Statement of Judith C. Appelbaum for the Hearing of the Subcommittee on the Constitution and Limited Government of the House Judiciary Committee, April 28, 2026

On the Freedom of Access to Clinic Entrances Act (FACE)

I am pleased to provide this statement for the record of the Subcommittee's hearing on April 28, 2026, entitled "From Tool to Weapon: The FACE Act and the Dangers of Federalizing Criminal Law." I base what follows on my deep knowledge of FACE and its history stemming from my role as the lead Congressional staff person responsible for drafting FACE and moving it through the legislative process to enactment when I served as Counsel to Senator Edward M. Kennedy, the bill's chief sponsor, in the 1990's. In the years since, I have closely monitored FACE's impact and its treatment by the courts.

FACE was enacted, with strong bipartisan support (including support from Senators with strong anti-abortion records), as a direct response to a nationwide campaign of violence and other extreme tactics that were barring access to abortion and other reproductive health services in the late 1980's and early 1990's. This conduct included bombings, arson, blockades and invasions of clinics and assaults and death threats targeted at reproductive health care providers – and even murder. These facts are thoroughly documented in the legislative record. To address this conduct, the law's central provisions prohibit – and provide criminal penalties and civil remedies for – the use or threat of force, physical obstructions of entrances to reproductive health clinics, and destruction or damage to clinic property, when such conduct intentionally injures, intimidates or interferes with persons seeking to obtain or provide reproductive health services. During the legislative process, language was added that prohibits the same conduct when aimed at places of religious worship. 18 U.S.C. § 248(a).

After FACE became law, it quickly had its intended effect: the violent and obstructive conduct that it addressed began to subside. *See, e.g.*, a 1996 report concluding that "violent protests at abortion clinics have decreased sharply in the 28 months since Congress made it a Federal crime to obstruct access to clinics." FACE has continued to reduce these extreme measures, although attacks on patients and providers of reproductive health services have by no means ended. FACE was critically needed when it was enacted and it is still needed now.

I would like to briefly address the main arguments made by opponents of FACE: that it is an example of "over-federalization" of criminal law, addressing matters that state laws can handle, and that FACE is unconstitutional. First, the record before Congress showed that *only a federal response* could stop the wave of extreme conduct against reproductive health patients and providers that was taking place across the country. Second, numerous Federal Circuit Courts have considered the constitutionality of FACE and, without exception, they have upheld it.

1. **FACE was enacted because state and local laws against using or threatening violence and blocking clinic entrances had proved inadequate, and the record before Congress showed that a federal response was urgently needed.** The conduct at issue

was nationwide in scope and included blockades and attacks that often were organized and conducted across state lines. But after the Supreme Court's decision in *Bray v. Alexandria Women's Health Clinic* in January 1993, federal injunctions were not available. Moreover, state and local law enforcement authorities simply were not up to the job of stopping many of the attacks. In some places, local officials willfully refused to act because of their anti-abortion views. In others, local authorities were willing to conscientiously enforce applicable state and local laws but were unable to do so; some were overwhelmed by massive human blockades and lacked jails large enough to hold the offenders. Moreover, the penalties for violations of local laws like trespass were so low (fines equivalent to speeding tickets) that they created no deterrent – indeed, offenders sometimes went right back to the blockades after arrest. See the Senate Committee Report on FACE at pp. 3-14, 17-21, and other records cited there, S. REP. NO. 103-117 (1993); *see also, e.g.*, the Senate Committee Hearing Record, S. HRG. 103-138 (May 12, 1993) at pp. 73-75 (testimony of City Manager, Falls Church, VA).

In short, whatever one's views on over-federalization in some areas of law, in the case of FACE the record before Congress was replete with evidence that a national response to a national problem, with meaningful federal remedies and penalties, was required.

2. **It is settled law that Congress had Constitutional authority to enact FACE under the Commerce Clause**. The courts have rejected every challenge to Congress's authority to enact FACE, finding that it had authority under the Commerce Clause of the Constitution (Art. I, § 8, cl. 3). *Eight* Circuit Courts (the Second, Third, Fourth, Fifth, Seventh, Eighth, Eleventh and D.C. Circuits) have concluded that the FACE is within the Commerce Clause power because the core conduct FACE prohibits – the use or threat of force and physical obstruction aimed at reproductive health care patients or providers – substantially affects interstate commerce. There is no decision to the contrary. For summaries of the extensive legislative record of the offending conduct's effects on interstate commerce see *U.S. v. Bird*, 124 F.3d 667, 678-682 (5th Cir. 1997); *Norton v. Ashcroft*, 298 F.2d 547, 558-559 (6th Cir. 2002).

