

MEMORANDUM

Sidewalk Counseling in the FACE of California SB 780

Last October, Governor Davis signed into law SB 780, comprising the California Freedom of Access to Clinic and Church Entrances Act and the Reproductive Rights Law Enforcement Act. The rationale for the enactment of this bill at this time is as convoluted and phony as the bill itself.

In 1994, Congress passed and President Clinton signed the federal Freedom of Access to Clinic and Church Entrances Act, 18 U.S.C. §248, commonly known as FACE. Although all of the acts prohibited under the bill were already crimes under generally applicable state laws against trespass, assault, battery, etc., the pro-abortion-controlled Congress declared that it was necessary to have a federal law because the state governments could not be trusted to enforce their own laws. Thus, Congress said, it is necessary for the federal government to step in and severely punish those crimes when they take place in the context of "reproductive health care" facilities and providers.

Fast forward to last winter: the pro-abortion-controlled California legislature declared that it was necessary to pass a similar bill in California, covering the exact same acts as FACE. Why? Because, with the change in administration, the federal government cannot be trusted to enforce its own laws. So the California Legislature passed a law prohibiting acts which are already crimes under generally applicable state laws, but, like FACE, singling out these acts for special treatment and punishment when they occur in the context of "reproductive health care" facilities and providers.

If you take away nothing else from the above, you should be in no doubt about one point: for the average sidewalk counselor or picketer, *SB 780 does not make any conduct illegal that wasn't already illegal, under both federal FACE and various state laws.* And, ironically, by the time the bill was finally passed, the draconian criminal penalties in earlier versions had been watered down to the point where they are considerably less severe than the penalties under federal FACE. The wording of the bill is indisputably confusing and vague, but this vagueness presents a danger only in the more arcane areas of First Amendment activity, i.e., advocacy of unlawful activity.

But doesn't SB 780 make it illegal to "intimidate" or "interfere with" clinic patients or workers? And aren't those terms vague enough to include regular sidewalk counseling and picketing, or at

least make it very easy to accuse a sidewalk counselor or picketer of a violation?

As with federal FACE, the operative words describing the crime are *not* "injure, intimidate, or interfere with." The words to keep your eye on come right before that: "by force, threat of force, or physical obstruction" and "by nonviolent physical obstruction." There is no violation of FACE or CalFACE in the absence of "force, threat of force, or physical obstruction."

And what does "physical obstruction" mean? "Physical obstruction" is defined as "rendering ingress to or egress from a ... facility ... impassable to another person, or rendering passage to or from a ... facility ... unreasonably difficult or hazardous to another person." In other words, physical obstruction is conduct which is already punishable under state and local laws.

Unfortunately, given the recent media hype over this bill, it is not unlikely that many people, including some police officers, will think that CalFACE has effectively outlawed sidewalk counseling. We can easily imagine a situation where a police officer would tell picketers or sidewalk counselors on a public sidewalk that they must move across the street or away from the clinic because there is a new law that prohibits "intimidating" women going into abortion clinics.

In such a scenario, the sidewalk counselors can do several things. First, they should tell the officer that they are familiar with the law, and the law prohibits intimidation by "force, threat of force, or physical obstruction." If the officer is unpersuaded, they might ask to speak to the officer's supervisor, and then explain the law to the supervisor. If the police insist that the law makes their activity illegal and threaten to make arrests, they should contact an attorney or LLDF, so that appropriate legal action can be taken.¹

There is more to CalFACE than just criminal penalties, however. First, as with federal FACE, the law creates a civil cause of action, with statutory penalties. This means that an "aggrieved" person can sue a pro-lifer under this bill and recover a set amount of monetary damages (\$1000 for a nonviolent violation and \$5000 for a violent violation) without showing any actual damage. Also, as with FACE, the law provides that the attorney general, a district attorney, or a city attorney may bring an action on behalf of an "aggrieved person" and collect not only those damages but civil penalties of \$2000 to

\$15,000 for a first violation. In both cases, the parties can also seek an injunction and their attorney fees. But, again, these damages and penalties are for *violations*, and a violation requires *force, threat of force, or physical obstruction*.

So, if CalFACE doesn't change the law, what was the point of the exercise? And why is LLDF bothering to challenge the bill?

