton v. Ashcroft, 298 F.3d 547, 547 (6th Cir. 2002); United States v. Gregg, 226 F.3d 253, 263 (3d Cir. 2000).

43. United States v. Bird, 401 F.3d 633 (5th Cir. 2005) [hereinafter *Bird III*].

44. United States v. Bird, 279 F. Supp. 2d 827, 829–30 (S.D. Tex. 2003) [hereinafter *Bird II*]. Defendant Bird drove a van though the front door of Houston Planned Parenthood facility. The government alleged a violation of 18 U.S.C.A. § 248 (FACE), specifically subsections (a)(3) and (b)(2). Subsection (a)(3) made it unlawful to intentionally damage or destroy facility property, and subsection (b)(2) dictated a penalty for second or subsequent violations of FACE. Subsection (b)(2) was applicable to defendant Bird—he had been first convicted of violating FACE in 1995. *See* United States v. Bird, 124 F.3d 667 (5th Cir. 1997) [hereinafter *Bird I*].

45. *Bird II*, 279 F. Supp. 2d at 834–36. The U.S. District Court for the Southern District of Texas resisted persuasion from the circuit courts, including the Fifth Circuit, when it found FACE unconstitutional under the Commerce Clause. The district court found that in light of *Morrison*, FACE could no longer escape Commerce Clause scrutiny because "[a]nti-abortion activities are no more bound up with interstate commerce activities than is a local public school zone," and FACE therefore failed to "escape the 'insubstantial/attenuated' effect tag." *Id.*

46. *Bird III*, 401 F.3d at 634.

47. *Bird I*, 124 F.3d at 675–78. The court held that the fact "[t]hat the Act fails to qualify under the first two *Lopez* categories of permissible Commerce Clause regulation is not surprising in light of what appears to be Congress's purpose to reach the prohibited activity at as many abortion clinics as possible." *Id*. at 675. However, the court found that "section 248(a)(1) is a legitimate regulation of intrastate activity having a substantial effect on interstate commerce." *Id.* at 678.

48. *Bird III*, *cert. denied*, 126 S. Ct. 150 (2005).

49. Gonzales v. Raich, 545 U.S. 1 (2005).

B. First Amendment Challenges to FACE

Although FACE limits some expression, it has survived First Amendment challenges.[50] Courts have produced a "uniform line of decisions and [held] that the Act does not, on its face, violate the First Amendment."[51]

In *American Life League Inc. v. Reno*, the Fourth Circuit found FACE to be consistent with the First Amendment because it "does not prohibit protesters from praying, chanting, counseling, carrying signs, distributing handbills or oth erwise expressing opposition to abortion, so long as these activities are carried out in a non-violent, non-obstructive manner."[52] There, veteran anti-abortion pro testers challenged FACE, claiming it would interfere with their free speech rights. The government argued that FACE had no impact on speech and prohibited only unprotected conduct.[53] The court concluded that although FACE

does not target speech protected under the First Amendment, it could "incidentally affect some conduct with protected expressive elements."[54] Despite primarily affecting the anti-abortion message, the court found FACE to be content-neutral,[55] meriting an intermediate standard of scrutiny. Under this intermediate standard, the court held that FACE does not violate the First Amendment and that any impact on First Amendment freedoms was related to, and was no greater than required to address, the substantial government interests involved.[56] The Eleventh Circuit followed *American Life League* in denying a similar challenge to FACE.[57] However, more recent Supreme Court decisions in *Reed v. Town of Gilbert*[58] and *McCullen v. Coakley*[59] may portend a weakening of this line of precedent, with the Court holding in *Reed* that strict scrutiny is the proper standard of review when a law targets "specific subject matter . . . even if it does not discriminate among viewpoints within that subject matter."[60] In a statement ultimately agree
ing with the Supreme Court's denial of certiorari in *Bruni v. City of Pittsburgh*,[61] Justice Thomas suggested that the Court should take up an appropriate case to

50. *See, e.g.*, Planned Parenthood of Columbia/Willamette v. Am. Coal. of Life Activists, 290 F.3d 1058 (9th Cir. 2002); New York ex rel. Spitzer v. Operation Rescue Nat'l., 273 F.3d 184 (2d Cir. 2001); United States v. Weslin, 156 F.3d 292 (2d Cir. 1998); United States v. Wilson, 154 F.3d 658 (7th Cir. 1998); United States v. Dinwiddie, 76 F.3d 913 (8th Cir. 1996).

