No. 99-1443

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

UNITED STATES OF AMERICA,

Appellee

v.

J. FRED HART, JR.,

Defendant-Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF ARKANSAS

BRIEF FOR THE UNITED STATES AS APPELLEE

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SUMMARY OF THE CASE

Appellant J. Fred Hart, Jr., appeals his convictions under the Freedom of Access to Clinic Entrances Act, 18 U.S.C. 248(a) (Access Act). Hart alleges that the district court erred in denying his motion for judgment of acquittal in that his actions did not constitute a threat. Hart also alleges that the Access Act violates his First Amendment right to free speech and that Congress exceeded its authority under the Commerce Clause when it enacted the Act.

Hart has requested fifteen minutes of oral argument. The United States does not believe oral argument is necessary in this case. The United States presented sufficient evidence on each element of the offense. This Court has previously rejected Hart's constitutional challenges in United States v. Dinwiddie, 76 F.3d 913, cert. denied, 519 U.S. 1043 (1996). If, however, this Court grants oral argument the United States requests as much time as Hart receives.

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STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

This action was instituted by the filing of an indictment in the United States District Court for the Eastern District of Arkansas charging appellant J. Fred Hart, Jr., with violating 18 U.S.C. 248(a) (R.A. 1).[1/] The district court had jurisdiction over this criminal case pursuant to 18 U.S.C. 3231.

The district court entered its judgment on February 11, 1999 (R. 45). Hart filed his notice of appeal on February 12, 1999 (R.A. 110). This Court has jurisdiction over this appeal pursuant to 28 U.S.C. 1291.

[1/] "R.A. __" refers to the Record on Appeal; "R. __" refers to the docket number for a document on the district court's docket sheet; "Tr. __" refers to the transcript of the trial; "Br. __" refers to Appellant's Opening Brief.

STATEMENT OF THE ISSUES

1. Whether the district court erred in denying Hart's motion for judgment of acquittal.

2. Whether Hart's bomb threat is protected by the First Amendment.

3. Whether Congress exceeded its Commerce Clause authority when it enacted the Freedom of Access to Clinic Entrances Act.

STATEMENT OF THE CASE

On July 29, 1998, the United States filed a two-count indictment against J. Fred Hart, Jr. (R.A. 1). The indictment alleged that Hart violated the Freedom of Access to Clinic Entrances Act, 18 U.S.C. 248(a), by placing two Ryder trucks at two different clinics that provide reproductive health services with the intent to intimidate and interfere with, and to attempt to intimidate and interfere with, persons who are seeking or persons providing reproductive health services (R.A. 1-2). Hart pled not guilty and his trial began on October 28, 1998 (R. 34). On November 2, 1998, the jury returned a guilty verdict against Hart on both counts (R. 36).

The district court held Hart's sentencing hearing on February 9, 1999 (R. 43). The court sentenced Hart to 12 months of home detention, 200 hours of community service, four years' probation, and imposed a special assessment of $50 (R. 45).

STATEMENT OF FACTS

A. Hart's Bomb Threats

In the afternoon of September 24, 1997, Hart rented two 24-foot Ryder trucks from Randy Jones, manager of the Sixth Street Exxon Service Station in Little Rock, Arkansas (Tr. 79, 244). At about 8 p.m. that evening, Hart went to the home of Robert Reneau and asked him for a ride to Sherman Street in Little Rock (Tr. 288, 290). After being dropped off, Hart asked Reneau to pick him up near the Women's Community Health Center, which provides abortion-related services (Tr. 86, 289). Upon arriving at a lot next to the center, Reneau saw Hart driving one of the Ryder trucks (Tr. 290). Hart parked the truck and got into Reneau's car (Tr. 291). Reneau drove him to Hart's law office, where Reneau saw a second truck (Tr. 291-292). Reneau followed Hart, who drove the second truck, to a parking lot across from the Little Rock Family Planning Services Clinic, which also performs abortion procedures (Tr. 293, 175). After Hart left the second truck, Reneau picked Hart up and drove him back to Hart's law office (Tr. 294).

The government witnesses, who saw the trucks on September 25, 1997, testified that they believed the trucks were bombs. Ms. Andrea Brown, an employee at the Women's Community Health Center, arrived there at about 8 a.m. that morning (Tr. 85-86). The Ryder truck was parked in the entrance to the lot she normally uses (Tr. 88). Since she was not expecting the truck to be parked there, she almost rear-ended it (Tr. 88-89). She

testified that she had seen Ryder trucks on various occasions in other locations and had not been scared (Tr. 91).

She was scared this time for several reasons (Tr. 91). The truck was parked "as close to the [abortion clinic] as it could possibly be" (Tr. 92). Also, Ms. Brown had learned through newsletters from the National Abortion Federation that abortion clinics tend to be targets of violent attacks (Tr. 89). There was apparently no valid reason for the truck's presence (Tr. 92), nor any note explaining why it was there (Tr. 92). The Ryder truck immediately reminded her of the 1994 bombing of the federal building in Oklahoma City when explosives were detonated inside a Ryder truck in order to destroy that building (Tr. 91). Accordingly, she got out of her car and ran across the street to the E-Z Mart to call the police (Tr. 94).

