# ABORTION PROTESTING

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## I. INTRODUCTION

From the 1973 *Roe v. Wade* decision[1] until 2022, the Supreme Court recognized abortion as an exercise of a fundamental privacy right grounded in the Constitution. In June 2022, the Supreme Court announced its decision in *Dobbs v. Jackson Women's Health Organization*, overruling *Roe* and *Planned Parenthood v. Casey* and holding that the Constitution does not confer a right to abortion.[2] The *Dobbs* decision rested partially on the argument that abortion remains controversial, surrounded by emotionally charged debates that combine issues of politics, gender, and healthcare.[3] Accordingly, people express their views on abortion through various forms of advocacy and protest.

The right to protest is at the core of free speech, protected by the First Amendment.[4] The 1960s civil rights movement used protest successfully to educate the public and ultimately bring about changes in the law.[5] Abortion

1. Roe v. Wade, 410 U.S. 113, 152-53 (1973), *overruled by* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022).

2. Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 5 (2022).

3. *See Quinnipiac University Poll, Sept. 10-13, 2021*, POLLING REPORT, https://perma.cc/2T8L-XPYX (last visited Oct. 16, 2022) (noting that, of those polled, 62% believed abortion should be legal "in all" or "in most" cases, compared with 32% who believed it should be illegal in all or most cases).

4. *See* U.S. CONST. amend. I ("Congress shall make no law . . . abridging freedom of speech.").

5. The civil rights movement is referenced by both sides of the debate surrounding abortion protesting. On one side, anti-abortion protesters argue that it is an example of the good that can come from protest movements challenging the government. On the opposition, pro-abortion activists 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).

protesting has differed from other forms of protesting, however, because of the competition between the privacy rights guaranteed to abortion seekers and the free speech rights of abortion protesters.[6] By linking abortion with fundamental constitutional rights,[7] *Roe v. Wade* set the stage for debate over access to abortion services and rights associated with abortion protesting.

Anti-abortion activists have organized efforts to protest the legality of abortion since *Roe*.[8] On occasion, abortion protestors have directly prevented abortion-seekers from accessing healthcare services.[9] Although the First Amendment protects an individual's right to protest,[10] anti-abortion protesters' actions exceeded the parameters of constitutionally protected free speech when those actions involved violence and threatening behavior.[11] In response, abortion rights supporters developed an arsenal of legal tactics for confronting anti-abortion protesting, ranging from general trespassing laws to federal legislation specifically protecting clinic access.[12] In the wake of *Dobbs*, however, analysts warn of a rising threat of violence in the realm of abortion protesting, with the Department of Homeland Security highlighting the potential for violence by domestic extremists.[13] This increase in violent threats and attacks against abortion-rights activists is likely tied to and amplified by the larger rise in hate speech and political violence that the United States (U.S.) had seen in the preceding five years.[14]

This Article provides an overview of abortion protesting, steps the federal government has taken to protect the rights and safety of patients and abortion providers, anti-abortion protesters' free speech rights, and the First Amendment

6. 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. *Roe*, 410 U.S. at 152, *overruled by* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022).

7. *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.").

8. For example, each year on January 22nd, on the 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), https://perma.cc/84JD-ZJM5.

9. *See 2019 Violence & Disruption Statistics*, NAT'L ABORTION FED'N, https://perma.cc/FKQ3-PZQE (last visited Oct. 2, 2022).

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

11. 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://perma.cc/83D9-TX4Y (last visited Oct. 2, 2022) (564,562 reported instances of violence and disruption of abortion providers between 2010-2019).

12. *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).

13. Vera Bergengruen, *Armed Demonstrators and Far-Right Groups Are Escalating Tensions at Abortion Protests*, TIME (July 8, 2022, 7:00 AM), https://perma.cc/EJT9-44ZA.

14. *Id.*

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. Finally, Part IV analyzes the shifting abortion protesting landscape post-*Dobbs*.

