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MADSEN AND THE FACE ACT: ABORTION RIGHTS OR TRAFFIC CONTROL?

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INTRODUCTION

An aggressive anti-abortion movement developed in the wake of Roe v. Wade.1 Although anti-abortion activism began with lawful pickets and demonstrations in the 1970s, it has since deteriorated into a myriad of unlawful activity, such as the destruction of reproductive health care clinics ("clinics"), the harassment and stalking of patients and clinic staff, and the murder of abortion providers.2 In the past seventeen years, clinics and clinic staff have suffered more than 6000 blockades and over 1000 acts of violence,3 including at least 36 bombings, 81 arsons,4

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1. Roe v. Wade, 410 U.S. 113, 153 (1973) (holding that the right of privacy — found in the First Amendment, the Fourth and Fifth Amendments, the penumbras of the Bill of Rights, the Ninth Amendment, and the concept of liberty guaranteed by the Fourteenth Amendment — "is broad enough to encompass a woman's decision whether or not to terminate her pregnancy").


3. Id.

4. Including attempted arsons and bombings, the number rises to nearly 200 since 1977. Id. at 6 n.9.
131 death threats, 84 assaults, 2 kidnappings, and 327 clinic "invasions."\textsuperscript{5}

In \textit{Bray v. Alexandria},\textsuperscript{6} the Supreme Court thwarted efforts to curb these violent anti-abortion protests when it held that federal courts did not have the authority under 42 U.S.C. § 1985(3) to enjoin abortion clinic blockades.\textsuperscript{7} Some anti-abortion protesters saw \textit{Bray} as a license to escalate their efforts.\textsuperscript{8} In the aftermath of \textit{Bray}, anti-abortion fanatics shot five people — fatally wounding two abortion providers.\textsuperscript{9} One result of this violence is a nationwide shortage of trained physicians willing to provide abortions.\textsuperscript{10} Vandalism and fire bombings have forced hundreds of clinics nationwide to close or curtail their services.\textsuperscript{11} The violence has also created a climate of fear and intimidation for wo-

\footnotesize{5. \textit{Id.} "During clinic invasions abortion providers have been 'pinched, hit, grabbed, kicked,' slammed against walls, dragged outdoors, crushed by crowds, and terrorized with drive-by shootings." \textit{Id.} at 6 n.10. 
7. \textit{Id.} 
9. See, e.g., infra notes 43, 45 and accompanying text. 

men seeking abortions and other reproductive health care services.\textsuperscript{12}

In response to the violence, Congress passed the Freedom of Access to Clinic Entrances Act (the "FACE Act"), which took effect in May 1994. At first glance, the FACE Act appeared to reinforce a woman's constitutional right to have an abortion, and as such, was a victory for the pro-choice movement. The FACE Act, however, is primarily concerned with traffic control; it simply protects access to "reproductive health services." To that end, it provides clinic doctors and patients with several remedies against violent anti-abortion protestors: (1) federal injunctions,\textsuperscript{13} (2) federal criminal penalties, and (3) a private cause of action.

One month after the FACE Act was enacted, the Supreme Court decided \textit{Madsen v. Women's Health Center}.\textsuperscript{15} \textit{Madsen} upheld a state injunction limiting the activities of anti-abortion protestors by providing buffer zones around a Melbourne clinic.\textsuperscript{16} These zones protected access to the clinic as well as the safety and well-being of abortion seekers and providers. The decision is particularly significant in that it denied First Amendment protection to expressive conduct.\textsuperscript{17} If the Supreme Court had struck down the injunction, those seeking or providing abortion services would have been denied state injunctive remedies.\textsuperscript{18} In conjunction with \textit{Bray} and in the absence of the FACE Act,

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\item 13. 18 U.S.C.S. § 248(a)(1) (Law. Co-op. 1994). Reproductive services are "services relating to the human reproductive system, including services relating to pregnancy or the termination of a pregnancy." \textit{Id.} § 248(e)(5).
\item 14. \textit{Bray} held that federal courts did not have the authority under 42 U.S.C. § 1985(3) to enjoin abortion clinics blockades. See infra notes 31, 32 and accompanying text. In providing federal injunctive relief, the FACE Act circumvents but does not overrule \textit{Bray}. Section 248(c)(1)(B) of the FACE Act establishes a new and separate right to enjoin a clinic blockade. See infra part II.A.2.
\item 15. 114 S. Ct. 2516 (1994).
\item 16. \textit{Id.} at 2527.
\item 17. Brief for Respondents at 11, \textit{Madsen v. Women's Health Ctr., Inc.}, 114 S. Ct. 2516 (1994) (No. 93-880) [hereinafter Brief for Respondents]. The purpose of the injunction was to "protect workers and patients at a medical facility from conduct that inhibited access to the Clinic, harassed and threatened people attempting to approach the Clinic, created health risks for individuals undergoing sensitive medical procedures, and blocked traffic on a public roadway. Petitioners' claim is that these activities constitute speech protected by the First Amendment." \textit{Id.}
\item 18. More than forty such injunctions have been issued nationwide. Press Release from The Feminist Majority Foundation (on file at The Feminist Majority Foundation).
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such a decision would have foreclosed both federal and state injunctive relief. Constitutional approval of buffer zones at clinics therefore appears, at a cursory glance, to be a meaningful victory for abortion rights.\textsuperscript{19} However, the decision in \textit{Madsen} simply allows the states to regulate traffic around clinics by using buffer zones.

In Part I of this Recent Development, we discuss the dual fronts on which the struggle for abortion rights has taken place — the courtroom and the clinic. We also explore how the dynamics of the struggle have led to escalated protests at clinics. In Part II, we discuss the \textit{FACE} Act, the remedies it has created, and some of the legal challenges brought by anti-abortion groups to have it declared unconstitutional. In Part III, we analyze \textit{Madsen}, its First Amendment implications, and its significance for state injunctive remedies. Finally, in Part IV we discuss how the \textit{FACE} Act and \textit{Madsen} complement each other and why the \textit{FACE} Act may not give abortion providers enough protection. \textit{Madsen} and the \textit{FACE} Act complement each other in the following ways. First, both protect the flow of traffic into clinics, providing a safe environment for abortion seekers and providers, yet neither reaffirms a fundamental right to an abortion. Second, \textit{Madsen} delineates the legal standards which lower courts should look to in assessing the constitutionality of the \textit{FACE} Act and future injunctions. Third, the federal penalties and awards provided under the \textit{FACE} Act supplement the state injunctions permitted in \textit{Madsen}. However, the \textit{FACE} Act has three significant weaknesses. It does not encompass "stalking"; it may not protect third parties; and it defines "intimidation" vaguely, making it difficult to prosecute successfully.

\section*{I. Dual Fronts: the Courthouse and the Clinic}

After the Supreme Court guaranteed abortion as a fundamental right in \textit{Roe v. Wade},\textsuperscript{20} there was a backlash from anti-abortion groups. Initially, anti-abortion activists tried to eliminate lawful abortions by challenging \textit{Roe} in the courts.\textsuperscript{21} Their

\textsuperscript{19} Cf., David Van Biema, Keep Your Distance, \textit{Time}, July 11, 1994, at 25 (Eleanor Smeal of the Feminist Majority and Judy Madsen, the anti-abortion activist after whom \textit{Madsen} was named, "were unanimous in their assessment of the \textit{Madsen} verdict, as were their respective comrades. All believed that the . . . decision . . . was a major defeat for antiabortion crusaders.").

