NO. 03-20884

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

UNITED STATES OF AMERICA,

Appellant,

v.

FRANK LAFAYETTE BIRD, JR.,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS

BRIEF FOR *AMICI CURIAE* IN SUPPORT OF APPELLANT, UNITED STATES OF AMERICA, ON BEHALF OF AMERICAN CIVIL LIBERTIES UNION, CENTER FOR REPRODUCTIVE RIGHTS, NATIONAL ABORTION FEDERATION, NOW LEGAL DEFENSE AND EDUCATION FUND, AND PLANNED PARENTHOOD FEDERATION OF AMERICA SUPPORTING REVERSAL OF THE DISTRICT COURT

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CERTIFICATE OF INTERESTED PERSONS

Pursuant to Fifth Circuit Rule 28.1, the undersigned counsel of record certify that the following listed persons and entities have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal:

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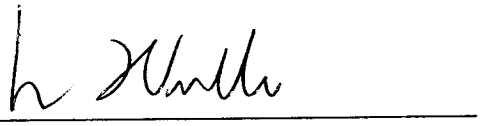
By: 

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INTERESTS OF AMICI CURIAE

The **American Civil Liberties Union** ("ACLU") is a nationwide, nonprofit, nonpartisan organization with over 400,000 members that has long supported reproductive rights as a core civil liberty. For that reason, the ACLU supported the enactment of the Freedom of Access to Clinic Entrances Act ("FACE"), and has repeatedly defended its constitutionality in court.

The **Center for Reproductive Rights** ("Center") is a national, nonprofit, public interest law firm dedicated to preserving and expanding reproductive rights in the United States and around the world. In the United States, Center attorneys represent providers of reproductive health care services and their patients in challenges to restrictions on abortion, and have represented providers in numerous cases defending the constitutionality of FACE. The Center is committed to ensuring that patients seeking reproductive health care services are not subjected to harassment or intimidation while seeking access to health care.

The **National Abortion Federation** ("NAF"), a private, non-profit organization founded in 1977, is the professional association of abortion providers in the United States and Canada. Its members include over 400 non-profit and private clinics, women's health centers, Planned Parenthood facilities and private physicians' offices in 46 states. NAF's mission is to promote and enhance the quality of abortion services, ensuring that abortion remains safe, legal, and accessible. Since its founding, NAF has worked to end anti-choice violence against abortion providers and their patients.

NOW Legal Defense and Education Fund ("NOW Legal Defense") has used the power of the law to define and defend women's rights for over thirty years. Recognizing that true reproductive freedom requires safe access to health care, NOW Legal Defense has litigated numerous cases involving abortion clinic blockades and violence, including *Schenck* v. *Pro-Choice Network*, 519 U.S. 357 (1997) and *Bray* v. *Alexandria Women's Health Clinic*, 506 U.S. 263 (1993), and has defended the constitutionality of FACE in courts around the country.

Planned Parenthood Federation of America (PPFA) is a non-profit corporation organized under the laws of New York. It is the leading national voluntary public health organization in the field of family planning. PPFA's 123 Planned Parenthood affiliates in 50 states operate 860 health centers that provide a broad range of family planning and reproductive health services, as well as educational services, to women and men. These clinics are regularly the targets of activities that are barred by FACE.

All parties to this appeal have consented to the filing of this *amici* brief.

SUMMARY OF THE ARGUMENT

In 1997, this Court upheld the constitutionality of the Freedom of Access to Clinic Entrances Act ("FACE"), 18 U.S.C. § 248 (1994), as a valid exercise of Congress's powers under the Commerce Clause. In so holding, this Court determined that there existed "a national commercial market in abortion-related services such that" the conduct regulated by FACE "substantially affects

interstate commerce." *See United States* v. *Bird*, 124 F.3d 667, 677 (5th Cir. 1997) (*"Bird I"*).