## II. THE CONGRESSIONAL RESPONSE TO CLINIC PROTESTS: FREEDOM OF ACCESS TO CLINIC ENTRANCES ACT OF 1994

Anti-abortion protesters have used a variety of tactics to discourage abortion. These tactics include "sidewalk counseling,"[15] pamphlet distribution outside clinics, gathering in groups outside abortion clinics, attempting to dissuade potential patients from having abortions, and blocking the entrances of clinics and health centers that offer abortions. Anti-abortion protesters also used the Internet, by, for example, publishing the names and addresses of abortion providers and photographs of patients at clinics.[16] In 2015, the anti-abortion activist group Center for Medical Progress released a series of controversial "sting" videos—highly edited videos taken undercover that falsely suggest Planned Parenthood illegally profits from fetal tissue donation.[17]

A minority of extreme anti-abortion activists have also stalked, threatened, and used violence against abortion providers and people seeking abortions.[18] Notably, anti-abortion activists murdered abortion provider Dr. Barnett Slepian in 1998, abortion provider Dr. George Tiller in 2009,[19] and a police officer and two civilians outside a Planned Parenthood clinic in Colorado in 2015.[20] The 2021 statistics on violence against and disruption of abortion providers by the National Abortion Federation (NAF) show a significant increase in "stalking (600%), blockades (450%), hoax devices/suspicious packages (163%), invasions (129%), and assault and battery compared to 2020."[21] The NAF has been compiling statistics on violent and disruptive incidents directed towards abortion

15. "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. & Se. Tex., Inc., 975 S.W.2d 546, 562 (Tex. 1998).

16. *See, e.g.*, Sue Chan, *Abortion WebCam*, CBS NEWS (Aug. 22, 2002, 4:43 PM), https://perma.cc/JJ85-NP9X.

17. *See* Jackie Calmes, *Planned Parenthood Videos Were Altered, Analysis Finds*, N.Y. TIMES (Aug. 27, 2015), https://perma.cc/FQC8-6BKT.

18. *See* Alanna Vagianos, *Threats and Targeted Intimidation Against Abortion Clinic Staff Have Significantly Increased Since 2010*, HUFFPOST (Feb. 10, 2015, 1:19 PM), https://perma.cc/W4KE-6VAG.

19. *See, e.g.*, Jim Yardley & David Rohde, *Abortion Doctor in Buffalo Slain; Sniper Attack Fits Violent Pattern*, N.Y. TIMES (Oct. 25, 1998), https://perma.cc/5NBP-ELPV; *Kansas: Guilty Verdict Upheld in Doctor's Killing,* N.Y. TIMES (Oct. 24, 2014), https://perma.cc/Y9FJ-QV2Q.

20. *See* Paul Vercammen & Holly Yan, *Planned Parenthood shooting suspect Robert Dear has outbursts at hearing*, CNN (Dec. 9, 2015, 7:31 PM), https://perma.cc/RM8K-XRZB.

21. *National Abortion Federation Releases 2021 Violence & Disruption Report*, NAT'L ABORTION FED'N (June 24, 2022), https://perma.cc/PG7S-NVYH.

providers for forty-five years; between 1977 and 2021 there have been "11 murders, 42 bombings, 196 arsons, 491 assaults, and thousands of incidents of criminal activities directed at patients, providers, and volunteers."[22]

Since its passage in 1994, the Freedom of Access to Clinic Entrances Act (FACE),[23] which prohibits activity that "intentionally damages or destroys a facility because it is used to provide reproductive health services"[24] and provides a right of action against anyone who "intentionally injures, intimidates or interferes with . . . persons . . . obtaining or providing reproductive health services"[25] has met several constitutional challenges alleging First Amendment violations. These[26] and other challenges[27] to FACE have been rejected. For example, courts found that FACE complied with the Tenth Amendment[28] and that prison terms designated under FACE did not violate the Eighth Amendment.[29] Most analysis of the constitutionality of FACE, however, has centered on Commerce Clause and First Amendment challenges.[30] Although FACE limits some expression, it has survived First Amendment challenges.[31] Courts have produced a "uniform line of decisions and [held] that the Act does not, on its face, violate the First Amendment."[32]

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22. *Id.*

23. Freedom of Access to Clinic Entrances Act, 18 U.S.C. § 248 (1994).

24. *Id.* § 248(a)(3).