\textsuperscript{20} 410 U.S. 113, 153 (1973).

\textsuperscript{21} Brief of the Center for Reproductive Law, \textit{supra} note 2, at 3–4.
efforts paid off when, in Planned Parenthood v. Casey, the Court strengthened the state’s ability to regulate first trimester abortions so long as the regulations do not unduly burden women seeking abortions.

Outside of the courtroom, anti-abortion activists protested at clinics in order to draw attention to their cause and to discourage women from seeking abortions. They targeted health care centers and clinics by trespassing, blocking access to the clinics, overloading the telephone lines so that appointments could not be scheduled, and creating an intimidating atmosphere for both clinic staff and patients. These tactics were somewhat successful — some patients rescheduled, but others never returned.

In response to anti-abortion tactics, various women’s groups established “clinic defense programs,” which provided volunteers to escort patients into clinics and to form physical buffers between patients and clinic staff and the anti-abortion protestors. With anti-abortion and pro-choice groups in such close proximity, fights and small riots erupted frequently, and demonstrators often obstructed the flow of traffic. Nonetheless, the clinic defense programs were often effective in reassuring patients by dif-

23. Id.
25. See Brief of the OBGYNS, supra note 24; Brief for Respondents, supra note 17, at 1-11; Kurt Chandler, Operation Rescue’s Minnesota Training Is Off to a Quiet Start, STAR TRIB., June 15, 1993, at 5B.
26. Brief of the OBGYNS, supra note 24, at 4; Brief of the Center for Reproductive Law, supra note 2, at 14.

The clinics also turned to law enforcement for protection. This drained local funds. For instance, Wichita, Kansas spent approximately $1,000,000 to arrest about 2750 anti-abortion demonstrators in July and August of 1991; Milwaukee spent approximately $1,500,000 to arrest about 2100 demonstrators between June of 1992 and September of 1993; and San Jose spent approximately $1,000,000 to arrest about 100 people in June of 1993. David Van Biema, Your Activist, My Monster, TIME, Feb. 7, 1994, at 32-33.

28. See Brief for the National Abortion Federation at 5-15, Madsen v. Women’s Health Ctr., Inc., 114 S. Ct. 2516 (1994) (No. 93-880) (discussing five clinics which have received injunctions for relief from these problems).
fusing the anti-abortion protestors' intimidating tactics. Pro-choice advocates also fought back in the courts, obtaining a number of strong federal injunctions under 42 U.S.C § 1985(3).29

Fueled by their inability to prevent abortions or close down the clinics,30 anti-abortion groups challenged the validity of the federal injunctions. They succeeded in *Bray v. Alexandria.*31 *Bray* held, by a five to four majority, that federal courts do not have authority under section 1985(3) to enjoin abortion clinic blockades.32 This decision effectively removed all federal protection for patients and clinic staff and gave the anti-abortion movement renewed energy.33

Some anti-abortion advocates interpreted *Bray* as a sign that they would not be held accountable for their harassing and intimidating tactics at clinics.34 Several anti-abortion groups turned to radical, even terrorist-like activity.35 They targeted cities where anti-abortion sentiment was well-entrenched and small towns where they could overwhelm local law enforcement.36 They used fire-bombs and butyric acid to vandalize and destroy abortion clinics, causing millions of dollars in damage.37 Additionally, some anti-abortion activists set up training centers that grouped anti-abortion protestors into IMPACT Teams38 and taught them how to vandalize clinics and harass clinic staff and patients without implicating themselves.39


31. *Bray,* 113 S. Ct. at 753.

32. *Id.*

33. *See infra* notes 34–39 and accompanying text.


35. *See generally* Scott-McLaughlin, *supra* note 12 (arguing that Operation Rescue's activities are similar to the Ku Klux Klan's activities during the Reconstruction Era). *See also* Van Biema, *supra* note 19, at 33 (Rev. Keith Tucci of Operation Rescue points out that RICO may send protestors "underground."). One of the problems patients and clinic employees face is that the more violent activity is harnessed through legal means such as the FACE Act, RICO, and injunctions, the more dangerous the activity of anti-abortion protestors becomes. *Cf. id.*


37. Brief of the Center for Reproductive Law, *supra* note 2, at 7 n.11.

38. "IMPACT" is the "Institute of Mobilized Prophetic Activated Christian Training . . . a nationally recruited group designed to [h]elp equip, train and lead [the impact teams] into true spiritual warfare." Brief for Respondents, *supra* note 17, at 3 n.6 (citation omitted). A brochure advertising the boot camps stated it was looking for "Christians with a serious attitude problem." Hinds, *supra* note 27, at A16.

Furthermore, anti-abortion protestors determined it would be more effective to concentrate their energy on forcing the limited number of clinic employees to abandon their profession than to prevent thousands of women from entering clinic doors annually. Thus, without abandoning the activities directed specifically at women and clinics, anti-abortion protestors shifted the majority of their energy to targeting doctors and clinic workers. Some of the more radical anti-abortion organizations and leaders stated that murdering abortion providers was an acceptable means of eliminating abortion. A few took this directive to heart; thus far, anti-abortion protestors have killed two doctors and one escort.

Several prominent anti-abortion organizations have publicly denounced these murders and acts of violence. However, doctors and other clinic employees fear further attacks. Many
wear bullet proof vests to and from work. Some have hired personal bodyguards. Others have simply resigned. They also receive harassing and threatening letters and phone calls. They are described as "baby killers" in flyers distributed by protestors.

Overall, the constant fervor of anti-abortion activities outside clinics has detrimentally affected patients. For example, in order to get through a blockade, patients must typically contend with: (1) loud and menacing crowds, (2) fear of being injured or killed by a protestor, (3) fear of being stalked when leaving the clinic, and (4) apprehension about having hate mail sent to friends, neighbors, and family. As a result, clinic workers often find symptoms of "extreme distress" in the women who manage to make their way through a blockade. These women "exhibit evidence of adrenergic 'fight-or-flight' reaction such as

the OBGYNs, supra note 24, at 9–11. Prior to Dr. David Gunn's murder there were other shootings. For example, "in December of 1991, a man in a ski mask opened fire with a sawed-off shotgun at a clinic in Springfield, Missouri. He wounded two clinic staff, including the office manager who is paralyzed as a result of the shooting." Brief of the Center for Reproductive Law, supra note 2, at 8 n.17 (citing Richard Lacayo, One Doctor Down, How Many More?, TIME, Mar. 22, 1993, at 46).

46. Dr. John Britton was wearing a bullet proof vest when he was shot and killed. Rogers & Reiss, supra note 41, at 22.

47. NOW had provided Dr. Britton with an escort and a ride to and from work. Tom Junod, The Abortionist, GQ, Feb. 1994, at 155.