Sergeant Richard Kinsey of the Little Rock Police Department responded to the call about the bomb threat at the Women's Community Health Center (Tr. 45-46, 53-54).[2/] Upon his arrival, he too concluded the truck presented a real bomb threat because the truck was parked, for no apparent legitimate reason, so as to block one of the entrances to an abortion clinic, and the Ryder truck reminded him of the Oklahoma City bombing (Tr. 59). Sergeant Kinsey immediately set up a perimeter of "about a block-and-a-half to two blocks all the way around" the Women's

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[2/] Sergeant Kinsey of the Little Rock Police Department testified that it was publicized that, on September 25, 1997, the President of the United States would be in Little Rock, Arkansas. Visits by the President call for security measures that affect the manpower levels of his police department (Tr. 52-53).

Community Health Center and closed "the northbound lanes of University" Drive (Tr. 60). He then evacuated businesses and homes in the area and awaited the arrival of Captain Bernard Sherwood of the Little Rock Fire Department and his bomb squad (Tr. 60-64).

Ms. Anne Krebs, an employee of the Little Rock Family Planning Services Center, arrived at that clinic at about 8:30 a.m. on September 25, 1997, and found the Ryder truck blocking the entrance to the clinic's driveway (Tr. 170-173). As with the truck parked at the Women's Community Health Center, there were no signs on the truck explaining why it was parked in the clinic's driveway and no other apparent valid reason for its presence (Tr. 174). Ms. Krebs was "very scared" that the truck was a bomb because of those factors and because she was reminded of the Oklahoma City bombing incident when a truck "blew up the Federal Building" (Tr. 175, 182). Accordingly, she reported the incident to the police.

Ms. Karen Hunter was a Director of the KidCo Child Day Care Center on September 25, 1997. KidCo is located across the street from the Family Planning Services Center (Tr. 234, 238-240). At about 9:30 a.m. on September 25, 1997, she spotted the Ryder truck parked across the street from KidCo and believed it to be a bomb (Tr. 238). She and the teacher of the three-year old class reacted quickly. They wrapped the children in "baby beds," to protect them from the possibility of broken glass and carried them away from the scene (Tr. 239-240).

Sergeant John Aquilino of the Little Rock Police Department responded to Ms. Krebs' call about the Family Planning Services Center (Tr. 127-132). When Sergeant Aquilino learned that "there were two large Ryder rental trucks parked blocking the entrances to" two abortion clinics, his "first thought was that this is real, that this is a bomb threat" (Tr. 131). He reached this conclusion also because of the "notoriety and publicity" of the Oklahoma City bombing incident (Tr. 131). Sergeant Aquilino also contacted the Fire Department's bomb squad (Tr. 137).

Captain Sherwood of the Little Rock Fire Department, and the Operations Officer of the Fire Department's bomb squad, arrived with his bomb squad first at the Women's Community Health Center (Tr. 195-196, 204). Captain Sherwood determined that the truck was a "high threat level," because it was placed at an abortion clinic, which he considers one of the "target hazards" (Tr. 201-202). Captain Sherwood testified that a "target hazard" is a place where bombings and violent attacks frequently occur (Tr. 202). He explained that the circumstances at both clinics were suspicious also because there was "no one at the clinic that [could] identify why the vehicle's there" (Tr. 206). Captain Sherwood extended the evacuation perimeter Sergeant Kinsey had established from "12th Street all the way down to 19th Street" (Tr. 64, 207). The bomb squad carefully and thoroughly searched both trucks until they were certain no bombs were present (Tr. 214-218).

The government also presented a stipulation of expected testimony from Hart's father. Based on conversations with his son, Hart's father concluded that Hart knew that using the Ryder truck would "cause some turmoil" (Tr. 315). Hart's father explained that Hart thought "if people believed that there was a bomb on one or more of those Ryder trucks, that it would have been worth it in order to save at least the life of one baby" (Tr. 314).

On August 20, 1998, a Ryder rental truck was parked in front of the building where the Little Rock branch office of the Federal Bureau of Investigations was located (Tr. 345-348). After spotting this, Hart entered the FBI offices and reported the presence of the Ryder truck to Ms. Rita Harris (Tr. 345-349). Ms. Harris paged for an FBI agent and Ms. Carrie Land responded (Tr. 354-355). Ms. Land testified that soon after initiating her investigation she learned that the Ryder rental truck had belonged to the Blue Cross/Blue Shield office which was moving out of the building that day (Tr. 359). Having obtained a valid reason for the truck's presence, she concluded her investigation (Tr. 359).

B. Hart's Motion To Dismiss The Indictment

On September 15, 1998, Hart filed a motion to dismiss the indictment (R. 18). Hart viewed the United States' case as "apparently alleg[ing] that the parking of a Ryder truck in a parking lot is itself an act of intimidation" and argued that the indictment fails to make a factual allegation that would support

a finding of actual intimidation (R. 18 at 2-3). Hart also argued that to apply the Freedom of Access to Clinic Entrances Act (18 U.S.C. 248(a)) (Access Act) to his alleged actions would violate the First Amendment's protection of expressive conduct. Finally, he argued that Congress did not have authority under the Commerce Clause "to regulate conduct outside abortion clinics, any more than it had the power to regulate handgun possession at schools" (R. 18 at 5).

The United States contended that the indictment's allegations are cognizable under the Access Act (R. 19 at 4) and argued, inter alia, that, in United States v. Dinwiddie, 76 F.3d 913, 919-924, cert. denied, 519 U.S. 1043 (1996), this Court correctly held that the Access Act does not violate the First Amendment (R. 19 at 7) and is valid under the Commerce Clause (R. 19 at 26). On October 26, 1998, the district court entered an order denying Hart's motion to dismiss the indictment (R. 31).

