Department of Justice

TESTIMONY

OF

JANET RENO
ATTORNEY GENERAL

BEFORE

THE

COMMITTEE ON LABOR AND HUMAN RESOURCES
UNITED STATES SENATE

CONCERNING

S. 636, THE FREEDOM OF ACCESS TO
CLINIC ENTRANCES ACT OF 1993

ON

MAY 12, 1993

Mr. Chairman and members of the Committee, it is a distinct privilege to appear before you regarding the very important matter of ensuring that women have an unobstructed opportunity to choose whether or not to have an abortion. When I appeared before the Senate Judiciary Committee as the President's nominee for the office of Attorney General, this subject was very much on my mind because of the tragic killing of Dr. David Gunn outside of a clinic in Pensacola in my home state. I promised the members of the Judiciary Committee that, if I were confirmed as Attorney General, I would undertake a review of existing federal law to determine what could be done in this area.

Immediately upon assuming office, I directed attorneys in the Civil Rights Division and the Criminal Division of the Department of Justice to examine existing law and report back to me. They did so and their unanimous judgment was that existing federal laws, while perhaps applicable in some instances, were inadequate. I, thereupon, instructed them to cooperate closely with members of Congress to assist in crafting the best possible legislation to remedy this deficiency. I emphasized that the legislation must secure the rights of women seeking reproductive health services and the individuals who provide those services, while respecting the First Amendment rights of those who oppose abortion to express that opposition in meaningful ways. I also stated that passage of this legislation would be one of the Department's top priorities. I remain firm in that commitment.

Shortly after our staffs met for the first time, Chairman Kennedy introduced S. 636. I am very pleased to report my strong

intact.

Need for Federal Legislation

A woman's right to choose whether to terminate a pregnancy is a fundamental right protected by the Constitution. While polls suggest that a substantial majority of Americans support that right, a deeply sincere minority opposes abortion. The right of individuals in that minority to express their views must be respected. The freedom that our society affords individuals to express even the most unpopular opinions is the bedrock upon which our democracy rests and makes us virtually unique. Peaceful anti-abortion protesters fit within this tradition. In recent years, however, anti-abortion activists have increased the intensity of their activities from picketing to physical blockades, sabotage of facilities, stalking and harassing abortion providers, arson, bombings, and finally culminating in the murder of Dr. Gunn. In the process, they have succeeded in shutting down abortion clinics and otherwise making it impossible for women to exercise their right to choose.

This Committee will hear far more eloquent testimony from the patients and health care providers who have been the victims of these activities than I could hope to provide. These witnesses can tell you of threats to their lives and the safety of their families, harassment in their homes and communities, massive obstruction and occupation of their workplaces, extensive property damage, and the tragedy of being denied access to scarce and time sensitive health care.

keep clinics open. A prime example is the assault on two clinics in Wichita, Kansas, in the summer of 1991 by Operation Rescue. Large numbers of activists converged on Wichita and physically blockaded the clinics. When police moved in to arrest them, they moved in baby steps and, when arrested, frequently refused to identify themselves to law enforcement officials. The clinics were closed for a week and were reopened only as a result of an injunction entered by the federal district court, which enabled federal marshals to move in. The district court found "that Operation Rescue * * * purposefully acted to interfere with the ability of the local law enforcement authorities to protect the rights of the plaintiffs and their patients." Women's Health Care Services v. Operation Rescue, 773 F. Supp. 258, 265 (D. Kan. 1991). The court concluded that "[b]y targeting Wichita as the focus of its national efforts, Operation Rescue has virtually overwhelmed the resources of the city's relatively small police forces to respond with dispatch and effectiveness." Id. at 265-266. This situation has been repeated in other jurisdictions. See, e.g., Pro-Choice Network v. Project Rescue, 799 F. Supp. 1417 (W.D.N.Y. 1992); Now v. Operation Rescue, 726 F. Supp. 1483 (E.D. Va. 1989), aff'd, 914 F.2d 582 (4th Cir. 1990), rev'd in part and vacated in part sub nom. Bray v. Alexandria Women's Health Clinic, 113 S. Ct. 753 (1993).