48. Brief for Respondents, supra note 17, at 5.

49. Id. at 8–11. "Death threats to abortion providers include statements like: 'hey * * * [Dr.] Boyd. Those babies didn't know when they were dying by your butcher knife. So now you will die by my gun in your head very soon—and you won't know when—like the babies don't. Get ready your [sic] dead.'" Id. at 9 n.20.

50. Id. at 10 n.21. For example, an anti-abortion group called the Lambs of Christ passed out leaflets at the school of a Minnesota doctor's child which stated "Sonia's Mom Kills Babies." Id. at 9–10 n.21.

51. Achiron & Howard, supra note 24, at 201. Dr. Remer is the only private doctor in central Iowa who provides a full range of obstetric and gynecological care, including abortions. Operation Rescue members stand outside his office, take down the license-plate numbers of his patients, contact the Iowa Department of Transportation to obtain their home addresses, then send letters to the patients which are intended to evoke pain and guilt. The letters are sent out without even verifying the reason for the patient's visit. For example, Karen Thomas Stewart received such a letter after she went to Dr. Herbert Remer to save her child when she began to cramp and bleed during her pregnancy. Id.

52. Brief of the Center for Reproductive Law, supra note 2, at 12–13. An unwanted pregnancy is a particularly stressful life event. Protests accompanied by violent and threatening behavior affect patients' already-anxious emotional state, causing elevated blood pressure, increased rates of perspiration, and rapid heart-
pallor, shaking, sweating, pupillary dilation, palpitations, hyperventilation, and urinary retention."\(^5\)

The increased level of anxiety can produce serious complications, even death, during the abortion procedure.\(^5^4\) For instance, "urinary retention makes it difficult or impossible to perform a pelvic examination and determine uterine size or the presence of any co-existing pelvic pathology, both of which are essential in the preoperative evaluation."\(^5^5\) Furthermore, "tension affects the degree of pain experienced and the difficulty of the procedure itself."\(^5^6\) Patients experiencing high levels of anxiety require higher than average amounts of sedation. This, in turn, increases the risk of the surgery.\(^5^7\) In some cases, physicians have been forced to postpone surgery because the patient's anxiety-related symptoms were so acute.\(^5^8\)

In response to the escalation of anti-abortion activity after the Bray decision, pro-choice groups turned to Congress and to state courts for protection.

II. THE FACE ACT: FREEDOM OF ACCESS TO CLINIC ENTRANCES

On May 26, 1994, in response to pro-choice lobbying and the public outcry over the murder of Dr. Gunn, a clinic physician, Congress enacted the Freedom of Access to Clinic Entrances Act (the "FACE Act").\(^5^9\) The FACE Act recognizes a federal interest in promoting public safety and health by ensuring that women have access to reproductive health care clinics.\(^6^0\) To accomplish this, the FACE Act prohibits anyone from using force, the threat of force, or physical obstruction to intentionally injure, intimi-
date, or interfere with someone because that person is obtaining or providing reproductive health services or in order to prevent that person from doing so. It also prohibits anyone from intentionally damaging or destroying a facility's property because that facility provides reproductive health services.

A. Enforcement

The FACE Act creates civil and criminal penalties as well as a private cause of action. While the FACE Act empowers federal law enforcement agencies to take action against violent or obstructionist anti-abortion activity, some fear that federal agencies will be hesitant to use these powers. The private cause of action, however, empowers the pro-choice movement by giving physicians, clinic workers, and patients two effective weapons — federal injunctions and monetary damages.

1. Government-Imposed Penalties

If convicted under the FACE Act, protestors are subject to one year in prison or up to $10,000 in fines, or both, for an initial violation. For a second violation, the penalty may be up to three years in prison, up to $25,000 in fines, or both. If bodily injury or death results from a violation of the FACE Act, the offender may be sentenced to up to ten years or "any term of years or for life" in prison, respectively. For "exclusively nonviolent physical obstructions," however, the penalties are lower: up to six months in prison, up to $10,000 in fines, or both for an

67. 18 U.S.C.S. § 248(b)(2) (Law. Co-op. 1994). Although the injury must result from a violation of the FACE Act, the Act does not explicitly limit bodily injury to those providing or seeking reproductive health services. Id. Thus, protestors may be criminally liable for injuries they inflict on third parties while violating the FACE Act. Compare this with the civil cause of action discussed infra in part II.A.2. Courts may interpret § 248(b)(2) as a strict liability provision, particularly since the legislature failed to include an intent provision here after inserting one in § 248(a). See supra note 59 and accompanying text. Because the penalties increase when bodily injury results, however, courts may read in an intent requirement, particularly where the violation consists only of physical obstruction. See WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., CRIMINAL LAW § 3.8(a) (2d ed. 1986).
initial violation\textsuperscript{68} and up to eighteen months in prison, up to $15,000 in fines, or both for subsequent violations.\textsuperscript{69}

In the aftermath of the recent double-murder at a Pensacola clinic, however, many are asking if the FACE Act does enough.\textsuperscript{70} Paul Hill\textsuperscript{71} openly advocated violence against abortion doctors and frequently demonstrated outside of the Pensacola Ladies Clinic ("Pensacola Clinic").\textsuperscript{72} About four weeks after the FACE Act took effect, Pensacola Clinic officials asked the FBI to arrest Hill.\textsuperscript{73} The FBI did not arrest Hill because his actions, taken individually, did not satisfy all of the elements required by the FACE Act.\textsuperscript{74} Six weeks later, Hill shot and killed Dr. John Bay-
ard Britton and his escort as they arrived to work at the Pensacola Clinic.\textsuperscript{75}

In hindsight, it seems easy to say that Hill posed a serious threat to the clinic workers. As this incident illustrates, however, one of the greatest weaknesses of the FACE Act’s criminal provisions is that “intimidation,” as defined in the FACE Act, is a vague standard.\textsuperscript{76} Law enforcement agencies, which are already “navigat[ing] a minefield of constitutional questions involving free speech, religion and privacy,”\textsuperscript{77} are likely to be cautious in bringing charges under the FACE Act when conduct is not clearly violent. Moreover, nothing in the FACE Act allows law enforcement agencies to take into consideration a pattern of behavior, which may only seem intimidating when viewed as a whole.\textsuperscript{78}

Nonetheless, the FACE Act has changed the political and legal climate for pro-choice and anti-abortion protestors. First, the FACE Act has provided new impetus to a year-long Justice Department investigation into a possible conspiracy among anti-abortion groups.\textsuperscript{79} Second, prosecutions of protestors under the FACE Act\textsuperscript{80} may have a ripple effect, deterring future abortion

\textsuperscript{75} Smothers, \textit{supra} note 70, at 26 (the shootings occurred on July 29, 1994). Hill has been convicted under the FACE Act. Laura Griffin, \textit{Violence Taken Seriously Now}, \textit{St. Petersburg Times}, Oct. 24, 1994, at 7A. A jury has also convicted Hill of murder and recommended a death sentence. Navarro, \textit{supra} note 43.

\textsuperscript{76} Thomas, \textit{supra} note 72, at A3. Intimidation is behavior that “place[s] a person in \textit{reasonable apprehension} of bodily harm to him- or herself or to another.” 18 U.S.C.S. \textsection 248(e)(3) (emphasis added).