C. Hart's Motion For Judgment Of Acquittal

On October 30, 1998, at the close of the government's case, Hart filed a motion for judgment of acquittal (Tr. 366-370). He claimed the government's case was nothing more than "the parking of the Ryder truck constitutes, in and of itself, a threat of force" (Tr. 366). He argued that the United States failed to prove that the Oklahoma City bombing actually occurred and failed to "show that there was something other than Ryder trucks available" (Tr. 369). Hart also argued that the government failed to show that he parked the Ryder trucks (Tr. 370). Hart

acknowledged (Tr. 370), however, that Robert Reneau testified he saw Hart park the Ryder trucks (Tr. 294). Hart contended that the government failed to prove he intended to interfere or intimidate (Tr. 371). Hart conceded that there was evidence of his possession and rental of the trucks, his anti-abortion convictions, "and a possible motive for doing this" (Tr. 371).

In response, the United States argued that the elements it is required to prove are: "there was a threat, there was an intent to intimidate, and that it was because of the clinics and the services that they provide" (Tr. 373). There is no requirement to prove the existence of the Oklahoma City bombing or that Hart could have rented trucks from a rental agency other than Ryder (Tr. 373, 375). The government contended it presented "overwhelming evidence" on the elements of the offense (Tr. 373). For instance, the United States pointed to the testimony from Hart's father who provided that his son realized that "when he used the Ryder truck, it would cause some turmoil about those people" (Tr. 376). The district court denied Hart's motion for judgment of acquittal (Tr. 380).

SUMMARY OF ARGUMENT

The district court correctly denied Hart's motion for judgment of acquittal. Hart argues (Br. 14-15) that the district court erred because "the placement of two Ryder trucks cannot, in and of themselves, constitute a threat of force," and to construe the statute as criminalizing his actions would render the Freedom

of Access to Clinic Entrances Act (Access Act), unconstitutionally vague and overbroad.

In determining whether conduct or a statement constitutes a true threat, a court must analyze the threat in the light of its "entire factual context," and decide whether the recipient of the threat could reasonably conclude that it expresses "'a determination or intent to injure presently or in the future.'" United States v. Dinwiddie, 76 F.3d 913, 925 (8th Cir.), cert. denied, 519 U.S. 1043 (1996) (citation omitted). In this case, a person could reasonably conclude that Hart communicated a true threat of an imminent bombing. Abortion clinics are frequently targets of violence. Hart parked two Ryder trucks so as to interfere with the entrance of two abortion clinics, and there were no signs or other information offering a valid reason for their presence. Several government witnesses testified that the sight of the trucks immediately reminded them of the infamous Oklahoma City bombing incident in 1994, in which a Ryder truck was used to destroy a federal government building.

In Dinwiddie, 76 F.3d at 924, this Court held that, facially, the Access Act is "not even close to being overbroad," and the terms, "interfere with," "physical obstruction," "intimidate," and "threat of force," are quite clear. Nor is the Access Act overbroad or vague as it is applied to Hart's conduct. The Access Act would not prohibit the lawful parking of a Ryder truck. The Act applies to Hart's conduct because he parked the

trucks in a manner and under circumstances which would threaten those seeking or providing reproductive health services.

Hart's claim that the Access Act violates the First Amendment is meritless. As this Court also explained in Dinwiddie, 76 F.3d at 922, it is well-settled that the First Amendment does not protect threats of violence. The evidence established that Hart's conduct constituted a true threat.

Equally unavailing is Hart's claim that Congress exceeded its powers under the Commerce Clause when it enacted the Access Act. As Hart concedes (Br. 22-25), in Dinwiddie, 76 F.3d at 919-921, this Court held that the Access Act is a proper exercise of Congress's Commerce Clause powers because it protects persons or things in interstate commerce and regulates activities that substantially affect interstate commerce. Hart offers no meritorious reason why Dinwiddie does not control this case. Every court of appeals that has addressed it has rejected the claim that the Access Act is not valid Commerce Clause legislation. United States v. Weslin, 156 F.3d 292 (2d Cir. 1998), cert. denied, 119 S. Ct. 804 (1999); United States v. Wilson, 154 F.3d 658 (7th Cir. 1998), cert. denied, 119 S. Ct. 824 (1999); United States v. Bird, 124 F.3d 667 (5th Cir. 1997), cert. denied, 118 S. Ct. 1189 (1998); Hoffman v. Hunt, 126 F.3d 575 (4th Cir. 1997), cert. denied, 118 S. Ct. 1838 (1998); Terry v. Reno, 101 F.3d 1412 (D.C. Cir. 1996), cert. denied, 520 U.S. 1264 (1997); Cheffer v. Reno, 55 F.3d 1517 (11th Cir. 1995).

STANDARDS OF REVIEW

When reviewing the denial of a motion for judgment of acquittal based on sufficiency of the evidence, this Court views the evidence in the light most favorable to the verdict and gives the government the benefit of all reasonable inferences that could logically be drawn from the evidence. United States v. James, 172 F.3d 588 (8th Cir. 1999).