The court below erred in concluding that this Court's holding in *Bird I* was somehow invalidated by the Supreme Court's decision in *United States* v. *Morrison*, 529 U.S. 598 (2000). After first noting the "fallacy" of the "*Bird I* precedent," the district court went on to find – contrary to every other circuit court of appeals to have addressed this question both before and after *Morrison* – that *Morrison* made clear that Congress lacked authority under the Commerce Clause to enact FACE. *United States* v. *Bird*, 279 F. Supp. 2d 827, 828 n. 1 (S.D. Tex. 2003). The district court's holding is directly at odds with applicable Supreme Court and Fifth Circuit precedent, and thus should be reversed. Indeed, *Morrison* itself and this Court's own decisions analyzing *Morrison* – far from undermining the rationale of *Bird I* – fully support the conclusion that FACE was a proper exercise of Congress's power to regulate conduct that, in the aggregate, has a substantial affect on interstate commerce.

Morrison and FACE's constitutionality under the Commerce Clause are fully addressed in the briefing submitted by the government, and *amici curiae* respectfully support and adopt those arguments here. By this brief, *amici curiae* provide additional background to assist this Court in analyzing the important question of whether FACE was a proper exercise of Congress's Commerce Clause authority under the four-part inquiry established by *Morrison*. As organizations intimately familiar with the campaign of violent and obstructive interference with

access to, and the provision of, reproductive health services, *amici* are particularly well-suited to this task. And, as we demonstrate below, studies conducted by *amici* and others – both before and after the enactment of FACE – repeatedly and consistently bear out the significant economic impact that obstructive and violent conduct has on the interstate commercial activities of reproductive health care providers. The district court's opinion fails properly to consider these issues, and *amici curiae*, therefore, respectfully urge the reversal of the decision below.

ARGUMENT

In *United States* v. *Lopez*, 514 U.S. 549, 558-59 (1995), and again in *United States* v. *Morrison*, 529 U.S. 598, 609 (2000), the Supreme Court reaffirmed the principle that Congress has the power to regulate "those activities having a substantial relation to interstate commerce . . . *i.e.*, those activities that substantially affect interstate commerce."

This Court has addressed the relevant considerations on which the *Lopez* and *Morrison* Courts relied on several occasions. As this Court explained in *GDF Realty Investments*, four factors guide the analysis: (1) "the economic nature *vel non* of the regulated intrastate activity"; (2) "a jurisdictional element limiting the reach of the law to a discrete set of activities that additionally has an explicit connection with or effect on interstate commerce"; (3) "express congressional findings regarding the effects upon interstate commerce of the activity in question"; and, (4) the "link between the regulated intrastate activity and its effect *vel non* on interstate commerce." *GDF Realty Investments, Inc.* v. *Norton*, 326

F.3d 622, 628-29 (5th Cir. 2003) (citing *Morrison*, 529 U.S. at 610-12). As the Third and Sixth Circuits have found following *Morrison* – in agreement with every federal court of appeals to ever address the question[1] – FACE readily satisfies the four-prong Commerce Clause analysis.

In light of *amici*'s unique ability to provide the Court with information on the economic impact of FACE, and to avoid unnecessary repetition of the government's arguments, this brief focuses on the legal and factual bases for the conclusion that FACE satisfies the first and fourth of the *Morrison* test: namely, that FACE expressly regulates economic activity, and the effect that the conduct regulated by FACE has on interstate commerce, *i.e.*, the "national commercial market in abortion-related services." *See Bird I*, 124 F.3d at 677.