\textsuperscript{77} Thomas, \textit{supra} note 72.

\textsuperscript{78} Id. at A3 (“[T]he] standards are too rigid . . . . If a person advocates ‘justifiable homicide . . . [and] stalks someone, the pattern of his actions should be considered.’”) (quoting Eleanor Smeal, president of the Feminist Majority). For example, the FBI considered separately each encounter between Hill and the clinic staff. Because any one incident did not rise to the level of intimidation required under the FACE Act, the FBI did not arrest Hill. See Smothers, \textit{supra} note 70, at 26.

\textsuperscript{79} Thomas, \textit{supra} note 72.

Third, the Justice Department has sent a clear message that it will rigorously enforce the FACE Act. Third, the Justice Department has sent a clear message that it will rigorously enforce the FACE Act.82

2. Private Cause of Action

Any person involved in providing or obtaining reproductive health services who is injured by conduct prohibited under the FACE Act may bring a civil action against the violator.83 The court may award injunctive relief, actual or statutory compensatory damages, punitive damages, attorney’s fees, and the costs of suit.84 The court may also award federal injunctive relief, thus circumventing Bray.85

If damages are large enough and consistently applied, they might discourage violent and threatening anti-abortion activities.86 Jury awards in several cases brought against anti-abortion protestors under tort law and racketeering charges for conduct similar to that proscribed by the FACE Act suggest that the liability for FACE Act violations may be considerable.87 In June of 1994 a Houston jury ordered Rescue America and Operation Rescue to pay approximately $205,000 in compensatory dam-

81. Brenner, supra note 70, at 1, 9 (statement by New York State Attorney General, G. Oliver Koppell). Koppell was the first to invoke the FACE Act’s civil penalties. He filed lawsuits seeking $10,000 in penalties from each of 21 Lambs of Christ protestors arrested for attaching bicycle locks to a clinic’s gates and door and then lying down in front of the clinic entrances. Id. U.S. Attorney Paula J. Casey is considering charging 30 demonstrators arrested in Little Rock, Arkansas with violations under the FACE Act. Id. at 9.


86. In fact, recent violence has alienated the anti-abortion movement from the fundamentalist community, which had provided their primary funding. With volunteers and contributions dwindling, some anti-abortion organizations may be on the verge of collapse. See James Risen, Abortion Clinic Slayings May Kill Operation Rescue, L.A. TIMES, Aug. 10, 1994, at A1.

87. See Bruce Nichols & Bruce Tomaso, Damages Assessed in Protests Against Abortion Foes: Jury Penalizes Group for Blocking Access During ’92 GOP Convention, DALLAS MORNING NEWS, May 10, 1994, at 15A.
ages and over $1 million in punitive damages to Planned Parenthood for tortious interference with the clinic's operations in 1992. In the same month, a Florida court ordered several anti-abortion organizations to pay about $216,000 in attorney's fees to the attorney for the National Organization for Women after he successfully prosecuted these anti-abortion organizations for violating state racketeering laws and causing intentional emotional distress to clinic patients.

The private cause of action under the FACE Act is specifically limited to persons involved in providing or obtaining reproductive health services, including medical, surgical, counseling, or referral services. In other words, the FACE Act protects physicians, clinic staff, and patients — but it may not protect their escorts. Escorts, however, are also in the line of fire. Several women's organizations have lobbied Congress to amend the FACE Act to include escorts.

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88. Id. (compensatory damages awarded for security costs, vandalism, and loss of business).


91. "[A]n action may be brought... only by a person involved in providing or seeking to provide, or obtaining or seeking to obtain, services in a facility that provides reproductive health services..." 18 U.S.C.S. § 248(c)(1)(A); see also Stephen Braun, Abortion's Wary Line of Defense, L.A. TIMES, Aug. 11, 1994, at A1.

92. "[R]eproductive health services' means reproductive health services provided in a hospital, clinic, physician's office, or other facility, and includes medical, surgical, counseling or referral services relating to the human reproductive system, including services relating to pregnancy or the termination of a pregnancy." 18 U.S.C.S. § 248(e)(5).

93. Hill's motion to dismiss the charges against him contended, in part, that the FACE Act was improperly drafted and that it did not cover escorts. Hill Seeks Dismissal of Federal Charges, MIAMI HERALD, Sept. 1, 1994, at 5B. Compare with government penalties discussed supra note 70.

94. During the recent attack on Dr. Britton, for example, one of his escorts was killed and the other wounded. Smothers, supra note 70, at 26.

95. Id.; see, e.g., Harris Testimony, supra note 82.
B. Legal Challenges: Freedom of Expression and First Amendment Issues

Several anti-abortion groups have filed actions attacking the FACE Act as facially unconstitutional. They argue that the FACE Act is not within Congress’s commerce powers and that it violates the First Amendment. Though all of the courts which have considered these questions have upheld the FACE Act, some trial courts have not yet ruled and at least one appeal has been filed.

1. A Valid Exercise of the Commerce Power

Under the Commerce Clause, Congress has a broad, plenary power to legislate if the regulation bears any rational relationship to interstate commerce and if the regulation is reasonably related to a legitimate legislative purpose. While this is an extremely permissive test, it is noteworthy that Congress expressly enacted the FACE Act to “protect and promote . . . activities affecting


99. Michael Kirkland, Judge Rules FACE Constitutional, UPI, June 16, 1994, available in LEXIS, News Library, WIRES File. Randall Terry, founder of Operation Rescue, filed a case that is pending in Washington, D.C. and Judy Madsen is one of the plaintiffs in a case pending in Florida. Id.

100. The American Life League has appealed its trial court ruling to the 4th Circuit Court of Appeals. Group Appeals, supra note 96. The American Center for Law and Justice also plans to appeal its trial court decision. FACE: Federal Judge Dismisses ACLJ Arizona Challenge, ABORTION REP., Aug. 16, 1994.

101. U.S. CONST., art. I, § 8; see, e.g., Katzenbach v. McClung, 379 U.S. 294, 301–02 (1964) (holding that Congress may regulate “local” businesses to protect interstate travel); Heart of Atlanta Motel v. United States, 379 U.S. 241, 245 (1964) (holding that the Commerce power includes the power to promote the general welfare); United States v. Darby, 312 U.S. 100, 115, 121 (1941) (“[R]egulations of commerce which do not infringe some constitutional prohibition are within the plenary power conferred on Congress by the Commerce Clause . . . [and Congress] may choose the means reasonably adapted to the attainment of the permitted end.”); see also Scott-McLaughlin, supra note 12, at 736–40.
interstate commerce,” not to protect a woman’s right to an abortion.

The three trial courts that have considered the issue have found that there is a rational relationship between the activity regulated by the FACE Act and interstate commerce. For example, both anti-abortion organizations and patients cross state lines in order to reach clinics, and many clinics purchase equipment, goods, and services through interstate commerce. These courts have held that “[b]ecause the Act focuses solely on conduct that involves violence or physical obstruction . . . the means Congress chose to effectuate legitimate ends were reasonably adapted to that purpose.”