51. Norton v. Ashcroft, 298 F.3d 547, 552 (6th Cir. 2002).

52. Am. Life League, Inc. v. Reno, 47 F.3d 642, 648 (4th Cir. 1995).

53. *Id*. at 648 ("The government's first defense is that the Act does not implicate the First Amendment at all; rather, it regulates conduct that is outside the First Amendment."). 54. *Id*.

55. *Id*. at 650–51 ("Congress can exercise its prerogative to single out and address conduct thought to inflict greater individual and societal harm by using a motive requirement to narrow the reach of a law . . . [A] statute is not rendered non-neutral simply because one ideologically defined group is more likely to engage in the proscribed conduct.").

56. *Id.* at 651–52.

57. *See* Cheffer v. Reno, 55 F.3d 1517, 1520–22 (11th Cir. 1995).

58. Reed v. Town of Gilbert, 576 U.S. 155 (2015).

59. McCullen v. Coakley, 573 U.S. 464 (2014).

60. 576 U.S. at 169.

61. Bruni v. City of Pittsburgh, 141 S. Ct. 578 (2021).

resolve the "glaring tension" in Supreme Court precedent regarding the proper standard of review in First Amendment cases.[62]

Similar to the Fourth and Eleventh Circuits, the Eighth Circuit upheld FACE's constitutionality in *United States v. Dinwiddie*, in which the government brought claims against a woman who protested outside a Planned Parenthood clinic for many years and allegedly obstructed the clinic's entrance.[63] The appeal provided the opportunity for the court to review FACE under the First Amendment. The court concluded that the act did not impose an unconstitutional content-based restriction on speech[64] and would apply to individuals who limited access to clin
ics regardless of their beliefs or messages.[65] In upholding FACE's "threat of

force" proscription as content-neutral, the court insisted that the First Amendment still protects even "advocacy of the view that it is justifiable to use violence against doctors who perform abortions."[66]

In 2002, the Ninth Circuit addressed the First Amendment issue in *Planned Parenthood of Columbia/Willamette, Inc. v. American Coalition of Life Activists*.[67] The Ninth Circuit considered reproductive service providers' right of action under FACE against individuals using threat of force to intentionally intimidate the provider.[68] The case was brought by abortion providers against protesters after the protesters created posters and a website with photographs and addresses of the doctors.[69] At issue were three separate potential threats: (1) a poster identifying three of the plaintiff physicians, along with others not party to the suit, as "GUILTY"; (2) a poster identifying one of the physicians as "GUILTY" and including his name, address, and photograph; (3) and a website called the "Nuremberg Files" where providers associated with a broad range of

62. *Id.* (Thomas, J., respecting the denial of certiorari) ("In 2000, we upheld one [buffer zone] law, determining that it survived under the First Amendment because it satisfied intermediate scrutiny. *Hill v. Colorado*, 530 U.S. 703, 120 S.Ct. 2480, 147 L.Ed.2d 597 (2000). Our use of intermediate scrutiny there, however, 'is incompatible with current First Amendment doctrine as explained in *Reed [v. Town of Gilbert*, 576 U.S. 155, 135 S.Ct. 2218, 192 L.Ed.2d 236 (2015)] and *McCullen [v. Coakley*, 573 U.S. 464, 134 S.Ct. 2518, 189 L.Ed.2d 502 (2014)].'").

63. United States v. Dinwiddie, 76 F.3d 913, 917 (8th Cir. 1996).

64. *Id.* at 922 ("[R]ather than imposing a content-based restriction on speech, FACE's proscription of 'threats of force' that 'place a person in reasonable apprehension of bodily harm' regulates speech that is not protected by the First Amendment.").

65. *Id.* at 923 ("FACE would prohibit striking employees from obstructing access to a clinic in order to stop women from getting abortions, even if the workers were carrying signs that said, 'We are underpaid!' rather than 'Abortion is wrong!'").

66. *Id.* at 926 n.10.