This Court conducts de novo review of challenges to the constitutionality of federal statutes. United States v. Prior, 107 F.3d 654, 658 (8th Cir.), cert. denied, 118 S. Ct. 84 (1997).

ARGUMENT

I

THE DISTRICT COURT CORRECTLY DENIED HART'S MOTION FOR JUDGMENT OF ACQUITTAL

Hart claims (Br. 13-15) that, even if the evidence is viewed in the light most favorable to the government, it was not sufficient to establish that he communicated a threat. The claim is meritless.

a. In United States v. Patrick, 117 F.3d 375, 376 (1997), this Court held that "'[i]f a reasonable recipient, familiar with the context of the communication, would interpret it as a threat, the issue should go to the jury.'" In determining whether conduct or a statement constituted a true threat, a court must analyze the threat in light of its "entire factual context" and decide whether the recipient of the threat could reasonably conclude that it expresses "a determination or intent to injure presently or in the future." United States v. Dinwiddie, 76 F.3d

913, 925 (8th Cir.), cert. denied, 519 U.S. 1043 (1996); see also, United States v. Whitfield, 31 F.3d 747, 749 (8th Cir. 1994); United States v. Bellrichard, 994 F.2d 1318, 1323-1324 (8th Cir.), cert. denied, 510 U.S. 928 (1993).

When the entire factual context is reviewed, the United States' evidence was more than sufficient to establish that Hart communicated a true threat. There was evidence that reproductive health clinics that perform abortions are frequently the targets of protest (Tr. 54, 131) and violence. Ms. Brown and Ms. Krebs specifically testified that the National Abortion Federation regularly informs them about violent events at abortion clinics around the nation (Tr. 89, 171, 175).

At trial, Ms. Andrea Brown of the Women's Community Health Center, Ms. Anne Krebs of the Little Rock Family Planning Services Clinic, as well as Sergeants Richard Kinsey and John Aquilino of the Little Rock Police Department testified that the circumstances concerning the Ryder trucks indicated they were bombs (Tr. 89-92, 173-175, 54, 56-61, 131-136). Those circumstances included: the use of Ryder trucks similar to that used in the 1994 Oklahoma City bombing of a federal office building (Tr. 59, 91, 175, 131, 175); the parking of the trucks near the entrances of the abortion clinics (Tr. 54, 57, 175) rather than in a regular parking space; and the absence of any apparent legitimate explanation for the presence of the trucks (Tr. 61, 92, 144, 174).

Captain Sherwood testified that the parking of trucks at abortion clinics was a "high threat level," because such clinics are places where bombs are frequently placed (Tr. 201-202). He further testified that the circumstances were particularly suspicious because there was "no one at the clinic that can identify why the vehicle's there" (Tr. 206).

The unexplained presence of two Ryder trucks, combined with a reasonable apprehension of violence at a clinic providing abortion services, was clearly evocative of violence and placed clinic employees in reasonable apprehension of imminent bodily harm. A recipient of this threat could reasonably conclude that the protests against abortions being performed at the Women's Community Health Center and the Little Rock Family Planning Services Center had escalated to violence.

b. Hart relies (Br. 15) upon United States v. Dubois, 645 F.2d 642 (8th Cir. 1981), and United States v. Diggs, 527 F.2d 509, 513 (8th Cir. 1975), to argue that a jury is not justified in convicting a defendant on the basis of suspicion or speculation. Hart's reliance on those cases is misplaced. Dubois, 645 F.2d at 643, involved whether the defendant was legally intoxicated when his car struck and killed a pedestrian. After the accident, he consumed more alcohol before he was given a breathalyzer that showed he was intoxicated. Ibid. The government presented the testimony of an expert in forensic chemistry to estimate what the blood alcohol level was at the time he struck the pedestrian. Id. at 644. This court rejected

the expert testimony because it was based on "speculation" about how much the defendant consumed after the accident. Id. at 645.

In Diggs, 527 F.2d at 511, the government charged that the defendant transported checks through interstate commerce with the intent to defraud, in violation of 18 U.S.C. 2314. This Court reversed the conviction because the United States failed to present any evidence from which the jury could infer that Diggs knew the checks were fraudulent. Id. at 512.

In this case, the jury was not asked to speculate. There was probative evidence as to every element of the offense. In addition to the evidence showing that Hart's conduct constituted a true threat, the government presented uncontradicted evidence that it was Hart who parked the trucks (Tr. 291-293). The evidence also established that Hart acted with the intent to intimidate persons providing or seeking abortion-related services. For instance, the stipulation from Hart's father established that Hart's intent "by parking the truck there," was that "if he could just save one baby from abortion, it would be worth the effort" (Tr. 309).

c. Under the Access Act, the term intimidate "means to place a person in reasonable apprehension of bodily harm to him- or herself or to another." 18 U.S.C. 248(e)(3). Contrary to Hart's contentions, intimidation can be conveyed by actions as well as by words. 18 U.S.C. 248(a).

Hart argues (Br. 17) that United States v. Lee, 6 F.3d 1297 (8th Cir. 1993) (en banc) (per curiam), cert. denied, 511 U.S.