2. Freedom of Speech

The most serious constitutional challenges to the FACE Act are that it violates the First Amendment because it is content- or viewpoint-based and that it is overbroad. So far, trial courts faced with freedom of speech challenges to the FACE Act have followed the Supreme Court’s direction in Madsen, which applied the traditional test set forth in Ward v. Rock Against Racism. Under the Ward standard, “a regulation of

the time, place, or manner of protected speech must be narrowly
 tailored to serve the government’s legitimate, content-neutral in-
terests but . . . it need not be the least restrictive or least intrusive
 means of doing so.”¹¹²

(a) Content-Neutrality

Under Ward, a statute which regulates expression must be
content-neutral if it is to avoid strict scrutiny.¹¹³ “A regulation
that serves purposes unrelated to the content of expression is
deemed neutral, even if it has an incidental effect on some speak-
ers or messages but not others.”¹¹⁴ Anti-abortion groups have
argued that the FACE Act is content-based because, by prohibit-
ing only conduct which intentionally interferes with individuals
because they are seeking or providing reproductive health ser-
vices, it effectively inhibits only the conduct of those with an anti-
abortion message.¹¹⁵

The district courts, however, have determined that Congress
enacted the FACE Act because of its concern over the impact of
violence at abortion facilities rather than a desire to curb a par-
ticular abortion message.¹¹⁶ Moreover, they have determined
that the FACE Act punishes anyone who interferes with access
to reproductive health services with the requisite intent, regard-
less of ideology.¹¹⁷ For instance, the FACE Act would “apply to
an individual who spray paints the words KEEP ABORTION
LEGAL on a facility providing counseling regarding abortion
alternatives.”¹¹⁸

¹¹². Ward, 491 U.S. at 798; see also Madsen, 114 S. Ct. at 2524 (requiring a signif-
icant government interest).
¹¹³. Ward, 491 U.S. at 791.
¹¹⁴. Id.; see also Madsen, 114 S. Ct. at 2523 (1994); Council for Life, 856 F. Supp.
at 1427.
¹¹⁵. E.g., Cook v. Reno, No. 94-0980, 1994 U.S. Dist. LEXIS 11355, at *6; Coun-
cil for Life, 856 F. Supp. at 1427; American Life League v. Reno, 855 F. Supp. 137,
143; see supra notes 61, 62, 67, and accompanying text for summation of the intent
requirements.
at 143; see also Scott-McLaughlin, supra note 12, at 740.
at 143.
at *26-27 (D. Ariz. Aug. 12, 1994); see also Cook, 1994 U.S. Dist. LEXIS 11355, at
*6; Council for Life, 856 F. Supp. at 1427; American Life League, 855 F. Supp. at
143-44. This also encompasses services such as treatment of sexually transmitted
diseases and "controversial conception treatments, such as in vitro fertilization of
(b) The FACE Act is Narrowly Tailored and Regulates Unprotected Conduct, Not Pure Speech

The second inquiry is whether the regulation is overbroad. Anti-abortion groups argue that the FACE Act needlessly "chills" speech by criminalizing forms of expression — such as praying and sidewalk counseling — "that merely present[ ] one point of view." Many anti-abortion protestors, however, intend for their praying and counseling to "injure" patients by causing emotional pain (i.e., shame, distress, and guilt). Because the FACE Act does not define the term "injure," anti-abortion groups fear that "injury" could include these psychological or emotional injuries, thus criminalizing and "chilling" pure speech.

Before reaching the question of injuries, however, the FACE Act requires a prohibited action. The trial courts have held that the FACE Act does not prohibit pure speech, such as picketing, praying, or the expression of views regarding abortion; the Act proscribes only "conduct that involves violence or physical obstruction." Moreover, Congress specifically provided that "[n]othing in [the FACE Act] shall be construed . . . to prohibit any expressive conduct (including peaceful picketing or other peaceful demonstration) protected from legal prohibition by the First Amendment." The trial courts have held that this

surrogate mothers and thawing of frozen embryos." American Life League, 855 F. Supp. at 144.
121. American Life League, 855 F. Supp. at 139-42.
122. Id. at 141.
123. The FACE Act applies only to "[w]hoever by force or threat of force or by physical obstruction, intentionally injures, intimidates or interferes with" a protected person. 18 U.S.C.S. § 248(a)(1) (Law. Co-op. 1994) (emphasis added).
removes any possible ambiguity — the FACE Act does not "chill" pure speech.\textsuperscript{126}

Moreover, the trial courts have "reject[ed] as insupportable any suggestion that shootings, arson, death threats, vandalism, or other violent and destructive acts addressed by FACE are protected by the First Amendment merely because those engaged in such conduct 'intend[,] thereby to express an idea.'"\textsuperscript{127} According to the trial courts, the important government interest in abating this violence "sufficiently justifies the incidental limitations FACE may impose on the speech component of such activity."\textsuperscript{128}

*** Madsen v. Women's Health Center ***

On June 30, 1994, one month after Congress enacted the FACE Act, the Supreme Court decided \textit{Madsen v. Women's Health Center}.\textsuperscript{129} Petitioners Judy Madsen, Ed Martin, and Shirley Hobbs, who were all officers of Rescue America,\textsuperscript{130} argued that an injunction issued against them by a Florida District Court was an unconstitutional restriction on their First Amendment right of free speech.\textsuperscript{131} Respondent, Women's Health Center,

\textsuperscript{126} \textit{American Life League}, 855 F. Supp. at 143. Some speech may constitute intentional infliction of emotional distress under tort law. \textit{See, e.g., Restatement (Second) of Torts § 46(1) (1964) ("One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability . . .").} However, many courts require that the distress result in bodily harm. \textit{See, e.g., George v. Jordan Marsh Co., 268 N.E. 2d 915 (Mass. 1971). But see, e.g., Agis v. Howard Johnson Co., 355 N.E. 2d 315 (Mass. 1976).}

\textsuperscript{127} \textit{Council for Life}, 856 F. Supp. at 1426 (citations omitted); \textit{see also American Life League}, 855 F. Supp. at 142 ("The First Amendment protects the plaintiffs' rights to hold and express beliefs opposing abortion; it does not give them unfeathered license to express those beliefs in conduct."). \textit{See generally} Cameron v. Johnson, 390 U.S. 611, 616 (1968) (upholding statute preventing picketing that "interfere[s] with free ingress or egress to and from any . . . courthouse["]").

\textsuperscript{128} \textit{Riely}, 1994 U.S. Dist. LEXIS 11463, at *19; \textit{Council for Life}, 856 F. Supp. at 1428; \textit{e.g., Roberts v. United States Jaycees, 468 U.S. 609, 628 (1984) ("[V]iolence or other types of potentially expressive activities that produce special harms distinct from their communicative impact . . . are entitled to no constitutional protection."); Madsen v. Women's Health Ctr., Inc., 114 S. Ct. 2516, 2529 (1994) ("Clearly, threats to patients or their families . . . are proscribable under the First Amendment.").}

\textsuperscript{129} 114 S. Ct. 2516 (1994).