67. Planned Parenthood of Columbia/Willamette v. Am. Coal. of Life Activists, 290 F.3d 1058 (9th Cir. 2002).

68. *Id.* at 1062 (citing 18 U.S.C. §§ 248(a)(1) and 248(c)(1)(A)) (finding that the Supreme Court has yet to set forth a bright line rule for distinguishing a threat from protected speech, but the federal courts of appeal have applied a reasonable person standard); *see also* United States v. Hart, 212 F.3d 1067 (8th Cir. 2000) (finding "threat of force" when defendant parked Ryder trucks in front of reproductive health clinic when President Clinton was scheduled to appear, knowing it would spark terrorism fears and an evacuation); Emma Goldman Clinic v. Holman, 728 N.W.2d 60 (Iowa Ct. App. 2006).

69. *Planned Parenthood of Columbia/Willamette*, 290 F.3d at 1062.

pro-abortion-rights activities were listed as people who might one day be prose cuted for crimes against humanity.[70]

The "Nuremberg Files" listed approximately two hundred people under the file heading "ABORTIONISTS: the shooters," while an additional two hundred peo ple—judges, politicians, law enforcement officials, spouses of abortion providers, and abortion rights supporters—were listed under separate file headings.[71] Within the "abortionists" section, there was a key: "Black font (working); Grey font (wounded); Strikethrough (fatality)."[72] The names of three

slain abortion pro viders were struck through to indicate "fatality."[73]

In the court's analysis of whether these posters and the website constituted true threats, the decisive factor was whether any explicit threats had been made.[74] The court applied an objective test, focusing on what a reasonable speaker would fore see as the listener's reaction under the circumstances.[75] If a reasonable person would interpret the statement "as a serious expression of intent to inflict bodily harm upon that person," then the threatening statement in violation of FACE would not be protected under the First Amendment.[76] With respect to the "Nuremberg Files" specifically, the court determined that the defendants crossed the line from protected to unprotected speech when they included the key and marked which physicians had been wounded and killed.[77] "In conjunction with the 'guilty' posters, being listed on a Nuremberg Files scorecard for abortion pro
viders impliedly threatened physicians with being next on a hit list. To this extent only, the Files are . . . a true threat."[78]

The Internet makes it difficult to determine the boundary between incitement, which is protected under the First Amendment, and threat, which is not. Courts will need to examine "true threat" analysis accordingly.[79] An anti-abortion protester may incite or create fear without actually making an overt threat.[80] *Planned Parenthood of Columbia/Willamette* was the first of what will probably be many cases on this issue.[81]

70. *Id.*

71. *Id.* at 1065.

72. *Id.*; *see also* Scott Hammack, *The Internet Loophole: Why Threatening Speech On-Line Requires a Modification of the Courts' Approach to True Threats and Incitement*, 36 COLUM. J. L. & SOC. PROBS. 65 (2002) (providing judicial history of *Planned Parenthood of Colombia/Willamette* and background threat jurisprudence).

73. *Planned Parenthood of Columbia/Willamette*, 290 F.3d at 1065.

74. *Id*. at 1070–71 ("The key question for us to consider is whether these posters can be considered 'true threats' when, in fact, the posters on their face contain no explicitly threatening language."). 75. *See id.* at 1074–76.

76. *Id*. at 1077.

77. *Id*. at 1080.

78. *Id.* at 1088.

79. *See* Hammack, *supra* note 72, at 67.

80. *See id.*

81. At least one state legislature, California's, has enacted a statute expressly addressing Internet inspired violence against abortion providers. Cal. Gov't Code § 6218 (West, Westlaw through 2021 Reg. Sess., Ch. 770), *amended by* 2021 Cal. Legis. Serv. Ch. 191 (A.B. 1356) (West). As amended, the statute creates civil liability for anyone who, with the intent to inspire violence or to threaten, posts on the Web or social media the personal information or image of a reproductive health provider, patient, or

FACE has thus withstood First Amendment challenges in the courts of appeals, while the Supreme Court has declined to consider the issue.[82] The lack of recent First Amendment challenges to FACE indicates some settling in the law.[83]

III. Abortion Protests and The Courts: State Interests and the First Amendment

Before FACE, and independent of it, the Supreme Court acknowledged a gov ernment interest in "ensuring public safety and order, promoting the free flow of traffic on streets and sidewalks, protecting property rights, and protecting a wom an's freedom to seek pregnancy-related services."[84] Consequently, the Court has upheld a number of narrowly tailored injunctions and state statutes restricting speech within designated areas surrounding healthcare facilities that provide abortion services.[85] These restrictions are frequently subject to litigation, and in recent times the "narrowly tailored" condition has become more limiting.