25. 18 U.S.C. § 248(a)(1).

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

27. *See, e.g.*, United States v. Weslin, 156 F.3d 292, 296 (2d Cir. 1998) (*per curiam*) (holding FACE to be a valid exercise of Commerce Clause because Congress found specific evidence that activities governed by FACE affect interstate commerce).

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

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

30. *See, Weslin*, 156 F.3d at 296; *Planned Parenthood of Columbia/Willamette*, 290 F.3d at 1070; *Gregg*, 226 F.3d at 267; *Soderna*, 82 F.3d at 1379; *Dinwiddie*, 76 F.3d at 919; *Am. Life League*, 47 F.3d at 648–52; *Cheffer*, 55 F.3d at 1521.

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

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

In *American Life League Inc. v. Reno*, for instance, 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 otherwise expressing opposition to abortion, so long as these activities are carried out in a non-violent, non-obstructive manner."[33] There, veteran anti-abortion protesters claimed FACE would interfere with their free speech rights, while the government argued that FACE had no impact on speech and prohibited only unprotected conduct.[34] 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."[35] The Fourth Circuit found FACE to be content-neutral, despite its primarily affecting the anti-abortion message,[36] 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.[37] The Eleventh Circuit followed *American Life League* in denying a similar challenge to FACE.[38]

Similarly, the Eighth Circuit upheld FACE's First Amendment 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.[39] The court concluded that the Act did not impose an unconstitutional content-based restriction on speech[40] and would apply to individuals who faced limited access to clinics regardless of their beliefs or messages.[41] 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."[42]

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33. *Am. Life League*, 47 F.3d at 648.

34. *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.").

35. *Id.*

36. *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.").

37. *Id.* at 651–52.

38. *See Cheffer*, 55 F.3d at 1521–22.

39. *Dinwiddie*, 76 F.3d at 917.

40. *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.").

41. *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!'").

42. *Id.* at 926 n.10.

However, Supreme Court decisions in *Reed v. Town of Gilbert*[43] and *McCullen v. Coakley*[44] 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."[45] In a statement ultimately agreeing with the Supreme Court's denial of certiorari in *Bruni v. City of Pittsburgh*,[46] Justice Thomas suggested that the Court should take up a case to resolve the "glaring tension" in Supreme Court precedent regarding the proper standard of review in First Amendment cases.[47]

In 2002, the Ninth Circuit addressed the First Amendment issue in *Planned Parenthood of Columbia/Willamette, Inc. v. American Coalition of Life Activists*.[48] The Ninth Circuit considered reproductive service providers' right of action under FACE against individuals using threats of force to intentionally intimidate the provider.[49] The case was brought by abortion providers against protesters after the protesters created posters and a website with photographs and addresses of the doctors.[50] 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 pro-abortion rights activities were listed as people who might one day be prosecuted for crimes against humanity.[51]

The "Nuremberg Files" listed approximately two hundred people under the file heading "ABORTIONISTS: the shooters," while an additional two hundred people—judges, politicians, law enforcement officials, spouses of abortion providers, and abortion rights supporters—were listed under separate file headings.[52] Within

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

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

45. *Reed*, 576 U.S. at 169.

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

47. *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 (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 (2015)] and *McCullen [v. Coakley*, 573 U.S. 464 (2014)].'").

48. *Planned Parenthood of Columbia/Willamette*, 290 F.3d at 1058.

49. *Id.* at 1062 (citing 18 U.S.C. §§ 248(a)(1),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).