Several cases upholding FACE under the Commerce Clause were decided after the Supreme Court decisions in *United States v. Lopez* (1995) and *United States v. Morrison* (2000) set forth the current standards governing the reach of the Commerce Clause. *See*, *e.g.*, *Norton v. Ashcroft, supra*. Moreover, no court has discerned a principle of federalism or state sovereignty that could override Congress's enumerated Commerce Clause power

to enact FACE, and a Tenth Amendment argument to that effect has been expressly rejected. *Cheffer v. Reno*, 55 F.3d 1517 (11th Cir. 1995).[1]

3. **It is also settled law that FACE does not violate the First Amendment's Free Speech Clause.** FACE challengers have argued that it abridges the First Amendment because it targets expressive activity based on its anti-abortion content, or because it is overbroad or vague. The courts have unanimously rejected these arguments. They have held that FACE is content- and viewpoint-neutral and is aimed at violent and obstructive conduct that is outside First Amendment protection even if motivated by certain biases or beliefs, and that FACE serves substantial government interests (public safety) and is narrowly tailored to serve them. They also have held that FACE is not vague or overbroad because of its limited reach and its narrow definitions (*e.g.*, "physical obstruction" is defined as "rendering passage to or from [a clinic or other facility] unreasonably difficult or hazardous"). *See, e.g.*, *United States v. Gregg*, 226 F.3d 252, 267-268 (3d Cir. 2000) and cases cited therein.

   Indeed, *the U.S. Supreme Court* has clearly signaled that FACE withstands scrutiny under the First Amendment's Free Speech Clause. In *McCullen v. Coakley*, 573 U.S. 464 (2014), the Court struck down a Massachusetts law creating "buffer zones" around abortion clinics, finding that it burdened more speech than necessary to achieve the state's interests. *In the opinion for the Court, Chief Justice Roberts wrote that the state "could enact legislation similar to the Freedom of Access to Clinic Entrances Act" and quoted the operative FACE language, 18 U.S.C. § 248(a)(1).*

4. **Nor does FACE violate the First Amendment's Free Exercise of Religion Clause.** In a few cases, challengers argued that FACE violates the Free Exercise Clause and the Religious Freedom Restoration Act because, they claimed, it restricts protest based on the protestors' religious motivations and substantially burdens their religious exercise. The courts, however, have upheld FACE because it is generally applicable and neutral toward religion and it punishes *conduct*. *See, e.g., American Life League v. Reno*, 47 F.3d 642 (4th Cir. 1995). As one court put it, just as one's religious beliefs do not give one the right to bomb a café, religious motives are no defense to barricading an entrance to a health care clinic. *U.S. v. Gallagher*, 680 F. Supp. 3d 886, 902 (M.D. Tenn. 2023).

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[1] Courts have not reached a second source of Constitutional authority for FACE that Congress cited, Section 5 of the Fourteenth Amendment, because Commerce Clause authority is sufficient. Whether Congress had constitutional authority to enact FACE's "place of worship" provisions has yet to be adjudicated.

5. **The Supreme Court's 2022 decision in *Dobbs v. Jackson Women's Health Organization* overturning *Roe v. Wad*e has no bearing on the constitutionality of FACE**. In a few cases since the *Dobbs* decision, defendants charged under FACE have moved, unsuccessfully, to dismiss their indictments based on *Dobbs*. Courts have rejected the argument that FACE is no longer a permissible exercise of the Commerce Clause. *See*, *e.g*., *U.S. v. Zastrow* (6th Cir. 2025), available here (collecting cases); *U.S. v. Gallagher*, *supra* at 906 ("What did Dobbs change about Commerce Clause jurisdiction? Nothing."); *U.S. v. Williams*, 701 F.Supp.3d 257 (S.D.N.Y. 2023); *U.S. v. Handy*, 2023 WL 4744057 (D.D.C. July 25, 2023).

   Also unavailing in these cases were factually and legally incorrect arguments that FACE "was enacted only to protect abortion" and must be "unconstitutional in the absence of a constitutional right to abortion" and that after *Dobbs* abortion could no longer be considered a reproductive health service. As shown in the legislative record of FACE, many of the facilities that were attacked provided a range of health services that included STD prevention and treatment, family planning, and even well baby care. *See, e.g*., the Senate Committee Report, *supra*, at pp. 14-15; the Senate Committee Hearing Record, *supra*, at pp. 58-66 (testimony of the director of a Montana clinic whose services included prenatal care and delivery, STD treatment, contraception, childhood immunizations, and more – until it was destroyed by arson).

6. **"Selective/Discriminatory Prosecution" arguments also have failed**. Some FACE defendants have asked the courts for relief on the ground that they were victims of improper "selective prosecution" because, they claim, the government was motived by animosity toward their pro-life beliefs and has brought fewer FACE cases where the targets of prohibited conduct were pro-life pregnancy counseling centers. This argument has been rejected. See *Gallagher*, *supra,* and *Zastrow*, *supra* (motion to dismiss the indictment in the trial court; motion for release pending appeal in the Sixth Circuit, respectively), where the courts found no basis for this claim and cited other decisions that reached the same conclusion because there was insufficient evidence that the Government was making prosecutorial decisions for improper reasons.[2]

I hope that any further debate around FACE will take into consideration the information I have provided here.

[2] Although the Department of Justice released a report in April 2026 purporting to show that the Biden Administration "weaponized" FACE, claiming that its enforcement of FACE was biased toward charging (and disproportionately penalizing) attacks on abortion providers and not on centers that counsel against abortion, the report's serious flaws and distortions have been carefully explained by experienced former federal prosecutors. See "Separating Fact from Fiction in FACE Act Enforcement," here, and another piece here.