The preliminary inquiry for statutes and injunctions is whether they are a valid regulation "of the time, place, or manner of protected speech."[86] The analysis relies on an evaluation of three elements: whether the regulations are "[a] content [neutral,] [b] that they are narrowly tailored to serve a significant governmental

assistant. *Id.* at 6218(a)(1)–(a)(2). It also creates liability, regardless of intent, for anyone who posts such information following a formal demand not to do so by the provider or patient. *Id.* at 6218(b)(1)–(2). The statute defines "personal information" as information that identifies, relates to, describes, or is capable of being associated with a reproductive health care services patient, provider, or assistant. Cal. Gov't Code § 6218.05 (West, Westlaw through 2021 Reg. Sess., Ch. 770), *amended by* 2021 Cal. Legis. Serv. Ch. 191 (A.B. 1356) (West).

82. *See, e.g.*, United States v. Gregg, 226 F.3d 253 (3d Cir. 2000); United States v. Weslin, 156 F.3d 292, 297–98 (2d Cir. 1998) (per curiam).

83. Meanwhile, First Amendment and related challenges to another form of restriction on abortion protest—that is, the application of anti-electioneering laws to anti-abortion groups—may be on the rise with mixed results. *See, e.g.*, Fed. Election Comm'n. v. Wis. Right to Life, 551 U.S. 449, 457 (2007) (holding unconstitutional, as applied to anti-abortion group, a Bipartisan Campaign Reform Act of 2002 provision that criminalized election-season broadcast by corporations of advertisements naming candidates and targeted to electorate); Fed. Election Comm'n v. Beaumont, 539 U.S. 146, 149 (2003) (holding that the Federal Election Campaign Act prohibition of direct corporate contributions to federal election campaigns applies to nonprofit anti-abortion advocacy corporations); Colo. Right to Life Comm., Inc. v. Coffman, 498 F.3d 1137, 1137 (10th Cir. 2007) (holding certain provisions of state limits on corporate campaign contributions unconstitutional as applied to plaintiff anti-abortion group).

84. Schenck v. Pro-Choice Network of W. N.Y., 519 U.S. 357, 358 (1997); *see also* Madsen v. Women's Health Care Ctr., Inc., 512 U.S. 753, 772–73 (1994) (finding that especially loud clinic protest may also support a public-nuisance theory); *see also* Spitzer v. Cain, 418 F. Supp. 2d 457, 484–85 (S.D. N.Y. 2006).

85. *See*, *e.g.*, Hill v. Colorado, 530 U.S. 703, 733 (2000); *Schenck*, 519 U.S. at 358; *Madsen*, 512 U. S. at 776. *But see* McCullen v. Coakley, 573 U.S. 464, 493 (2014) (striking down a regulation because it was not narrowly tailored).

86. Ward v. Rock Against Racism, 491 U.S. 781, 789 (1989).

interest, and [c] that they leave open ample alternative channels for communica tion of the information."[87]

A. Content Neutrality

A regulation or injunction is content neutral if the regulation's purpose serves a government interest unrelated to the content of the speech.[88] In *Ward*, a regula tion which limited sound amplification was found to be content-neutral because its purpose was to "retain the character of the Sheep Meadow and its more sedate activities, and to avoid undue intrusion into residential areas and other areas of the park."[89] Similarly, in *McCullen* the regulation was found to be content-neutral because it was violated if any non-exempt party entered the fixed buffer zone, regardless of the content of their speech.[90] "The Act would be content based if it required 'enforcement authorities' to 'examine the content of the message that is conveyed to determine whether' a violation has occurred."[91] However, the regu
lation or injunction must also be enforced without a view to the content of the speech.[92] In *McTernan v. City of York*, the Third Circuit found a restriction on pe destrian activity in an alley adjacent to a reproductive health clinic was content neutral because there was "not a scintilla of evidence" suggesting police hostility towards the pro-life protestor's views.[93] In contrast, in *Hoye v. City of Oakland*, the Ninth Circuit found a regulation was facially constitutional, but was being used unconstitutionally because it was only applied against anti-abortion protes tors, never pro-choice protestors.[94]

B. Narrow Tailoring

A regulation or injunction is narrowly tailored to serve a significant govern mental interest if the governmental interest would be achieved less effectively absent the regulation[95] or the use of other means.[96] This is not a "less-restric tive alternative analysis."[97] However, it must not burden more speech than

87. *Id*. at 791.