\textsuperscript{130} "The Florida injunction was also directed at Operation Rescue, Operation Goliath, Operation Rescue America, their officers, agents, members, employees and servants, and . . . Bruce Cadle, Pat Mahoney, Randall Terry, . . . and all persons acting in concert or participation with them, or on their behalf." \textit{Id.} at 2521 n.1. However, only Judy Madsen, Ed Martin, and Shirley Hobbs are parties to this appeal.

\textsuperscript{131} \textit{Id.} at 2523–24.
Inc., contended that the injunction was directed at petitioners' conduct and not their speech.\textsuperscript{132}

A. Facts and Procedural History

The Aware Woman Center for Choice in Melbourne (the "Clinic"), the only women's health clinic in Brevard County, Florida, had been continuously targeted since Operation Rescue-National arrived in Central Florida in 1991.\textsuperscript{133} On September 30, 1992, a district court issued a permanent injunction against Operation Rescue based on findings that petitioners "are individuals and organizations, acting in concert, who have planned a nationwide campaign which they call 'Operation Rescue'... directed towards closing down abortion clinics and providers throughout the country."\textsuperscript{134} The court also found that the protestors posed a threat to (1) the Clinic's business relationships with its clients, (2) the Clinic's property interests, and (3) patients' right to an abortion guaranteed by the Florida Constitution.\textsuperscript{135} Thus, the court determined that an injunction was necessary to maintain unobstructed access to the Clinic and to prevent the harassment and intimidation of the Clinic's staff and patients.\textsuperscript{136}

However, after the court issued the permanent injunction, anti-abortion activity intensified at the Clinic.\textsuperscript{137} The Clinic was hit with butyric acid and its doors were "disabled with super glue."\textsuperscript{138} Dr. Snydle, a doctor at the Clinic, began receiving threats.\textsuperscript{139} In addition, he and other Clinic staff were subjected to residential picketing.\textsuperscript{140} In January 1993, the IMPACT Team arrived, significantly increasing the number of protestors outside the Clinic and residences of the Clinic staff.\textsuperscript{141} Protestors repeat-

\textsuperscript{132.} Brief for Respondents, supra note 17, at 15.
\textsuperscript{133.} Id. at 1.
\textsuperscript{134.} Id. at 1–2.
\textsuperscript{135.} Id. at 2.
\textsuperscript{136.} Id. at 1–10. The injunction was also needed to prevent others from joining Operation Rescue's and Rescue America's activities against the Clinic. Id. at 2.
\textsuperscript{137.} Brief for Respondents, supra note 17, at 2–8.
\textsuperscript{138.} Id. at 3.
\textsuperscript{139.} Id. On one occasion, a member of the IMPACT Team followed Dr. Snydle when he left the Clinic and chased him by car until he pulled off the road. The team member then pulled up next to Dr. Snydle, rolled down the car window, and pretended to shoot him. Id. at 3 n.5.
\textsuperscript{140.} Id. at 3.
\textsuperscript{141.} Id. at 3–8. By March 1993, as many as four hundred protestors crowded the street. Id. at 4. The Clinic is located on Dixie Way, a very narrow residential street about 21 feet wide. The public right-of-way on either side is about 14 feet. Id. at 4 n.7.
edly overwhelmed the Clinic’s telephone lines in order to block calls from patients.\textsuperscript{142} Cars attempting to enter the Clinic were forced to slow down or stop, and anti-abortion protestors tried to push literature into any open windows.\textsuperscript{143} In addition, protestors used ladders to reach over the Clinic’s eight-foot “privacy fence” in order to shout at patients and staff, and to display signs with the names of patients and their escorts.\textsuperscript{144}

Due to the increased protest activity, the Clinic returned to court. On April 8, 1993, Judge McGregor issued the amended permanent injunction.\textsuperscript{145} Petitioners appealed, and the case was certified to the Florida Supreme Court, which unanimously upheld the injunction, stating that petitioners did not “seriously question the technical validity of the amended injunction or the factual findings on which it is based.”\textsuperscript{146} Nonetheless, the court reviewed the record and found support for the factual findings of the trial court.\textsuperscript{147}

The petitioners then filed a writ of certiorari for review by the Supreme Court of the United States.\textsuperscript{148} Petitioners argued the injunction was content- or viewpoint-based because it restricted only the speech of the anti-abortion demonstrators.\textsuperscript{149} Accordingly, they urged that the injunction should be evaluated under the strict scrutiny standard.\textsuperscript{150} Respondents contended that the injunction was directed at conduct and not speech.\textsuperscript{151}

\textsuperscript{142} Brief for Respondents, \textit{supra} note 17, at 4.
\textsuperscript{143} \textit{Id.}
\textsuperscript{144} \textit{Id.}
\textsuperscript{145} See \textit{id.} at 6–10, for a detailed account of the trial court’s findings.
\textsuperscript{146} Brief for Respondents, \textit{supra} note 17, at 11.
\textsuperscript{147} \textit{Id.} at 11.
\textsuperscript{148} \textit{Id.}
\textsuperscript{150} \textit{Madsen}, 114 S. Ct. at 2523.
\textsuperscript{151} The Court rejected petitioners’ contention that the injunction is an unconstitutional prior restraint on speech. \textit{Id.} at 2524 n.2 (citing New York Times Co. v. United States, 403 U.S. 713 (1971) and Vance v. Universal Amusement Co., 445 U.S. 308 (1980)). Petitioners also challenged the portion of the injunction which referred to persons or groups “acting in concert” with the named parties for vagueness and overbreadth. Because petitioners are named parties in the injunction, however, they lack standing to challenge the portion of the injunction directed at those who are not parties. \textit{Id.} at 2530 (citing Knitwear Co. v. NLRB, 324 U.S. 9, 14 (1945)).
B. Holding

The Supreme Court upheld the constitutionality of the injunction because it was directed at restricting conduct and not speech protected by the First Amendment. In particular, the Court upheld the injunction’s prohibitions against blocking access to the Clinic and residences of the Clinic staff, physical abuse or intimidation of abortion providers and seekers, and too much noise created by the protestors outside the Clinic. The Court also held that the appropriate standard of review for a content-neutral injunction is whether “no more speech than necessary [is burdened] to serve a significant government interest.”

With respect to the challenged provisions of the injunction, the Court upheld both the thirty-six-foot buffer zone around the Clinic entrances and driveway and the noise restrictions. However, the private property buffer zone to the north and west of the Clinic, the “images observable” clause, the 300-foot no-approach zone around the Clinic, and the 300-foot buffer

152. “[N]one of the restrictions imposed by the court were directed at the contents of petitioner[s’] message.” Id. at 2523. “The freedom of association protected by the First Amendment does not extend to joining with others for the purpose of depriving third parties of their lawful rights.” Id. at 2530.

153. Id. at 2521-22. In balancing the state’s interest with the First Amendment claims of petitioners, the Court noted the failure of the first injunction, stating that this is a valid consideration when evaluating a broader, subsequent order. Id. at 2527.


155. The 36-foot buffer zone was necessary to protect the state’s interest in unobstructed access to the Clinic and parking lot and to maintain the free flow of traffic on Dixie Way. Id. at 2526-27.