The Wichita court also found that "significant questions exist as to the lack of zeal displayed by the City of Wichita in defending the legal rights of the plaintiffs and their patients."

(1983). The Court assumed, without deciding, that animus based on gender would be reached by Section 1985(3), but it concluded that Operation Rescue activists in that case had not disfavored women by reason of their sex, but had been motivated by a desire to prevent abortions. The Court refused to equate hostility to abortion with hostility to women. The Court also held that the right to abortion, which falls under the Fourteenth Amendment, is protected by the Constitution only against state -- and not private -- infringement. The only right protected by the Constitution against private infringement that was alleged in the case was the right to travel interstate. The Court held that Operation Rescue had not acted with the conscious aim of interfering with that right. It also noted that, in any event, the right was violated only by the erection of actual barriers to interstate movement or the discriminatory treatment of interstate travelers. The Court concluded that the barriers erected at abortion clinics only impeded movement from one part of Virginia to another and that there had been no effort to discriminate between interstate and intrastate travelers.

The Court, by a vote of five to four, declined to consider whether there had been a violation of the second clause of Section 1985(3), commonly referred to as the "hindrance clause," which prohibits conspiracies with "the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws." Although the majority expressed some

limited to those situations involving massive blockades of clinics and will not address other acts of violence or sabotage or the whole range of activities that occur away from clinics, but are designed to prevent individuals from obtaining abortion services.

We have been unable to identify any other federal law that would be generally applicable to private interference with a woman's right to choose. Section 241 of Title 18 protects against private conspiracies only to the extent that the conspiracies interfere with federal rights protected against private interference. The right to abortion has not been recognized as such a right. Section 242 of Title 18 does not extend to conduct by private actors, but rather requires a showing that the offensive conduct occurred "under color of law." Section 245(b)(1)(E) of Title 18 prohibits the use of force or threat of force to interfere with an individual's participation in a program or activity receiving federal financial assistance. Because federal funds may not be used for abortion services, clinics do not receive federal financial assistance for those services. Section 245(b)(3) prohibits interference with a business engaged in interstate commerce during times of "riot" or "civil disorder." The statute does not define those terms and it would be a difficult burden to prove the existence of those conditions.

Finally, in his concurring opinion in Bray, Justice Kennedy suggested that 42 U.S.C. 10501 could be used in circumstances such as those in Bray. That statute authorizes the Attorney General to provide law enforcement assistance if a state submits an

for finding that an activity affects interstate commerce and acts rationally in addressing the activity. See Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264, 276 (1981); Preseault v. ICC, 494 U.S. 1, 17 (1990); Katzenbach v. McClung, 379 U.S. 294, 305 (1964). In conjunction with the Necessary and Proper Clause, art. I, sec. 8, cl. 18 of the Constitution, the Commerce Clause gives Congress authority to regulate activity that affects interstate commerce, even if the activity is purely local. See Katzenbach v. McClung, 379 U.S. at 301-302; NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937); Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 258 (1964); Wickard v. Filburn, 317 U.S. at 123-125. In determining whether an activity affects interstate commerce, a single event should not be viewed in isolation. Fry v. United States, 421 U.S. 542, 547 (1975); Perez v. United States, 402 U.S. 146, 152 (1971). Rather, "[e]ven activity that is purely intrastate in character may be regulated by Congress, where the activity, combined with like conduct by others similarly situated, affects commerce among the states." Fry v. United States, 421 U.S. at 547. Thus, Congress has authority to regulate a class of activities -- and even to impose criminal penalties -- "without proof that the particular intrastate activity against which a sanction was laid had an effect on commerce." Perez v. United States, 402 U.S. at 152; Russell v. United States, 471 U.S. 858 (1985); Wickard v. Filburn, 317 U.S. at 127-128. It has also been considered important to the Commerce Clause analysis that the problem Congress is addressing is national in scope and