1035 (1994), supports his position that the government must prove that the bomb threat was made orally or in writing. In fact, Lee supports the opposite conclusion. Lee burned a cross near apartment buildings where several black families resided, and a jury convicted him for violating 18 U.S.C. 241, which prohibits conspiring to "intimidate" persons in the enjoyment of their rights. 6 F.3d at 1300. This Court addressed the circumstances under which a cross-burning would constitute a crime and when it would be considered expressive conduct protected by the First Amendment. But, the Lee Court held that a defendant could be convicted for the act of burning a cross if he intended to threaten the residents of the apartments or at least intended to cause residents to reasonably fear the imminent use of force or violence. Id. at 1303. Thus, Lee established that a threat may be unlawful even if it is communicated only through conduct.

d. On appeal, Hart argues (Br. 16-17) that the Access Act is overbroad and vague. Since he failed to raise this claim at trial, it is waived absent plain error. United States v. Olano, 507 U.S. 725, 731 (1993); United States v. Tulk, 171 F.3d 596, 599 (8th Cir. 1999). Hart cannot establish that applying the Access Act to his conduct was even erroneous.

In Dinwiddie, 76 F.3d 913 at 924, this Court held that the Access Act is "not even close to being overbroad," because it "prohibits only a limited range of activity." Id. at 924. With regard to the vagueness challenge, the Dinwiddie Court held that "threat of force" is a "readily understandable" term "used in

everyday speech." Id. at 924. The Court also explained that "intimidate" is equated with placing a person in reasonable apprehension of harm, and thus, is "a clear term that is similar to an element in the crime and tort of assault." Ibid.

Applying the Access Act to Hart's conduct in no way renders the statute overbroad or vague. Contrary to Hart's mischaracterization (Br. 16-17), he was not convicted for violating the Act simply because he parked two legally leased Ryder trucks. As explained, supra, at pp. 13-16, he was found guilty under the Act because his actions placed individuals in fear that the trucks were bombs.

Hart refers (Br. 17) to the presence, on August 20, 1998, of a Ryder truck at the building where the Little Rock branch of the Federal Bureau of Investigation is located. He argues that the fact that FBI personnel and the public did not react to that truck in the alarmed manner with which it responded to Hart's threat on September 25, 1997, demonstrates that the parking of a Ryder truck is so ambiguous it should not be considered a threat under the Access Act. But, the circumstances concerning the August 20, 1998, incident are quite distinguishable from Hart's bomb threats.

On August 20, 1998, after Hart reported the presence of the Ryder truck to the Little Rock branch office of the Federal Bureau of Investigations (Tr. 345-349), Ms. Carrie Land, an FBI agent conducted an investigation (Tr. 354-355). Shortly after initiating her investigation, Ms. Land learned that the Ryder

rental truck had belonged to Blue Cross/Blue Shield who were moving out of the building that day (Tr. 358-359). Having obtained a valid explanation for the truck's presence, Ms. Land concluded her investigation (Tr. 359).

In contrast, when, on September 25, 1997, Hart parked the Ryder trucks at the two abortion clinics, there was no explanation for the trucks being parked so as to interfere with entrances at those clinics. Contrary to Hart's conclusion, the differences in the facts concerning Hart's conduct and the Blue Cross/Blue Shield's parking of a Ryder truck at the FBI offices demonstrates that the Access Act is being properly applied to true threats of violence.

II

HART'S CONDUCT IS NOT PROTECTED BY THE FIRST AMENDMENT

As this Court held in Dinwiddie, 76 F.3d at 922, it is "'well-settled that threats of violence are ... unprotected speech.'" Id. at 922 (quoting United States v. J.H.H., 22 F.3d 821, 825 (8th Cir. 1994). Since, as discussed supra, at pp. 12-18, the evidence established that Hart communicated a true threat of violence, his conduct was not protected by the First Amendment.

Hart fails to present a meritorious argument why this Court's holding in Dinwiddie is not applicable here. For instance, Hart argues (Br. 19) that "[p]olitical expression having the effect of intimidation is constitutionally protected speech." This claim is, in substance, the same one this Court

addressed in Dinwiddie. There, the appellant contended that a prohibition against "threats of force that 'intimidate' * * * imposes a content-based restriction on speech because it punishes the speech based on its communicative impact." 76 F.3d at 922. This Court rejected the argument and noted that in Watts v. United States, 394 U.S. 705, 707 (1969), the Supreme Court upheld the constitutionality of a statute that criminalizes threats to the President.

Every court of appeals that has addressed the constitutionality of the Access Act has concluded that threats of violence are outside the First Amendment's protection. United States v. Weslin, 156 F.3d 292, 296 (2d Cir. 1998), cert. denied, 119 S. Ct. 804 (1999); United States v. Wilson, 154 F.3d 658, 663 (7th Cir. 1998); cert. denied, 119 S. Ct. 824 (1999); Hoffman v. Hunt, 126 F.3d 575, 588 (4th Cir. 1997), cert. denied, 118 S. Ct. 1838 (1998); United States v. Bird, 124 F.3d 667, 683 (5th Cir. 1997), cert. denied, 118 S. Ct. 1189 (1998); Terry v. Reno, 101 F.3d 1412, 1419 (D.C. Cir. 1996), cert. denied, 520 U.S. 1264 (1997); Cheffer v. Reno, 55 F.3d 1517, 1521 (11th Cir. 1995); American Life League, Inc. v. Reno, 47 F.3d 642, 648 (4th Cir.), cert. denied, 516 U.S. 809 (1995).