A. FACE Expressly Regulates Economic Activity

The activity regulated by FACE is clearly economic in nature. Reproductive health clinics are income-generating businesses – they employ doctors, nurses and other staff to provide medical services to patients. And, there can be little doubt that the *primary* goal and effect of the violent and destructive

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[1] *See Norton* v. *Ashcroft*, 298 F.3d 547, 555-56 (6th Cir. 2002); *United States* v. *Gregg*, 226 F.3d 253, 262-63 (3d Cir. 2000); *United States* v. *Weslin*, 156 F.3d 292, 296 (2d Cir. 1998); *Hoffman* v. *Hunt*, 126 F.3d 575, 583 (4th Cir. 1997); *Terry* v. *Reno*, 101 F.3d 1412, 1415 (D.C. Cir. 1996); *United States* v. *Dinwiddie*, 76 F.3d 913, 919 (8th Cir. 1996); *United States* v. *Wilson*, 73 F.3d 675, 679 (7th Cir. 1995); *Cheffer* v. *Reno*, 55 F.3d 1517, 1519 (11th Cir. 1995).

activities prohibited by FACE is to interrupt or eliminate completely the business operations of reproductive health care facilities. By ensuring access to reproductive health care facilities and other medical services, and thus protecting persons who are providing and/or seeking reproductive health care, FACE "by its terms" is directly "connected with a commercial transaction." *Lopez*, 514 U.S. at 561. Accordingly, and contrary to the conclusion of the court below, FACE expressly regulates activity that is "in any sense of the phrase, economic activity." *Morrison*, 529 U.S. at 613.[2]

In holding that FACE regulates only "noneconomic" activities, the district court erroneously limited its analysis to examining the *defendant's* activity, thereby entirely ignoring the obvious economic impact that violence against clinics has on the business of providing reproductive health goods and services. *See* 279 F. Supp. 2d at 836. Significantly, the Supreme Court and this Court have made clear that Congress's Commerce Clause powers must be understood more broadly than was recognized by the district court here: the power of Congress extends to activities that "arise out of or are connected with a commercial transaction," *Lopez*, 514 U.S. at 561, including activities that *interfere with* such transactions. *See, e.g., Wickard* v. *Filburn*, 317 U.S. 111 (1942); *Heart of Atlanta Motel, Inc.* v. *United*

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[2] Unlike *Morrison* and *Lopez*, where the conduct expressly regulated by the challenged statutes and the immediate effect of that conduct were found to be non-economic, the conduct prohibited by FACE is conduct that invariably interferes with commercial transactions and is intended to have a direct commercial effect. Thus, contrary to the district court's conclusion, there is no need to "pile inference upon inference," *Lopez*, 514 U.S. at 567, to conclude that the acts prohibited by FACE interfere with persons, things, and the provision of reproductive health services in interstate commerce.

States, 379 U.S. 241 (1964) (upholding the Civil Rights Act of 1964 because a race-based refusal to provide commercial hotel or restaurant services involves "economic" activity); *Katzenbach* v. *McClung*, 379 U.S. 294 (1964) (same); *GDF Realty*, 326 F.3d at 638 (recognizing that whether an activity is economic should be given a broad reading under the Commerce Clause); *Groome Res. Ltd.* v. *United States*, 234 F.3d 192, 208 (5th Cir. 2000) (same).

And, while this Court previously described the conduct regulated by FACE as "noncommercial," *Bird I*, 124 F.3d at 675, the Court's use of that term clearly does not encompass a determination by this Court that the acts being prohibited by FACE are not "economic" within the meaning of the Supreme Court's jurisprudence on the Commerce Clause. *Compare Bird I*, 124 F.3d at 675 (stating that *Wickard* v. *Filburn*, 317 U.S. 111 (1942), "concern[ed] congressional regulation of intrastate, noncommercial activity") *with Morrison*, 529 U.S. at 610 (stating *Wickard* "involved economic activity").[3]

Indeed, the economic impact on reproductive health clinics of anti-abortion blockages and violence is well-documented, and has, since *Bird I*, only become more evident. For example, studies conducted by the National Abortion Federation and other organizations that track incidents of violence against reproductive health care facilities, which *amici* attach as Exhibits ("Exs.") A through C of their Addendum, document that violent and obstructive acts directed