numbers of patients from other states. For example, in Bray v. Alexandria Women's Health Clinic, 113 S. Ct. at 762, the Supreme Court accepted the district court's finding that substantial numbers of patients at abortion clinics in the Washington, D.C., area traveled interstate to obtain the services of the clinics. In Wichita, Kansas, the federal district court found that some 44% of the patients at one clinic came from out of state. See New York State NOW v. Terry, 886 F.2d at 1360 (many women travel from out-of-state to New York clinics). Thus, there can be little doubt that abortion providers are engaged in interstate commerce and Congress should not have difficulty developing a legislative record allowing it to make such a finding.

In addition, it is equally clear that the types of activities that would be prohibited by S. 636 have a negative effect on interstate commerce. As the Committee will hear, clinics have been closed because of blockades and sabotage and have been unable to provide services. Abortion providers have been harassed and frightened into ceasing to perform abortions and, of course, Dr. Gunn, tragically, has been prevented from ever again engaging in this form of commerce. Congress, therefore, should have no difficulty in gathering evidence supporting a conclusion that the conduct prohibited by S. 636 results in the provision of fewer abortions and less interstate movement of people and goods. This situation is analogous to the exercise of the commerce power in passing Title II of the Civil Rights Act of 1964, which was premised on the conclusion that restaurants that discriminated

Amendment protects individuals only against actions taken by the states or that can fairly be ascribed to the states. Since United States v. Guest, 383 U.S. 745 (1965), however, there has been a suggestion that even though section 1 of the Fourteenth Amendment reaches only state action, Congress may have power pursuant to section 5 of the Amendment to punish private conduct that interferes with the exercise of a right protected by section 1. Six Justices agreed to that view in dicta in Guest, 383 U.S. at 782 (opinion of Brennan, J., joined by Warren, C.J., and Douglas, J., concurring in part, dissenting in part); id. at 761 (Clark, J., concurring, joined by Black and Fortas, JJ.), and the Court expressed support for an expansive view of congressional authority pursuant to Section 5 in Katzenbach v. Morgan, 384 U.S. 641 (1966). The Court, however, has never had occasion to address the question squarely. As a matter of statutory interpretation, it has refused to read 42 U.S.C. 1985(3) as reaching private conspiracies to interfere with rights protected pursuant to section 1 of the Fourteenth Amendment. See Bray v. Alexandria Women's Health Clinic, supra; Carpenters v. Scott, 463 U.S. 825, 831 (1983).

In Bray, the dissenting Justices would have held that an action against a private conspiracy to prevent law enforcement officials from protecting women who are exercising the right to have an abortion would be prohibited by 42 U.S.C. 1985(3). Justice Stevens explained that a conspiracy to interfere with the ability of law enforcement officers to perform their duties necessarily involves sufficient involvement with the state to trigger the right

legislation makes clear that it is not intended to suppress a particular message.

Of course, conduct can express a message and is frequently entitled to First Amendment protection, but the Supreme Court has acknowledged that "[t]he government generally has a freer hand in restricting expressive conduct than it has in restricting the written or spoken word." Texas v. Johnson, 491 U.S. 397, 406 (1989). Therefore, the Court has concluded, "where 'speech and nonspeech elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms' * * * [so long as] the governmental interest in question [is] unconnected to expression." Id. at 407, quoting United States v. Obrien, 391 U.S. 367, 377 (1969) (upholding a statute prohibiting destruction of a selective service card, even though the public burning of the card was expressive conduct, because the government had a sufficient interest in administering the selective service system that was unrelated to regulation of expression). Indeed, this reasoning is compelled by the fact that it is possible to find some element of expression in nearly any conduct, regardless how harmful the conduct may be to individuals or society. That possibility does not mean that government may not act. Rather, it means that government must have a sufficiently important reason for doing so. Suppression of the use of force, threats of force, physical obstruction, and destruction of property standing alone should supply a sufficient government interest, but

protect the rights of individuals to be free of the invidious harm inflicted by discrimination.