The true purpose of CalFACE is to stigmatize and intimidate pro-life activists. But the California legislature wasn't content just to imitate federal FACE. They included in CalFACE several other provisions to drive home this stigmatization and intimidation.

First, CalFACE provides that, in any action filed for a violation of this section, a court "shall take all steps reasonably required, including granting restraining orders, to safeguard the health, safety, or privacy" of the pro-abortion parties, witnesses, or anyone "at risk" of becoming a victim. CalFACE specifically provides that these restraining orders may allow these people to testify using false names, and may prohibit photographing and videotaping.

Allowing the use of pseudonyms not only hobbles the preparation of a defense against false charges, but is bound to have a prejudicial effect on a jury which hears the case. Who would not be influenced by learning that the witnesses were so fearful for their safety that they didn't want the defendants to learn their real names? Maybe these witnesses will even be allowed to testify with paper bags over their heads, if a court finds this "reasonably required" to safeguard their health, safety, or privacy."

The provision allowing restraining orders restricting photographing is even more pernicious. Prohibiting the pro-life defendants from videotaping guarantees that the only images in the judge or jury's mind will be those put there by the media, which consistently replay ten-year-old footage of rescues rather than showing an actual boring day sidewalk counseling at a clinic. Without videotape, these cases will be reduced to swearing matches between the smooth, white-coated health care professionals and the scary, trouble-making anti-abortion fanatics.

Unfortunately, however unfair these provisions are on their face, they can probably only be effectively challenged when actually applied in a particular situation, i.e., when a plaintiff

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LIFELINE MISSION STATEMENT

The mission of Life Legal Defense Foundation is to give innocent and helpless human beings of any age, and particularly unborn children, a trained and committed defense against the threat of death, and to support their advocates in the courtrooms of our nation.

The purpose of LLDf is set forth in our mission statement above. To that end, *Lifeline* welcomes all ideas, opinions, research and comments, and all religious and political points of view, so long as not seen to be clearly divisive, and so long as fundamentally based upon the twin pillars of truth and charity.

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abortion clinic seeks an order utilizing these provisions. In the meantime, we highly recommend that pro-life activists continue to document their activities at the clinic, including the use of cameras and videotape in a non-obtrusive, non-confrontational manner.

The next poison pill provision in CalFACE is a mandate placed on the Attorney General to “collect and analyze information related to anti-reproductive rights crimes, including, but not limited to, the threatened commission of these crimes and *persons suspected of committing these crimes or making these threats.*” The attorney general is to make this information available

to federal, state, and local law enforcement agencies and prosecutors, as well as to write a report to the Legislature and publish it on the Department of Justice website.

The obnoxiousness of this provision needs no elaboration. It puts the resources and backing of the state behind every trumped-up accusation a pro-abort wishes to make against a pro-lifer. It also mandates an invasion of privacy of unknown dimension, as the law gives no guidance or limitation on the means or extent of the information collecting the Attorney General is supposed to conduct.

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However, this provision may also be the undoing of SB 780. “Anti-reproductive rights crimes” is defined to include any crime “committed partly or wholly because the victim is a reproductive health services client, ...” Under California law, false advertising is a crime. How many abortion clinic clients are misled every day by representations that abortion is a safe procedure, safer than childbirth, and that there is no link between abortion and breast cancer? Each one of these is a “anti-reproductive rights crime” which should be reported to the appropriate authorities, including the attorney general’s office, along with documentation of the false advertising and a demand that the “persons suspected of committing these crimes” be investigated. Any other crimes committed by abortion providers against their patients, such as

fraudulent billing practices, should also be reported.

When it comes time for the Attorney General to report to the Legislature, our representatives may be surprised to find out there are a lot more “anti-reproductive rights crimes” in California than they thought.

Please be advised that every case is specific to its own facts. Therefore, this memorandum should not be construed as legal advice. For more information, consult an attorney or contact LLDf’s administrative office at (707) 224-6675.

1 Ironically, SB 780 also mandates a course of training in which “subject matter experts” including specifically NOW, PPFA, National Abortion Federation, and their ilk, will train police officers in dealing with “anti-reproductive rights crimes.” We can only hope that concern for their own liability for false arrest and civil rights violations will make the police think twice before believing what these “subject matter experts” tell them about supposed crimes.