Hart's reliance upon cases, such as Simon & Schuster, Inc. v. Members of the New York State Crime Victims Board, 502 U.S. 105, 118 (1991), Texas v. Johnson, 491 U.S. 397, 405 (1989), NAACP v. Claiborne Hardware Co., 458 U.S. 886 (1982), and Organization for a Better Austin v. Keefe, 402 U.S. 415, 419

(1971), is unavailing. To be sure, those cases did hold that peaceful expressive conduct and speech, even if coercive of and somewhat offensive to its audience, are entitled to the First Amendment's protection. None of those decisions, however, limited the established principle that threats of violence are not protected by the First Amendment.

Indeed, in more recent cases the Supreme Court has reaffirmed that "threats of violence are outside the First Amendment." R.A.V. v. St. Paul, 505 U.S. 377, 388 (1992); see also, Madsen v. Women's Health Ctr., Inc., 512 U.S. 753, 773-774 (1994); Wisconsin v. Mitchell, 508 U.S. 476, 484 (1993). That is because "'[v]iolence or other types of potentially expressive activities that produce special harms distinct from their communicative impact ... are entitled to no constitutional protection.'" Id. at 484-485, quoting Roberts v. United States Jaycees, 468 U.S. 609, 628 (1984).

Hart also claims (Br. 21) that the Access Act is targeted against those with a particular viewpoint, because it is aimed at abortion protesters, and that the restriction on First Amendment freedoms is greater than is essential to the furtherance of legitimate governmental interests. Hart, therefore, contends that the Access Act fails the test, under United States v. O'Brien, 391 U.S. 367 (1968), for determining whether a statute, which affects expressive conduct, violates the First Amendment. In Dinwiddie, 76 F.3d at 923, this Court correctly rejected the same argument.

III

CONGRESS WAS WELL WITHIN ITS CONSTITUTIONAL POWERS WHEN IT ENACTED THE ACCESS ACT

Relying on United States v. Lopez, 514 U.S. 549 (1995), Hart contends that Congress exceeded its authority under the Commerce Clause when it enacted the Access Act (Br. 22). Hart correctly concedes, however, that this Court previously rejected this argument in Dinwiddie, 76 F.3d at 919-921. Indeed, every court of appeals that has addressed this contention has rejected it (see cases cited supra at p. 19).

a. A court "must defer to a congressional finding that a regulated activity affects interstate commerce, if there is any rational basis for such a finding." Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264, 276 (1981) (emphasis added). As this Court concluded in Dinwiddie, 76 F.3d at 919-921, the voluminous testimony and evidence Congress considered clearly supports a conclusion that Congress had a rational basis for concluding that the activity regulated by the Access Act substantially affects interstate commerce. Specifically, the Access Act passes muster under the second and third categories identified by the Lopez Court; the Act is a proper exercise of Congress' power to "protect * * * persons or things in interstate commerce," as well as its power to regulate activities that substantially affect interstate commerce. Lopez, 514 U.S. at 558.

(1) The Access Act properly protects persons or things in interstate commerce. The Supreme Court has determined that an

entity is engaged in interstate commerce, "when it is itself 'directly engaged in the production, distribution, or acquisition of goods or services in interstate commerce.'" United States v. Robertson, 514 U.S. 669, 672 (1995), quoting United States v. American Bldg. Maintenance Indus., 422 U.S. 271, 283 (1975).

In addition to this Court's holding in Dinwiddie, the Seventh Circuit held, in United States v. Soderna, 82 F.3d 1370, 1373, cert. denied, 519 U.S. 1006 (1996), that the Access Act is "a statute that really does seek to remove a significant obstruction, in rather a literal sense, to the free movement of persons and goods across state lines." Id. at 1373 (emphasis added) (citing Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964); cf., United States v. Bird, 124 F.3d 667, 675 (5th Cir. 1997) (upholding Access Act as a valid exercise of Congress's Commerce Clause authority because it substantially affects interstate commerce, but stating that abortion clinics are not necessarily involved in interstate commerce). The holdings in Dinwiddie and Soderna are correct.

Congress reasonably concluded that reproductive health clinics are involved in interstate commerce. S. Rep. No. 117, 103d Cong., 1st Sess. 31 (1993). Congress found that "many of the patients who seek services from [abortion providers] engage in interstate commerce by traveling from one state to obtain [the abortion services] in another." S. Rep. No. 117, supra, at 31; accord H.R. Conf. Rep. No. 488, 103d Cong., 2d Sess. 7 (1994), reprinted in 1994 U.S.C.C.A.N. 724; H.R. Rep. No. 306, 103d

Cong., 1st Sess. 10 (1993), reprinted in 1994 U.S.C.C.A.N. 707. Physicians and other reproductive health services providers often travel across state lines to provide abortion services. See S. Rep. No. 117, supra, at 31; H.R. Rep. No. 306, supra, at 8. Also, Congress found that "medicine, medical supplies, surgical instruments and other necessary medical products, often [come] from other [s]tates." S. Rep. No. 117, supra, at 31; see also, H.R. Conf. Rep. No. 488, supra, at 7, reprinted in 1994 U.S.C.C.A.N. 724. Congress determined that there was a national market for abortion services because of the shortage of clinics that provide those services. S. Rep. No. 117, supra, at 17.