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

51. *Id.*

52. *Id.* at 1065.

the "ABORTIONISTS" section, there was a key: "Black font (working); Grey font (wounded); Strikethrough (fatality)."[53] The names of three slain abortion providers were struck through to indicate "fatality."[54]

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.[55] The court applied an objective test:[56] 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.[57] 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.[58] "In conjunction with the 'guilty' posters, being listed on a Nuremberg Files scorecard for abortion providers impliedly threatened physicians with being next on a hit list. To this extent only, the Files are . . . a true threat."[59]

The Internet makes it difficult to determine the boundary between incitement—the action of provoking unlawful behavior or urging someone to behave unlawfully, which is protected under the First Amendment—and threat: a statement of an intention to inflict pain, injury, damage, or other hostile action on someone in retribution for something done or not done, which is not.[60] Courts will need to examine "true threat" analysis accordingly.[61] An anti-abortion protester may incite or create fear without actually making an overt threat.[62] *Planned Parenthood of Columbia/Willamette* was the first of what will probably be many cases on this issue.[63]

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53. *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 Columbia/Willamette* and background threat jurisprudence).

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

55. *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.").

56. *See id.* at 1074–76.

57. *Id.* at 1077.

58. *Id.* at 1080.

59. *Id.* at 1088.

60. *Incitement*, OXFORD LANGUAGES, https://perma.cc/BLD7-K476 (last visited Oct. 2, 2022); *Threat*, OXFORD LANGUAGES, https://perma.cc/BLD7-K476 (last visited Oct. 2, 2022); Shira Ovide, *When is Online Nastiness Illegal?*, N.Y. TIMES (Apr. 23, 2021), https://perma.cc/627E-ZASH.

61. *See* Hammack, *supra* note 53, at 67.

62. *See id.*

63. At least one state legislature, California, has enacted a statute expressly addressing Internet-inspired violence against abortion providers. Prohibition on Soliciting, Selling, Trading, or Posting on Internet Private Information of Those Involved with Reproductive Health Services Act, 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 assistant. *Id.* § 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.* § 6218(b)(1)–(2). The statute defines "personal information" as

FACE has thus withstood First Amendment challenges in the courts of appeals, while the Supreme Court has declined to consider the issue.[64] The lack of recent First Amendment challenges to FACE indicates some settling in the law.[65] After the June 2022 decision by the Supreme Court to overturn *Roe* and *Planned Parenthood*, Attorney General Merrick B. Garland announced that "under FACE, the Justice Department will continue to protect healthcare providers and individuals seeking reproductive health services in states where those services remain legal."[66] Moreover, Attorney General Garland emphasized that under "fundamental First Amendment principles, individuals must remain free to inform and counsel each other about the reproductive care that is available in other states."[67]

## III. ABORTION PROTESTS AND THE COURTS: STATE INTERESTS AND THE FIRST AMENDMENT

Before the 1994 enactment of FACE, and independent of it, the Supreme Court acknowledged a government interest in "ensuring public safety and order, promoting the free flow of traffic on streets and sidewalks, protecting property rights, and protecting a woman's freedom to seek pregnancy-related services."[68] 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.[69] The preliminary inquiry for statutes and injunctions is whether they are a valid regulation "of the time, place, or

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).

64. *See, e.g.*, *Gregg*, 226 F.3d 253; *Weslin*, 156 F.3d at 297–98.

65. 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).

66. Att'y Gen. Merrick B. Garland Statement on S. Ct. Ruling in *Dobbs v. Jackson Women's Health Organization*, 22 Op. Att'ys Gen. 663 (2022).

67. *Id.*

68. 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).

