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To: Interested Parties  
From: NYCLU, Policy Department  
Date: September 2020  
Re: Application of Clinic Access Laws During the COVID-19 Pandemic

### Access to Reproductive Health Clinics during the COVID-19 Pandemic

For the past fifty years reproductive health care facilities have been targeted by aggressive and violent behavior that has intimidated entrants and prevented access to abortion care. Because of this, federal, state, and city laws were enacted to protect patients and staff entering facilities. These laws are designed to both prevent intimidation and violence as well as honor the First Amendment rights of those who choose to peacefully express their views.

Beginning in March of 2020, New York adopted strict guidelines in an attempt to slow the spread of COVID-19. This is for good reason: COVID-19 is highly contagious, causes serious illness, long-term health complications, and, in some cases, can be fatal.<sup>1</sup> Through a series of executive orders<sup>2</sup> and guidance by the

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<sup>1</sup> Velentyn Stadnytskyi, et. al., *The airborne lifetime of small speech droplets and their potential importance in SARS-CoV-2 transmission*, PROCEEDINGS OF THE NATIONAL ACADEMY OF SCIENCES OF THE UNITED STATES OF AMERICA (May 13, 2020, updated June 2, 2020), <https://www.pnas.org/content/117/22/11875> (finding that “there is a substantial probability that normal speaking causes airborne virus transmission in confined environments,” and “loud speech can emit thousands of oral fluid droplets per second”); Carrie Arnold, *How scientists know COVID-19 is way deadlier than the flu*, NATIONAL GEOGRAPHIC (July 2, 2020), <https://www.nationalgeographic.com/science/2020/07/coronavirus-deadlier-than-many-believed-infection-fatality-rate-cvd/#close> (referencing scientific studies that have estimated COVID-19 to be around 50 to 100 times more lethal than the seasonal flu).

<sup>2</sup> *New York State on PAUSE: 10 Point Plan*, NEW YORK STATE, <https://coronavirus.health.ny.gov/new-york-state-pause> (last accessed Jun. 25, 2020) (requiring individuals to practice social distancing of at least six feet from others when in public); N.Y. Exec. Order No. 202.17 (Apr. 15, 2020), <https://www.governor.ny.gov/news/no-20217-continuing-temporary-suspension-and-modification-laws-relating-disaster-emergency> (requiring any individual over age two and able to medically tolerate a face-covering to cover their nose and mouth with a mask or cloth face-covering when in public and unable to maintain, or not maintaining, social distance).

Department of Health,<sup>3</sup> New York State now requires individuals to maintain at least six feet between themselves and others while in public and to wear a face-covering when not maintaining such distance. Public health experts agree: individuals should wear a face mask whenever they are in a public place where they will encounter other people.<sup>4</sup>

Given the danger of contracting COVID-19, these guidelines inform acceptable conduct in our public spaces, including outside reproductive health care facilities. Yet across the country and in New York, clinic opponents are placing themselves within six feet of patients, staff, and clinic entrances, declining requests to wear (or properly wear) face masks, and engaging in active conversation with entrants. This conduct puts clinic entrants in the untenable position of choosing between accessing/providing constitutionally protected health care services and the safety of themselves and their families. And by triggering this unacceptable tradeoff, this conduct invokes our clinic access protections.

This memo addresses the interplay between clinic access laws, public health guidelines, and conduct by clinic opponents. Conduct that places patients and staff in reasonable fear of bodily harm by contracting COVID-19 may constitute unlawful behavior under federal, state, and city clinic access laws and lends itself to established enforcement mechanisms such as “frozen zones” or “buffer zones” (physical boundaries outside clinics to limit contact) around entrants and facilities.

### **Clinic Access and First Amendment Legal Protections**

There are three principal laws that protect clinic access in New York: the federal Freedom of Access to Clinic Entrances Act (FACE), a New York State version of FACE, and the New York City Access to Reproductive Health Care Facilities Act (ARHCF).<sup>5</sup> While similar in purpose, the laws differ to some degree with regard to the scope of their protections.