These findings accurately reflect the extensive testimony and evidence presented to the respective committees. See Abortion Clinic Violence: Hearings Before the Subcomm. on Crime and Criminal Justice of the Comm. on the Judiciary, 103d Cong., 1st Sess. 3 (1993) (letter of Attorney General Reno, stating that "patients and staff frequently travel interstate" to receive or to administer abortion-related services); The Freedom of Access to Clinic Entrances Act of 1993: Hearing Before the Committee on Labor and Human Resources, 103d Cong., 1st Sess. 11, 16-17 (1993) (statement by Attorney General Reno that clinics are engaged in interstate commerce and that clinics serve significant numbers of out-of-state patients); id. at 59, 64-65 (statement of Willa Craig, Executive Director, Blue Mountain Clinic, Missoula, MT, that "[a] large number of our abortion and our prenatal patients travel an average of 120 miles to their appointments at our

clinic due to lack of services in their own areas. These areas include Idaho, eastern Washington, Wyoming and Canada."); See S. Rep. No. 117, supra, at 17 ("The availability of abortion services is already very limited in many parts of the United States"); S. Rep. No. 117, supra, at 17 n.29 ("Nationwide, 83% of counties have no abortion provider * * * In North Dakota, the only physician who performs abortions commutes from Minnesota.").

(2) The activity the Access Act proscribes substantially affects interstate commerce. The Senate found that the activity regulated by the Access Act had "a significant adverse impact not only on abortion patients and providers, but also on the delivery of a wide range of health care services. This conduct has forced clinics to close, caused serious and harmful delays in the provision of medical services, and increased health risks to patients. It has also taken a severe toll on providers, intimidated some into ceasing to offer abortion services, and contributed to an already acute shortage of qualified abortion providers." S. Rep. No. 117, supra, at 14.

Congress had ample evidence to support these findings. The House Report explained that the evidence showed that "[t]hese incidents have destroyed millions of dollars worth of property, endangered lives and curtailed access to health care for women, especially in rural areas." H.R. Rep. No. 306, supra, at 8, reprinted in 1994 U.S.C.C.A.N. 705. The House Report cited the National Abortion Federation's Report which showed that between 1984 and 1992 more than 1,000 acts of violence against abortion

providers, including "28 bombings, 62 arsons, 48 attempted bombings and arsons, 266 bomb threats, and 394 incidents of vandalism. * * * The total cost of such incidents to clinics in 1992 totaled almost $1.8 million in property damage alone." H.R. Rep. No. 306, supra, at 8, reprinted in 1994 U.S.C.C.A.N. 705. Other NAF statistics showed that in 1992 there were 57 instances in which persons injected butyric acid into reproductive health clinics providing abortion services, which resulted in "almost half a million dollars [of damage]" to these clinics. H.R. Rep. No. 306, supra, at 9, reprinted in 1994 U.S.C.C.A.N. 706.

The Senate report cited other evidence of violence and threats of violence against abortion providers. "At least three physicians in Dallas stopped performing abortions in 1992 as a result of pressure by an anti-abortion group. In early 1993, after receiving death threats, two doctors stopped working at an abortion clinic in Melbourne, Fl[orida]. And since Dr. Gunn was shot in March 1993, at least eight more doctors have stopped offering abortion services." S. Rep. No. 117, supra, at 17. Congress also considered testimony about the deleterious affects that such activity had on patients. One physician testified, for example, that "[w]omen who do make it in have a heightened level of anxiety and a greater risk of complications. The delay caused by the [attacks] has forced some patients to seek care elsewhere due to the fact that their gestational age has gone beyond the first trimester." S. Rep. No. 117, supra, at 15 (quoting testimony of Dr. Pablo Rodriguez).

Extensive evidence that interference with abortion services is a problem of national scope further buttresses Congress' conclusion that the proscribed conduct has a substantial effect on interstate commerce. In Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964), the Supreme Court explained that Congress had found that the practice of excluding blacks from hotels was "nationwide," which "had a qualitative as well as quantitative effect on interstate travel by Negroes." Id. at 253. The Court determined that evidence of this nationwide problem was sufficient to support Congress's finding that such discrimination substantially affects interstate commerce. Id. 253-256.

Testimony at the hearings supported Congress's finding that "[m]any of the activities * * * have been organized and directed across State lines." S. Rep. No. 117, supra, at 13. David R. Lasso, City Manager and former City Attorney for Falls Church, Virginia, testified that "[t]he City has no practical ability to charge or seek injunctions against persons in other states who may have planned the disturbance. * * * Activities like [clinic blockades] are usually multi-state activities and the ability of localities like Falls Church to prevent them is all but non-existent." S. Rep. No. 117, supra, at 13. Attorney General Janet Reno testified that "much of the activity has been orchestrated by groups functioning on a nationwide scale, including, but not limited to, Operation Rescue, whose members and leadership have been involved in litigation in numerous areas

of the country." Senate Committee on Labor and Human Resources, May 12, 1993, Hearings on S. 636, Freedom of Access to Clinic Entrances Act of 1993 (quoted in H.R. Rep. No. 306, supra, at 9).