156. The noise level restrictions, applicable during surgery and recovery periods, served the state’s interest in protecting the health and well-being of the patients. The Court held that the “nature of [a] place” determines the type of regulations which are “reasonable.” Id. at 2528 (citing Grayned v. City of Rockford, 408 U.S. 104, 116 (1972)).

157. The north and west sides of the Clinic border private property. The Court determined that the record lacked evidence to prove the state’s interest in unobstructed access and traffic flow was threatened with respect to these areas. Thus, the 36-foot buffer zone did not encompass them. Id.

158. The Court found threats to patients or their families communicated in the form of signs or otherwise “are prescribable under the First Amendment.” Id. at 2529. However, the injunction swept too broadly because it placed a blanket ban on all images displayed by the protestors, not just those which were threatening. Id.

159. This provision of the injunction prevented petitioners from physically approaching anyone seeking the Clinic’s services “unless [the] person indicat[ed] a desire to communicate.” Madsen v. Women’s Health Ctr., Inc., 114 S. Ct. 2516, 2529 (1994). The Court held that the state interest in preventing “stalking” and “shadowing” of patients, while valid, did not warrant a blanket ban on all uninvited contact because it prohibited even contact that is not hostile. Id.
zone around the residences were held to be unconstitutional "because these provisions [swept] more broadly than necessary to accomplish the permissible goals of the injunction."161

The importance of the holding is its recognition of the state's right to enjoin conduct which threatens or harasses even if the conduct is expressive. In doing so, Madsen does not address abortion rights but merely expands the state's authority to regulate access to the clinics. Thus, the state may impose restrictions on expressive conduct — if it threatens, intimidates, or obstructs — by enjoining groups or individuals in order to ensure access to a reproductive health facility. The state may, under its traditional authority to control traffic, demand that driveways, entrances, streets, and even groups and individuals not be obstructed.

1. Injunction is Content-Neutral

The Court rejected petitioners' argument that the injunction was necessarily content- or viewpoint-based because it restricted only the speech of the anti-abortion demonstrators.162 The Court explained that the principle inquiry in deciding content neutrality is "whether the government has adopted a regulation of speech 'without reference to the content of the regulated speech.' "163 The Court clearly stated that petitioners' conduct, not their speech, violated the rights of the abortion providers and patients.164 The Court also noted that nothing in the record sug-

160. This provision prohibited the use of sound amplification as well as pickets and demonstrations outside the residences of the Clinic's staff. Id. at 2529–30. With respect to the noise, the Court held: "[T]he state may simply demand that the petitioners turn down the volume if the protests overwhelm the neighborhood." Id. at 2529. (citing Grayned v. City of Rockford, 408 U.S. 104, 116 (1972)). However, despite the state's interest in protecting the "well-being, tranquility, and privacy of the home" the Court struck down this provision because the buffer zone "would ban [g]eneral marching through residential neighborhoods or even walking a route in front of an entire block of houses." Id. at 2530 (citing Frisby v. Schultz, 487 U.S. 474, 484 (1988)). By contrast, the prohibition in Frisby was limited to "focused picketing taking place solely in front of a particular residence." Id.

161. Id. at 2530.

162. "To accept petitioners' claim would be to classify virtually every injunction as content or viewpoint-based. An injunction, by its very nature, applies only to a particular group (or individuals) and regulates the activities, and perhaps the speech, of that group." Id. at 2523.

163. Id. (citing Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989)).

gests that similar conduct outside of the abortion context would not be enjoined.165

2. Standard of Review

The Court rejected review of the injunction under the strictest standard of scrutiny because it was not content- or viewpoint-based.166 Having found the injunction to be content-neutral, the Court held that a content-neutral injunction does require "a somewhat more stringent application of general First Amendment principles" than a statute.167 Because injunctions target particular groups or individuals, the Court held that injunctions carry a greater risk of censorship and discriminatory application.168 Thus, when reviewing a content-neutral injunction, the appropriate standard is whether "no more speech than necessary is burdened to serve the significant government interest."169

3. State Interests

In upholding certain provisions of the injunction, the Supreme Court recognized the state's interests in: (1) ensuring

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165. Id.
166. Id.
167. Id. at 2524. ("Ordinances represent a legislative choice regarding the promotion of particular societal interests," and as such, they are directed at the general public. "Injunctions, by contrast, are imposed for violations (or threatened violations) of a legislative or judicial decree" and are directed at specific groups or individuals.; see also supra note 153; discussion supra part II.B.2.
168. See generally Madsen v. Women's Health Ctr., Inc., 114 S. Ct. 2516, 2538–39 n.40 (1994). Justice Scalia believes that content-neutral injunctions deserve the strict scrutiny applied to content-based restrictions because 1) injunctions may be issued to suppress speech rather than to achieve any legitimate government aim, 2) injunctions are imposed by individual judges rather than the legislature, and 3) "injunction[s are] more powerful weapon[s] than statute[s]." Id. at 2539. Injunctions require that the person or persons against whom the injunction is issued have the time and money to appeal. Id. Otherwise, they are effectively silenced. Id. Thus, an injunction must be necessary to serve a compelling state interest and must be narrowly drawn to serve that end. Id. Justice Stevens agrees that a different standard should be applied to a content-neutral injunction, but disagrees as to the appropriate standard. According to Stevens, injunctions should be judged by a more lenient standard than statutes because they "apply solely to the individual or a limited group of individuals who, by engaging in illegal conduct, have been judicially deprived of some liberty — the normal consequence of illegal activity." Id. at 2531 (Stevens J., concurring).
169. Id. at 2525. The restrictions this standard imposes on speech are consistent with the general rule "that injunctive relief should be no more burdensome to the defendants than necessary to provide complete relief to the plaintiffs." Id. (citing Califano v. Yamasaki, 442 U.S. 682, 702 (1979)).
public safety and order,\(^{170}\) (2) promoting the free flow of traffic on public streets and sidewalks,\(^{171}\) (3) protecting citizens’ property rights,\(^{172}\) and (4) assuring medical privacy.\(^{173}\) Additionally, Madsen recognized the state’s interest in “protecting a woman’s freedom to seek lawful medical or counseling services in connection with her pregnancy.”\(^{174}\) Unlike Florida, however, all states do not guarantee a woman’s right to an abortion. Yet, this is not an essential prerequisite to obtaining an effective injunction.\(^{175}\)

C. Significance of Madsen

In Madsen, the Supreme Court resolved an ongoing dispute between anti-abortion and pro-choice advocates. The Court held that conduct that was threatening, harassing, or obstructed traffic would not be entitled to First Amendment protection even if the protestors intended for this conduct to be expressive. The Madsen decision is of great importance in that it speaks to the constitutionality of over forty similar injunctions which have been issued nationwide.\(^{176}\) In addition, Madsen expressly allows clinics, abortion providers, and abortion patients to obtain relief from local courts.\(^{177}\) Furthermore, Madsen enables the states to regulate noise levels and effectively protect patients from experiencing high levels of anxiety, which can lead to serious complications during surgical procedures. A limited buffer zone similar to