The federal and state FACE laws prohibit people from intentionally injuring, intimidating, or interfering with a reproductive health care patient or provider—or

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<sup>3</sup> According to Department of Health Guidance, a face covering must be worn when, walking on a busy street, going to pharmacies and grocery stores, visiting the doctor, and, in New York City, face coverings are required at all times when riding public transportation and are strongly recommended in indoor spaces even if social distance is maintained. *COVID-19 Face Coverings: Frequently Asked Questions*, NEW YORK CITY DEPARTMENT OF HEALTH, <https://www1.nyc.gov/assets/doh/downloads/pdf/imm/covid-19-face-covering-faq.pdf>.

<sup>4</sup> Lisa Lockerd Maragakis, *Coronavirus Face Masks & Protection FAQs*, JOHNS HOPKINS MEDICINE (July 2, 2020), <https://www.hopkinsmedicine.org/health/conditions-and-diseases/coronavirus/coronavirus-face-masks-what-you-need-to-know>.

<sup>5</sup> Freedom of Access to Clinic Entrances Act (FACE), 18 U.S.C. § 248; Clinic Access Act, N.Y. Penal Law §§ 240.70-240.71; Prevention of Interference with Reproductive Health Services (ARHCF), N.Y.C. Admin. Code §§ 10-1001-10-1007.

from attempting to injure, intimidate, or interfere with them—by force, threat of force, or physical obstruction.<sup>6</sup> They also forbid intentionally damaging or attempting to damage facility property.<sup>7</sup> In addition, the New York City ARHCF also prohibits individuals from following and harassing a clinic visitor within fifteen feet of a clinic facility and from interfering or attempting to interfere with clinic operation.<sup>8</sup>

In line with the First Amendment’s expressive speech protections, these laws provide ample room for communicating one’s viewpoint, even if the expression feels unpleasant or uncomfortable for those entering or leaving the clinic. Indeed, clinic opponents may engage in activities like holding signs or images, chanting, preaching, praying, or engaging individuals in conversation (often called “sidewalk counseling”), so long as they do not block entry to the clinic, make entry to the clinic unreasonably hazardous, interfere with the delivery of healthcare, or otherwise place individuals in fear for their safety.

Whether these activities create hazardous and intimidating conditions for clinic entrants is a fact-specific inquiry. Over the past thirty years courts have considered different types of behavior outside of clinics to determine whether it crosses the line from protected speech to prohibited conduct. In doing so, they examine “the particular factual context” of each incident, including attendant circumstances beyond a clinic opponent’s own actions, to determine whether an individual’s conduct constitutes obstruction or a threat of force.<sup>9</sup> For example, clinic opponents’

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<sup>6</sup> FACE § 248(a)(1); FACE prohibits persons who “by force or threat of force or by physical obstruction, intentionally injures, intimidates or interferes with or attempt to injure, intimidate or interfere with any person because that person is or has been, or in order to intimidate such person or other person or any class of persons from, obtaining or providing reproductive health services.” *Id.* Depending on the frequency of the violations, the law sets forth different criminal penalties. *Id.* at § 248(b). The law also allows for civil remedies which can be initiated by the reproductive health care facility itself, the U.S. Attorney General or State Attorney General. The civil remedies include temporary, preliminary or permanent injunctive relief and compensatory and punitive damages as well as reasonable fees. *Id.* at § 248(c). *See also* Clinic Access Act § 240.70(1).

<sup>7</sup> FACE § 248(a)(3); Clinic Access Act § 240.70(d).

<sup>8</sup> ARHCF §§ 10-1003(a)(3), 10-1003(a)(6); ARHCF makes it unlawful for any person to “follow and harass another person within 15 feet of the premises of a reproductive health care facility,” as well as to “knowingly interfere with the operation of a reproductive health care facility, or attempt to do the same, by activities that include, but are not limited to, interfering with, or attempting to interfere with (i) medical procedures being performed at such facility or (ii) the delivery of goods to such facility.” *Id.* ARHCF also goes further than FACE by prohibiting individuals from knowingly obstructing or interfering with reproductive health care facilities, whereas FACE only prohibits this conduct when committed intentionally. *Compare* ARHCF §§ 10-1003(a)(1)-10-1003(a)(2), *with* FACE §248(a), *and* Clinic Access Act § 240.70(1).