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[3] Moreover, to the extent that the *Bird I* Court held otherwise, we respectfully submit that this ruling should be revisited for the reasons discussed herein.

at reproductive health facilities have caused significant economic harm. Among other things – and as Congress expressly found prior to enacting FACE – such conduct has forced dozens of clinics to close; has caused millions of dollars of damage; has caused serious delays in the provision of medical services, forcing women to undergo more costly procedures; and has intimidated a number of health care providers from offering medical services. These studies highlight that:

- since 1977, thousands of clinic blockades, clinic invasions and other reported incidents of disruption at reproductive health care facilities have taken place in the United States, preventing the provision of reproductive health care and other medical services to patients nationwide (Exs. A-C);
- since 1977, arson and bombing attacks on reproductive health care facilities, alone, have caused an estimated *$17 million* in property damage (Ex. A);
- since 1992, butyric acid attacks have forced numerous clinics to close and have caused over $1 million in property damage (Ex. B); and
- since 1998, nearly 10% of all clinics nationwide have experienced staff resignations due to violent and obstructive acts, causing serious delays in the provision of medical services as well as temporary closures (Ex. C).

As these studies further demonstrate, the obstructive and violent conduct regulated by FACE is intended to interfere with and stop *the commercial activity* of providing reproductive health care services. *See, e.g.* Ex. B. Because the effect of the activity expressly regulated by FACE is, at its essence, unambiguously economic, this Court should – as have the Third and Sixth Circuits post-*Morrison* – find that the first prong of the *Morrison* inquiry is satisfied.

B. The Economic Activity Regulated by FACE Has A Substantial Effect on the National Commercial Market in Abortion-Related Services

This Court has explained that "there are two ways in which intrastate activity might substantially affect interstate commerce": either the activity being regulated alone has such an effect, or, "the activity's effects may be aggregated with those of other similar activities, the sum of which might be substantial in relation to interstate commerce." *GDF Realty*, 326 F.3d at 640. In *Bird I*, this Court concluded that when the activities being regulated by FACE are considered in the aggregate, they undoubtedly have a substantial affect on interstate commerce. "In light of the national commercial market in abortion-related services recognized by Congress, we hold that Congress was justified in concluding that the regulation of intrastate activity – the activity prohibited by the Act – was necessary to ensure the availability (both in terms of access and price) of abortion services in the national commercial market." 124 F.3d at 678.

The district court mistakenly concluded that *Morrison* called into question this Court's use of the aggregation principle in *Bird I*. *See* 279 F. Supp. 2d at 835. In fact, *Morrison* did no such thing, and the other circuits to have addressed the question have so held. Rather than breaking any new ground, *Morrison* simply derived its four-factor framework from *Lopez*, which predated this Court's decision in *Bird I* by almost two years. *See Morrison*, 529 U.S. at 609 ("Since *Lopez* most recently canvassed and clarified our case law governing this third category of Commerce Clause regulation, it provides the proper framework

for conducting the required analysis . . ."). Furthermore, nothing in *Morrison* questioned the Supreme Court's ruling in *Lopez* that Congress may regulate activities that form "an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated," because, in the aggregate, such activities substantially affect interstate commerce. *Lopez*, 514 U.S. at 561. Indeed, as this Court has explained, "the *Morrison* Court did not analyze this aspect of *Lopez*, as there exists no 'national market' to protect women from violence. The Court did, however, cite to Justice Kennedy's concurrence in *Lopez*, recognizing this means of analysis." *Groome Res. Ltd.*, 234 F.3d at 210 n.28 (citing *Morrison*, 529 U.S. at 611). Thus, because, as explained above, protection of income-generating reproductive health clinics *is* economic in nature, the "national market" rationale set forth in *Lopez* and followed in *Bird I* still applies.