69. *See*, *e.g.*, Hill v. Colo., 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).

manner of protected speech."[70] The analysis relies on an evaluation of three elements: first, whether the regulations are "content [neutral,] [second,] that they are narrowly tailored to serve a significant governmental interest, and [third,] that they leave open ample alternative channels for communication of the information."[71]

### 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.[72] In *Ward v. Rock Against Racism*, for instance, a regulation 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."[73] Similarly, the court found *McCullen*'s regulation—which was violated if any non-exempt party entered a fixed buffer zone, regardless of the content of their speech[74]—to be content neutral, noting, "[t]he 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."[75] However, the regulation or injunction must also be enforced without a view to the content of the speech.[76] In *McTernan v. City of York*, the Third Circuit found a restriction on pedestrian 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.[77] 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 protestors, never pro-abortion protestors.[78]

### B. NARROW TAILORING

A regulation or injunction is narrowly tailored to serve a significant governmental interest if the governmental interest would be achieved less effectively

70. Ward v. Rock Against Racism, 491 U.S. 781, 789 (1989).
71. *Id.* at 791.
72. *See id.*
73. *Id.* at 792.
74. *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.").
75. *Id.* at 476 (quoting FCC v. League of Women Voters of Cal., 468 U.S. 364, 383 (1984)).
76. *See*, *e.g.*, Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 295 (1984); Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989).
77. McTernan v. City of York, 564 F.3d 636, 654 (3d Cir. 2009).
78. Hoye v. City of Oakland, 653 F.3d 835, 859 (9th Cir. 2011).

absent the regulation[79] or through the use of other means.[80] This is not a "less-restrictive alternative analysis," but rather a requirement that the regulation promote a substantial government interest that would be achieved less effectively absent the regulation.[81] However, it must not burden more speech than necessary.[82] *McCullen* makes clear that the State needs to establish a history of failed use of other means before implementing a prophylactic measure.[83] In contrast, in the earlier 2000 Supreme Court decision of *Hill*, the record revealed that "demonstrations in front of abortion clinics impeded access to those clinics and were often confrontational."[84] Although the decision in *McCullen* did not expressly overrule *Hill*, it will likely be utilized by buffer zones challengers in future cases.[85]

### C. ALTERNATIVE MEANS OF EXPRESSION

Alternative means of expression must remain for a speech regulation or injunction to be upheld. For example, *Hill* upheld a law regulating the distance between unwelcome activists and nonactivists, but did not limit the size of activists' posters, nor their manner of communication.[86] In contrast, without explicitly addressing the alternative means of expression prong in *McCullen*, the majority made clear its belief that the thirty-five-foot fixed buffer zone placed too great a burden on sidewalk counselors.[87] It is unclear what significance *McCullen v. Coakley* will have for the future of measures protecting the rights of abortion seekers. Given that the Court was unwilling to allow Massachusetts to increase protections of abortion seekers without evidence of statewide need or a failure of current law, the validity of statewide measures in general may be in question.[88] Some believe *McCullen* may be an implicit overruling of *Hill*,[89] but the factual distinctions of the cases and the differences in the laws themselves do not make this conclusion necessarily true. What is clear is that the jurisprudence around abortion protests

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

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

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

82. Hill v. Colo., 530 U.S. 703, 749 (2000) (citing *Ward*, 491 U.S. at 799).

83. *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 seventeen years).

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

85. Kevin Russell, *What is left of Hill v. Colorado?*, SCOTUSBLOG (Jun. 26, 2014, 4:34 PM), https://perma.cc/577F-YKU5.

86. *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).

87. *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.").

88. *See id.* at 494.

89. *See* Russell, *supra* note 85.

has yet to settle and will likely continue to evolve as the members of the Court change.[90]

## IV. ABORTION PROTESTING POST-*DOBBS*

In the U.S. Supreme Court's June 2022 decision in *Dobbs v. Jackson Women's Health*, the majority claimed to return "authority to the people and their elected representatives" by granting states near-total regulatory power over abortion.[91] Unfortunately, the views of the elected representatives in many states do not accurately represent the views of their constituents; while many states have taken steps to make abortion illegal in most or all circumstances,[92] a review of national polls show that a clear majority of Americans support keeping abortion legal at least some of the time, depending upon the circumstances.[93]