Even intrastate activity that the Access Act regulates substantially affects interstate commerce. The Lopez Court explained that the Court has upheld statutes as falling within the third category of permissible statutes, as long as the intrastate activity substantially affects interstate commerce. See Lopez, 514 U.S. at 559-560. Indeed, in Summit Health, Ltd. v. Pinhas, 500 U.S. 322, 329-330 (1991), the Court held that Congress could prevent the boycott of one ophthalmologist because of the potential impact on interstate commerce. As the Seventh Circuit reasoned in Soderna, 82 F.3d at 1373, the "market in reproductive health services is as large nationwide as the Los Angeles market in ophthalmological services; is as much or more an interstate market because of interstate movement of patients, staff, and supplies; and is as likely to be disrupted by the kind of activity in which the defendants in this case engaged as the Los Angeles market in ophthalmological services was likely to be disrupted by" the violations at issue in Pinhas. Id. at 1374.

b. Once a court finds that Congress had a rational basis for concluding that an activity substantially affects interstate commerce, "the only remaining question for judicial inquiry is whether 'the means chosen by [Congress are] reasonably adapted to the end permitted by the Constitution.'" Hodel, 452 U.S. at 276, quoting Heart of Atlanta Motel, Inc., 379 U.S. 241, 262 (1964).

The Act's criminal and civil penalties are designed to deter violent and obstructive conduct. These penalties are reasonably adapted to the Act's permissible ends, which include protecting: (1) the free flow of goods and services in commerce, (2) patients in their use of the lawful services of reproductive health facilities, (3) women who exercise their constitutional right to choose an abortion, (4) the safety of reproductive health care providers, and (5) reproductive health care facilities from destruction and damage. American Life League, 47 F.3d at 647.

c. Hart contends (Br. 24) that Congress exceeded its Commerce Clause authority because the Access Act does not regulate commercial activity. This claim is meritless. First, in Dinwiddie, this Court ruled that the Access Act regulates commercial activity, stating "unlike the Gun-Free School Zones Act [in Lopez, 514 U.S. at 557], [the Access Act] prohibits interference with a commercial activity — the provision and receipt of reproductive-health services." 76 F.3d at 921. Moreover, "'[t]here is no authority for the proposition that Congress's power extends only to the regulation of commercial entities.'" Id. at 920, quoting Wilson, 73 F.3d at 684. In Lopez, 514 U.S. at 559-560, the Court reaffirmed that Congress is authorized to regulate activities that substantially affect interstate commerce. As discussed (supra at pp. 23-28), the Act regulates conduct that substantially affects interstate commerce.

Second, Congress can regulate activity that substantially affects interstate commerce for any lawful motive. In Heart of

Atlanta Motel, Inc., in which the Supreme Court held Congress could prohibit racial discrimination in public accommodations, the Court listed several other decisions upholding federal statutes that proscribed immoral and injurious activities that had a substantial effect upon interstate commerce. 379 U.S. at 256-257. Like all the courts of appeals that have addressed this specific attack against the Access Act, this Court should reject it. See Weslin, 156 F.3d at 296 (2d Cir. 1998); Hoffman, 126 F.3d at 587 (4th Cir. 1997); Bird, 124 F.3d at 682 n.15 (5th Cir. 1998); Terry, 101 F.3d at 1417 (D.C. Cir. 1996); Soderna, 82 F.3d at 1374 (7th Cir. 1996); Wilson, 73 F.3d at 684 (7th Cir. 1996); Cheffer, 55 F.3d at 1520-1521 & n.6 (11th Cir. 1995).

d. Contrary to Hart's contention (Br. 24-25) the fact that, in Brzonkala v. Virginia Polytechnic Institute, 169 F.3d 820 (1999), the Fourth Circuit held some provisions of the Violence Against Women Act unconstitutional under the Commerce Clause, presents no occasion for this Court to revisit Dinwiddie's holding that the Access Act does not violate the Commerce Clause.

First, Brzonkala involved very different issues from those at issue here. Brzonkala held that the section of the Violence Against Women Act (VAWA), which creates a private cause of action against any person who commits a crime of violence motivated by gender, violates the Commerce Clause. That statute, of course, has different purposes and provisions from the Access Act. Moreover, Hart fails to point out that, in Bronzkala, the Fourth Circuit, sitting en banc, distinguished VAWA from the Access Act.

Indeed, the Court noted that in Hoffman v. Hunt, 126 F.3d at 587, it found the Access Act was closely and directly tied to economic activity and that there was a direct relationship between obstruction of abortion clinic entrances and the interstate commercial market in reproductive health care services. Brzonkala, 169 F.3d at 839. Brzonkala supports a conclusion that the Access Act is constitutional.[3/]

For the reasons stated (supra, at pp. 24-33), Congress was well-within its Commerce Clause authority when it enacted the Act.

CONCLUSION

This Court should affirm Hart's convictions and sentence.

Respectfully submitted,

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[3/] This Court has yet to decide the constitutionality of the private right of action provisions of VAWA. In Doe v. Hartz, 134 F.3d 1339, 1344 (8th Cir. 1998), the Court declined to address the statute's constitutionality after finding the plaintiff failed to state a claim under VAWA. In United States v. Wright, 128 F.3d 1274, 1275 (1997), cert. denied, 118 S. Ct. 1376 (1998), this Court upheld those provisions of VAWA that permit prosecution of defendants who cross state lines to violate protective orders.

CERTIFICATE OF COMPLIANCE

I hereby certify, pursuant to Eighth Circuit Rule 32 (a)(7)(C), that the foregoing brief complies with Federal Rule of Appellate Procedure 32(a)(7)(B). The brief contains 7,604 words.

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CERTIFICATE OF SERVICE

I hereby certify that on this 17th day of June 1999, two copies of the Brief For The United States As Appellee were mailed first class, postage prepaid, to the following counsel of record:

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