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170. Id. at 2526 (citing Operation Rescue v. Women’s Health Ctr., Inc., 626 So. 2d. 664, 672 (1993)).
171. Id. at 2526.
172. Id.
173. Madsen v. Women’s Health Ctr., Inc., 114 S. Ct. 2516, 2526 (1994). The Court agreed with the Florida Supreme Court that the interest in residential privacy acknowledged in Frisby v. Schultz, 487 U.S. 474 (1988), applied by analogy to “medical privacy.” Id. In Frisby, the Court found that the targeted picketing of the home threatened the psychological well-being of the “captive” resident. Here the Court found the targeted picketing of the Clinic threatened the psychological as well as the physical well-being of the “captive” patient. Id.
174. Id. at 2526.
175. See Brief for National Abortion Federation and Planned Parenthood Federation of America, Inc. as Amici Curiae in support of Respondents, 114 S. Ct. 2515 (1994) (No. 93-880), for an account of other locations where similar injunctions have been successful.
177. The importance of the right to a state injunctive remedy cannot be overlooked. When Madsen was brought to court, the FACE Act had not been enacted and Bray was the controlling authority. If Congress had not enacted the FACE Act, Madsen would have been the only recourse for clinics, abortion seekers, and abortion providers.
the one upheld in *Madsen* may also provide protection to abortion providers forced to pass through blockades and protestors on a daily basis. Additionally, an appropriately tailored injunction may be used to create a buffer zone around the residences of the clinic staff.

*Madsen* is not an affirmation of federal abortion rights but rather a declaration that, while abortion is legal, the state may protect access to this procedure. This protection is important since the right to an abortion is a hollow one without access to medical facilities or trained abortion providers.

### IV. *Madsen* and the FACE Act: The "One-Two Punch"

*Madsen v. Women's Health Center, Inc.*[^178] and the FACE Act are not about a woman’s right to have an abortion. The standards established in *Roe v. Wade*[^179] and *Planned Parenthood v. Casey*[^180] are still controlling. *Madsen* and the FACE Act concern the flow of traffic — in other words, physical access. *Madsen* ensures access to clinics by expanding the state authority to control traffic. It affirms a state’s ability to enjoin any conduct which physically obstructs access to entrances, driveways, or streets. The FACE Act establishes a federal interest in maintaining access to reproductive health care clinics. This is justified by the clinic's role in interstate commerce, not by a woman’s fundamental right to an abortion.

Both *Madsen* and the FACE Act offer significant remedies to women seeking access to reproductive health care clinics blockaded by anti-abortion protestors. For instance, injured parties may now choose either state or federal injunctive relief. *Madsen* allows local courts to enjoin conduct which threatens, harasses, or obstructs access to a reproductive health care clinic.[^181] Injured parties may also seek federal injunctions under the FACE Act.

The FACE Act’s civil and criminal penalties reinforce the injunctive remedies by providing substantial prison sentences,

[^181]: Additionally, the injunction prohibited the "harassing, intimidating, or physically abusing, assaulting or threatening" of any present or former clinic worker or patient. *Madsen v. Women's Health Ctr., Inc.*, 114 S. Ct. 2516, 2522 (1994). Besides proscribing violence or threats of violence, these provisions ensure "psychological access" to the clinics.
monetary penalties, and the threat of compensatory or punitive damages for conduct similar to that enjoined in Madsen. These penalties may serve as effective deterrents. If awarded compensation, clinics could use their awards to rebuild damaged or destroyed facilities. Additionally, knowing that their funds are likely to be passed on to the very clinics they hope to destroy may discourage supporters from donating to radical anti-abortion groups.  

Moreover, Madsen set the tone for analyzing constitutional challenges to the FACE Act and future injunctions. First, Madsen held that a content-neutral injunction is subject to a degree of scrutiny that falls between the intermediate scrutiny applied to a content-neutral statute and the strict scrutiny applied to a content-based statute. Second and more importantly, Madsen established that the type of conduct involved at the Pensacola anti-abortion protests does not qualify as expressive conduct protected by the First Amendment. Thus far, the trial courts have followed the Supreme Court’s lead in Madsen and have held that the FACE Act, which proscribes the same type of conduct that the court considered in Madsen, is constitutional on its face because it prohibits only unprotected conduct.  

Nevertheless, there are at least two apparent weaknesses to the FACE Act. First, it does not encompass the “stalking” of physicians. Physicians may seek protection under state stalking laws, but many already consider these laws to be ineffective. An alternative would be to make it more difficult for protestors

182. See supra note 86.
to locate physicians. For instance, reporting requirements for abortion providers could be eliminated or at least not made public.\textsuperscript{186} In order to counteract the growing shortage of abortion providers,\textsuperscript{187} regulations could be amended to allow trained nurse-practitioners, certified midwives, or physician assistants to perform first-trimester abortions, a minor surgery.\textsuperscript{188}

Second, the FACE Act's application to third parties is limited. Because an abortion is a surgical procedure, patients are often accompanied by family and friends who must drive them to and from the clinics. Bodyguards and volunteer escorts often accompany physicians.\textsuperscript{189} Because they are neither seeking nor providing reproductive health care services, the language of the FACE Act excludes these people from its civil cause of action, and they might not be covered by its government-imposed penalties.\textsuperscript{190} Yet, these third parties are potential victims of the clinic violence that the FACE Act is designed to prevent.

\textbf{Conclusion}

Despite the fact that \textit{Madsen} and the FACE Act are justified as traffic control measures and are not an affirmation of abortion rights, the judicial and legislative recognition of the right to clinic access may prove to be a broad victory for the pro-choice movement. Together, they provide clinics with both state and federal injunctive relief for blockades. The FACE Act also established significant criminal penalties and the potential of hefty civil dam-

\begin{footnotesize}
\begin{enumerate}
\item For example, Pennsylvania law requires that the names of all physicians performing abortions must be reported, along with the names of staff, directors, and affiliated organizations. Benshoof, \textit{supra} note 11, at 2250. Pennsylvania also requires quarterly reports of the number of abortions performed in each trimester of pregnancy. \textit{Id.} If the clinic receives state funds, this information must all be made a matter of public record. \textit{Id.} The Abortion Control Act will consolidate all of this information about abortion providers, making them easy targets for anti-abortion groups. \textit{Id.} at 2255.
\item For a discussion of the anti-abortion movement's largely successful efforts to force clinic employees and physicians to abandon their profession, see \textit{supra} part I. and Brief of the Center for Reproductive Law, \textit{supra} note 2, at 2.
\item See Benshoof, \textit{supra} note 11, at 2257. Perhaps the main obstacle which women in low-income brackets face is the lack of funds to pay for an abortion. See Toni Y. Joseph, \textit{Blacks No Longer Silent on Abortion}, \textit{Orlando Sentinel}, Aug. 23, 1992, at G1. Permitting certified midwives or trained nurse practitioners to provide abortions may help to lower the costs of the procedure for two reasons. First, it will increase the supply of abortion-providers, driving the price of the service down. Second, nurse-practitioners and certified midwives are not as highly educated or as highly compensated as physicians are.
\item See \textit{supra} note 47 and accompanying text.
\item See \textit{supra} part II.A.1-2.
\end{enumerate}
\end{footnotesize}
ages against protestors who engage in threatening or obstructive conduct — regardless of its expressive content.