<sup>9</sup> *New York ex. rel. Spitzer v. Operation Rescue Nat’l*, 273 F.3d 184, 199 (2d Cir. 2001) (noting that “the particular factual context of these incidents may be critical to determining whether [defendant] has violated F.A.C.E.” and that “We also need to know what part of the zones [defendant] entered..., whether patients were present during those incidents, or even, assuming patients were present, whether [defendant’s] actions blocked clinic access.”).

physical placement, the tone of their communications, patients’ responses to their behavior, and even recent events have all been relevant to courts’ determining whether behavior crosses the line from protected speech to a violation of the law.<sup>10</sup> Here, we must take in to account the attendant circumstances of the pandemic.

### **Clinic Access Protections during the COVID-19 Pandemic**

The ongoing threat of viral transmission during the COVID-19 pandemic must be taken into consideration when determining whether clinic access remedies and enforcement are available. Whether an individual wears a face mask or maintains social distancing impacts a patient/provider’s ability to safely enter a reproductive health care facility and can place clinic entrants in reasonable fear for their safety and the safety of their loved ones. These considerations are critical when determining whether conduct rises to the level of obstruction or threats of harm under clinic access laws.

#### ***Individuals’ Conduct may not Obstruct Entrance to a Clinic***

As discussed, the federal and state FACE laws prohibit people from intentionally injuring, intimidating, or interfering with a reproductive health care patient or provider by force, threat of force, or *physical obstruction*.<sup>11</sup> The ARHCF additionally prohibits activity that “impedes” access to a facility, including entryways, driveways, and parking lots.<sup>12</sup> FACE defines obstruction as rendering passage to or from a clinic “impassible” or “unreasonably difficult or hazardous.”<sup>13</sup> Courts also consider whether the individual acted with the requisite intent—or in ARHCF claims, knowledge—to restrict patients’ freedom of movement or impede their progress to the clinic so they might have more time to communicate their message.<sup>14</sup>

And as courts have acknowledged, prohibitions on obstructing clinic entrances “does not limit physical obstruction to bodily obstruction, but rather is *broadly phrased to*

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<sup>10</sup> See *Operation Rescue Nat’l*, 273 F.3d at 198-99 (noting that the court needed to know where the defendant was standing, whether patients were present, and whether defendant’s actions blocked clinic access to determine whether there was a FACE violation); *New York ex rel. Spitzer v. Cain*, 418 F. Supp. 2d 457, 478 (S.D.N.Y. 2006) (finding that circumstances including the tone in which statements were made and proximity to the recipient provided evidence of defendants’ intent to intimidate); *People of State of New York ex rel. Spitzer v. Kraeger*, 160 F. Supp. 2d 360, 375 (N.D.N.Y. 2001) (holding that the context of a recent bombing of an abortion clinic added to an employee’s reasonable fear that an unmarked package was a bomb).

<sup>11</sup> See *supra*, note 6.

<sup>12</sup> ARHCF § 10-1002; The ARHCF defines “premises of a reproductive health care facility” to mean “the driveway, entrance, entryway, or exit of a reproductive health care facility and the building in which such facility is located and any parking lot in which the facility has an ownership or leasehold interest.” *Id.*

<sup>13</sup> FACE § 248(e)(4).

<sup>14</sup> See, *Cain*, 418 F. Supp. 2d at 480.

*prohibit any act rendering passage to the facility unreasonably difficult.*<sup>15</sup> For example, in *U.S. v. Mahoney*, a federal appellate court interpreted the prohibition on obstruction to capture behavior that compels patients to pass through a “crowded and chaotic” scene to enter the clinic – in *Mahoney*, the protester had been kneeling and praying outside of the emergency exit where patients did not typically enter, thus forcing patients to navigate the chaotic scene at the other entry point.<sup>16</sup> Other examples of FACE’s prohibition on obstructing clinic entrances include: standing directly in front of pedestrians in an attempt to provide literature, standing directly in front of a clinic door and refusing to move, blocking patients inside their cars by standing near car doors, and creating demonstrations so close to clinic entrances that patients are compelled to use alternate entrances.<sup>17</sup> Importantly, entry to the clinic need not be impossible: the critical point is whether conduct makes “ingress or egress unreasonably difficult given the circumstances.”<sup>18</sup>