Other states are pushing for expanded abortion access for their residents, as well as access for patients who travel from other states.[94] California, Oregon, and Washington have launched a new multi-state commitment to be a safe haven for all people seeking abortions and other reproductive health care services, protecting patients and doctors against efforts by other states to exercise jurisdiction over citizens who have traveled out of state for an abortion.[95]

With pro-choice abortion protesting accelerating in the wake of *Dobbs*, including sustained protests in cities and towns across the U.S., one looming question is how the Supreme Court will address interjurisdictional abortion conflicts.[96] Justice Kavanaugh's concurrence opines that, based on the constitutional right to interstate travel, no state may bar its residents from traveling to other states to obtain an abortion.[97] But can Americans be confident that this sort of ban will not eventually take effect based on the Court's reasoning in *Dobbs*? Experts caution that because the right to travel is not explicitly mentioned in the Constitution, the Supreme Court could use its argument in *Dobbs* to prevent interstate travel for abortions.[98] Courts in a state banning abortions may even be

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

91. *Dobbs*, 142 S. Ct. at 2284.

92. *After Roe Fell: Abortion Laws by State*, CTR. FOR ABORTION RTS., https://perma.cc/8YXP-378N (last visited Mar. 5, 2023).

93. Alison Durkee, *How Americans Really Feel About Abortion: The Sometimes Surprising Poll Results As Supreme Court Overturns Roe V. Wade*, FORBES (June 24, 2022, 10:29 AM), https://perma.cc/YPW9-ZFSB.

94. *Id.*

95. Office of Governor Gavin Newsom, *West Coast States Launch New Multi-State Commitment to Reproductive Freedom, Standing United on Protecting Abortion Access*, CA.GOV (June 24, 2022), https://perma.cc/V8YH-JWJ6.

96. Natasha Ishak, *In 48 Hours of Protest, Thousands of Americans Cry Out for Abortion Rights*, VOX (June 26, 2022, 4:00 PM), https://perma.cc/S7SH-5TUA.

97. *Dobbs*, 142 S. Ct. at 2309.

98. Ishak, *supra* note 96.

allowed to exercise jurisdiction over citizens who have traveled out of state for an abortion if attempts to do so are upheld by the Supreme Court.[99]

## V. 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 constitutional challenges. The decisions in *Madsen*[100] and *Schenck*[101] provide a framework for injunctive relief available to abortion providers and their patients. In these cases, the Court held that, in some instances, a particularly loud or disruptive protest outside of an abortion clinic may be enjoined.[102] The legislative options available to states seeking to restrict protests outside clinics are limited by *McCullen*. It seems likely courts will continue to attempt to balance the rights of anti-abortion protesters and the needs of reproductive health. With this said, however, each state will likely respond differently based on its political composition. With the June 2022 decision in *Dobbs* reversing *Roe v. Wade*, the abortion landscape, and related protesting, is being rewritten. States like Michigan, California, Kentucky, Montana, and Vermont are likely to protect abortion access despite the *Dobbs* decision, whereas more conservative states will give less priority to this objective.[103]

99. Naomi Cahn, *Is it Legal to Travel for Abortion After Dobbs?*, BLOOMBERG LAW (July 11, 2022, 4:00 PM), https://perma.cc/F57Z-C3YA.

100. *Madsen*, 512 U.S. at 772–73 (finding that especially loud clinic protest may be enjoined due because it is a public nuisance).

101. Schenck v. Pro-Choice Network of W. N.Y., 519 U.S. 357, 358 (1997) (finding a governmental interest in "ensuring public safety and order, promoting the free flow of traffic on streets and sidewalks, protecting property rights, and protecting a woman's freedom to seek pregnancy-related services.").

102. *See Madsen*, 512 U.S. at 772-73; *Schenck*, 519 U.S. at 58.

103. Larissa Jimenez, *60 Days After* Dobbs*: State Legal Developments on Abortion*, BRENNAN CTR. FOR JUST. (Aug. 24, 2022), https://perma.cc/WLU7-DYLY.