Indeed, this Court, post-*Morrison*, has repeatedly applied the principles of aggregation discussed in *Bird I* – namely, the "national commercial market" rationale – to uphold numerous statutes against Commerce Clause challenges, often in cases involving far fewer commercial activities than the provision of health care services at issue here. For example, in *GDF Realty*, its most recent Commerce Clause decision, this Court held that the Endangered Species Act's "take" provision, which prohibited land development affecting an endangered species, was "economic in nature," and that the link between species loss and interstate commerce was "substantial" because regulation of solely

"intrastate" takes was an essential part of the larger economic regulatory scheme. *GDF Realty*, 326 F.3d at 640. Similarly, in *United States* v. *Ho*, 311 F.3d 589 (5th Cir. 2001), this Court held that the asbestos work practice standards imposed by the Clean Air Act were valid economic regulations because, in the aggregate, conduct violating those standards clearly "posed a threat to the interstate commercial real estate market." *Id.* at 604.

In fact, in almost every Commerce Clause case since *Morrison*, this Court has upheld the challenged statute under the "national commercial market" rationale. *See United States* v. *Mississippi Dep't of Pub. Safety*, 321 F.3d 495, 500-01 (5th Cir. 2003) (upholding the Americans with Disabilities Act because of the "compelling evidence supporting the proposition that there is a national labor market and that even local acts of discrimination, when considered in the aggregate, can have a substantial effect on that market"); *United States* v. *Kallestad*, 236 F.3d 225, 229 (5th Cir. 2000) (upholding the Protection of Children From Sexual Predators Act because "Congress could rationally have determined that it must reach local, intrastate [possession of child pornography] in order to effectively regulate a national, interstate market"); *Groome Res. Ltd.*, 234 F.3d at 210 (upholding the Fair Housing Amendments Act because of Congress's "plain intent to prohibit discrimination in the national market for housing"). And, in nearly every one of these cases, this Court has approvingly cited to *Bird I* as an example of legitimate, economic regulation that was related to a larger regulatory

scheme regarding a national commercial market.[4] It is thus clear that there is no "fallacy in the *Bird I* precedent." 279 F. Supp. 2d at 828 n.1. On the contrary, this Court has consistently recognized the precedential value of *Bird I* – and the national commercial market rationale espoused by *Bird I* – even after *Morrison*.

That there is a "national commercial market" for abortion-related services, and that the regulation of local acts of violence against reproductive health care facilities is essential to protect that market, is also clear from the numerous studies and findings contained in *amici*'s Addendum.

First, the "national commercial market" for these services is readily apparent from the fact that both patients and providers of reproductive health care travel across state lines, thereby creating "an interstate market both with respect to patients and doctors." *Gregg*, 226 F.3d at 263. Confirming Congress's findings and this Court's holding in *Bird I*, the attached studies demonstrate that not only do substantial numbers of women travel interstate to seek the services of reproductive health clinics (*see* Exs. D-E), but doctors and staff also routinely travel across state lines to provide reproductive health-related services. *See, e.g.* Anna Kampourakis and Robin C. Tarr, Note, *About F.A.C.E. in the Supreme Court: The Freedom of Access to Clinic Entrances Act in Light of Lopez*, 11 St. John's J. Legal Comment.

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[4] *See GDF Realty*, 326 F.3d at 631; *Ho*, 311 F.3d at 604 n.15; *Kallestad*, 236 F.3d at 230-31; *Groome Res. Ltd.*, 234 F.3d at 210; *see also United States* v. *McFarland*, 311 F.3d 376, 400 (5th Cir. 2002) (per curiam) (Garwood, J., dissenting) ("Of course, Congress may protect, enhance, or restrict some particular interstate economic market, such as those in wheat, credit, minority travel, *abortion service*, illegal drugs, and the like, and Congress may regulate intrastate activity as part of a broader scheme.") (emphasis added) (citation omitted).