88. *See id*.

89. *Id.* at 792.

90. *McCullen*, 573 U.S. at 472 (explaining that the Act exempted four categories of individuals: "persons entering or leaving such facility," "employees or agents of such facility acting within the scope of their employment," "law enforcement, ambulance, firefighting, construction, utilities, public works and other municipal agents acting within the scope of their employment," and "persons using the public sidewalk or street right-of-way adjacent to such facility solely for the purpose of reaching a destination other than such facility.").

91. *Id*., at 476 (quoting FCC v. League of Women Voters of Cal., 468 U.S. 364, 383 (1984)). 92. *See*, *e.g.*, Clark v. Community for Creative Non-Violence, 468 U.S. 288, 295 (1984); *Ward*, 491 U.S. at 791.

93. *McTernan v. City of York*, 564 F.3d 636, 654 (3d Cir. 2009).

94. Hoye v. City of Oakland, 653 F.3d 835, 859 (9th Cir. 2011).

95. *Ward*, 491 U.S. at 799.

96. *McCullen*, 573 U.S. at 486.

97. *Ward*, 491 U.S. at 797.

necessary.[98] *McCullen* makes clear that the State needs to establish a history of failed use of other means before implementing a prophylactic measure.[99] In con trast, in *Hill*, the record revealed, "demonstrations in front of abortion clinics impeded access to those clinics and were often confrontational."[100]

C. Alternative Means of Expression

Alternative means of expression must remain for a speech regulation or injunc tion to be upheld. *Hill* upheld a law regulating the distance between unwelcome activists and non-activists, but did not limit the size of activist posters or manner of communication.[101] In contrast, though this prong was not explicitly and indi vidually addressed, it is clear the majority in *McCullen* felt the thirty-five-foot fixed buffer zone placed too great a burden on sidewalk counselors.[102]

Going forward it is unclear what significance *McCullen v. Coakley* has for the future of measures protecting the rights of abortion seekers. The validity of state wide measures in general may be in question as the Court was unwilling to allow Massachusetts to adopt stronger measures without evidence of statewide need or a failure of current law.[103] Some believe *McCullen* may be an implicit overruling of *Hill*,[104] and the differences in the laws but the factual distinctions of the cases themselves do not make this conclusion necessarily true. What is clear is that the jurisprudence around abortion protests has yet to settle and will likely continue to evolve as the members of the Court change.[105]

IV. Conclusion

Anti-abortion protesters and abortion clinics remain in a delicate balance as courts and legislatures seek to protect both First Amendment and privacy rights. FACE seems to promote and clarify that balance while withstanding constitu tional challenges. The decisions in *Madsen* and *Schenck* provide a firm frame

98. *Hill*, 530 U.S. at 749 (citing *Ward*, 491 U.S. at 799).

99. *See McCullen*, 573 U.S. at 492 (holding an injunction could be used to address driveway obstructions and a local ordinance could require crowds to disperse when ordered to do so by the police); *see id*. at 494 (explaining that the record revealed no prosecution had been brought under existing laws in the last 17 years).

100. *Hill*, 530 U.S. at 709.

101. *Id*. at 729 (explaining that the eight-foot barrier did not fully foreclose verbal communication, as a conversational volume could still be used, and it did not limit the use of signs or other means). 102. *McCullen*, 573 U.S. at 490 ("If all that the women can see and hear are vociferous opponents of abortion, then the buffer zones have effectively stifled petitioners' message.").

103. *See id*. at 494.

Kevin Russell, *What Is Left of Hill v. Colorado?,* SCOTUSBLOG (June 26th, 2014, 4:34 PM),

104.

http://www.scotusblog.com/2014/06/what-is-left-of-hill-v-colorado/.

105. *See id*. (stating that four of the Justices in the majority in *Hill* had been replaced by the time of *McCullen*).

work for injunctive relief available to abortion providers and their patients. The legislative options available to states that involve restrictions on protests outside clinics are limited by the recent Supreme Court *McCullen* decision. It seems courts will continue their attempt to balance the rights of anti-abortion protesters and the needs of reproductive health.