S. 636 fits easily within this analysis. It addresses traditionally proscribable conduct -- the use of force, threats of force, physical obstruction, and destruction of property -- not because of its expressive content, but because -- and only if -- it injures, intimidates, or interferes with an individual's access to abortion services or results in the destruction of property. The bill, therefore, is valid because it does not target conduct on the basis of its expressive content, but is an effort to protect individuals in the exercise of their right to choose an abortion and to eliminate the harmful effect on interstate commerce resulting from interference with the exercise of that right. That justification is surely sufficient to override any incidental effect that the bill may have on expression.

Similarly, the fact that S. 636 singles out only those individuals who act with the required intent is not an indication that it disfavors certain expression. Rather, the intent requirement is a means of defining the interest that government can legitimately protect and is seeking to protect through enactment of S. 636. See Cox v. Louisiana, 379 U.S. 559, 560 (1965) (upholding a Louisiana statute prohibiting picketing near a courthouse "with the intent of interfering with, obstructing, or impeding the

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because of the victim's race); 18 U.S.C. 245(b) (prohibiting force or threat of force to interfere because of race with the victim's exercise of federal rights).

bill, which I heartily endorse, but it can be improved. First, I have already mentioned that the findings and purpose sections should be expanded to describe the connection of the bill to interstate commerce and to make clear that a purpose of the bill is to remove impediments to interstate commerce. I have also already urged that the coverage of abortion providers be made more explicit by adding the words "or providing" after "obtaining" in proposed 42 U.S.C. 2715(a)(1)(A).

I also suggest that the enhanced penalty for "second and subsequent offenses" be made applicable even when the defendant has not been previously convicted of a prohibited activity. As currently drafted, proposed 42 U.S.C. [illegible] would require a previous conviction before the enhanced penalty provision of proposed 42 U.S.C. 2715(b)(2) would apply. Our concern is that a person who engaged in a series of violations, such as repeated obstruction of abortion clinic entrances, over a period of weeks or even months would not be sentenced as a repeat offender since, in all likelihood, he would not have been indicted and convicted of the prior offenses. Because of the importance that we attach to deterring repeat offenders and the propensity that individuals involved in these activities have demonstrated to engage in repeated violations of the law, we urge deletion of the words "after a prior conviction" from proposed Section 2715(b)(2).

I am concerned by proposed 42 U.S.C. 2715(d), which gives the Secretary of Health and Human Services authority to investigate violations of proposed 42 U.S.C. 2715(a), the prohibited activities

636, let me tell you about the important features that I do like. First, as I have indicated, the definition of prohibited activities, with the addition of explicit protection for abortion providers, does a very good job of addressing the problem.

The inclusion of both civil and criminal penalties is very important. The civil remedies of injunctions and damages are appropriate as a means of addressing massive blockades. Courts can fashion injunctive relief that will keep clinics operating, yet allow room for the legitimate expression of opinion by demonstrators. Damages are important to compensate those individuals who, seeking to exercise their rights, suffer real harm, whether physical or psychological. And the authorization of statutory damages is appropriate to encourage victims to pursue violations and as a deterrent to violators.

I also think it is very important that the Attorney General have authority to file a civil action. This approach follows the model of other statutes protecting individual rights -- notably the Fair Housing Act -- by shifting the burden of civil enforcement from private victims to the government, which is often better able to pursue such cases and vindicate the enormous interest that our society has in protecting individual rights.

The authorization of criminal penalties is essential. As I stated earlier in my testimony, opponents of the right to choose have escalated the level of their opposition in recent years. They have demonstrated a willingness to break the law and to defy court injunctions. Unfortunately, criminal sanctions, including