191, 213 (1995). And reproductive health clinics themselves are engaged in interstate commerce; for example, clinics purchase medicine and medical supplies across state lines. *Id.* In short, as Congress found, these clinics "operate within the stream of interstate commerce." S. Rep. No. 103-117, at 31 (1993).

Second, the conduct expressly regulated by FACE disrupts commercial transactions and, thus, has a "direct effect" on the "national commercial market in abortion-related services." *Bird I*, 124 F.3d at 677. As this Court has already held, when considered in the aggregate, "the activity proscribed by the Act – which has (or threatens to have) the effect of precluding access to abortion-related services in the area served by the targeted clinic – can have a substantial effect on the availability of abortion-related services in the national market." *Id.* at 681. Indeed, as already noted, the illegal conduct listed in the studies cited in Section A, *supra*, causes millions of dollars in damages, impedes the ability of patients to receive medical care, directly correlates to the resignation of health care professionals and thereby also contributes to a nationwide shortage of reproductive health services, and repeatedly forces clinic closures. In short, the damage caused to reproductive health care facilities eliminates, either temporarily or permanently, the reproductive health care services that are provided by the facilities. Thus, this extensive evidence only serves to confirm that, in the aggregate, interference with reproductive health care facilities severely curtails "abortion-related services" in the "national commercial market," and thus appropriately may be regulated under Congress's Commerce Clause powers.

Accordingly, as this Court found in *Bird I*, there still exists, even after *Morrison*, a direct nexus between the conduct being regulated by FACE and the availability and provision of reproductive health services in interstate commerce. *Gregg*, 226 F.3d at 265-66; *Norton*, 298 F.3d at 558-59. Because Congress may legitimately regulate local acts of obstruction and violence against reproductive health care clinics that have an effect on "the national commercial market in abortion-related services," FACE is a valid exercise of Congress's powers.

CONCLUSION

In 1997, this Court properly upheld FACE as a valid regulation of activity that had a substantial effect on interstate commerce. Since that time, the justification for doing so has only been strengthened, not weakened. Because FACE regulates conduct that interferes with the economic activities of reproductive health clinics, and because regulation of that conduct is an essential part of the larger regulatory scheme protecting the national market in abortion services, FACE is a valid exercise of Congress's power, and the district court's decision holding FACE unconstitutional should be reversed.

Dated: February 19, 2004

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Keith Whitman, hereby certify under penalty of perjury, this 19th day of February, 2004, that true and correct paper and electronic copies of the BRIEF FOR *AMICI CURIAE* IN SUPPORT OF APPELLANT, UNITED STATES OF AMERICA, ON BEHALF OF AMERICAN CIVIL LIBERTIES UNION, CENTER FOR REPRODUCTIVE RIGHTS, NATIONAL ABORTION FEDERATION, AND PLANNED PARENTHOOD FEDERATION OF AMERICA SUPPORTING REVERSAL OF THE DISTRICT COURT were served, via first class mail, postage prepaid on the following counsel of record:

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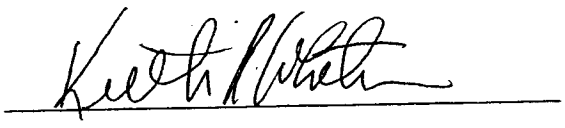

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CERTIFICATE OF COMPLIANCE

Pursuant to Fifth Circuit Rule 32.3 and Rule 32(a)(7)(c) of the Federal Rules of Appellate Procedure, I hereby certify that the foregoing brief was prepared using Microsoft Word 2002 and complies with the type and volume limitations set forth in Rule 32 of the Federal Rules of Appellate Procedure. I further certify that the font used for text is Times New Roman, a proportionally spaced font, in 14 points, and for footnotes is Times New Roman 12 points, and the computerized wordcount for the foregoing brief (excluding exempt material) is 3554.

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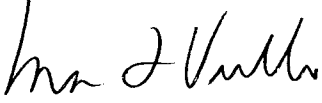

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