The COVID-19 pandemic and public health guidelines cast new light on the meaning of obstructing clinic entrants under the law. Whereas courts already consider obstruction to include behaviors such as pacing in a manner that monopolizes a narrow walkway, crowding, and failing to yield to clinic visitors, this and similar conduct now additionally risks transmitting COVID-19.<sup>19</sup> Approaching patients at close range, not wearing a mask, or engaging in spirited conversation under either or both of these conditions creates unreasonably hazardous conditions for patients and staff, ultimately giving rise to a form of constructive obstruction. Forcing close and unprotected contact during a pandemic, in defiance of public health warnings, is more than “unpleasant” or “emotionally difficult;” it makes clinic access unreasonably challenging and hazardous and impedes patients from entering the clinic.<sup>20</sup>

In some instances, conversation may be welcome: patients or staff may choose to accept the invitation to converse at close range without protective equipment. This is not obstruction. However, the choice to engage is just that, a choice; and therefore, consent to approach prior to creating the obstruction must be secured.

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<sup>15</sup> *U.S. v. Mahoney*, 247 F.3d 279, 284 (D.C. Cir. 2001)(citing FACE § 248(e))(emphasis added).

<sup>16</sup> *Id.* An individual who knelt and prayed in front of an emergency exit did not avoid making ingress or egress unreasonably difficult just because the door was not the primary entrance and was typically locked. Simply by entering a cordoned-off area and subjecting himself to arrest, the individual contributed to “disruption” and “interference” with clinic entrants, compelling them to use a rear entrance that was “crowded and chaotic.” This constituted physical obstruction, even though people were still ultimately able to enter and exit the clinic. *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> See *Kraeger*, 160 F. Supp. 2d at 369-70, 376.

<sup>20</sup> Cf. *Operation Rescue Nat’l*, 273 F.3d at 195.

## ***Individuals' Conduct may not Threaten Force against an Entrant***

In addition, FACE prohibits individuals from using threats of force to intentionally intimidate, interfere with, or injure clinic patients or staff and from attempting to do so.<sup>21</sup> The law defines intimidation as placing a person in reasonable apprehension of physical injury.<sup>22</sup> Similarly, the ARHCF prohibits conduct that places another person in reasonable fear of physical harm.<sup>23</sup>

In determining whether a person's speech or conduct constitutes a threat of force, courts look to whether the person being threatened has both a subjective and objective fear, and whether the aggressor's actions indicate an immediate intent to harm.<sup>24</sup> Courts also consider the entire factual context in which the threat was made.<sup>25</sup> For example, placing a package that resembled a bomb at a clinic entrance constituted a threat especially in light of a bombing at another reproductive health care facility, *i.e.* knowledge that clinics have been bombed lent objectivity to entrants' fears.<sup>26</sup>

During the COVID-19 pandemic it is both subjectively and objectively reasonable for clinic entrants to fear imminent harm from individuals approaching them within six feet or not wearing protective face coverings and engaging in active conversation. Studies have demonstrated that speaking, yelling, or singing are activities that increase aerosol emissions.<sup>27</sup> The risk of viral transmission inherent in such interactions constitutes an immediate physical threat.

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<sup>21</sup> Clinic Access Act § 240.70(1)(a)-(c). While the state FACE Act does not explicitly define "force," the Southern District has interpreted it as "power, violence, or pressure directed against a person or thing," including even "fleeting and de minimis contact." *Cain*, 418 F. Supp. 2d at 473. This includes actions like bumping into clinic visitors and stepping on their heels. *Kraeger*, 160 F. Supp 2d at 375.

<sup>22</sup> Clinic Access Act § 240.70(1)(a)-(c).

<sup>23</sup> ARHCF § 10-1003.

<sup>24</sup> *See Operation Rescue Nat'l*, 273 F.3d at 196-97; *See also Cain*, 418 F. Supp. 2d at 475, quoting *United States v. Malik*, 16 F.3d 45, 49 (2d Cir.1994) (inquiring whether "an ordinary, reasonable recipient who is familiar with the context of the [statement] would interpret it as a threat of injury.").

<sup>25</sup> *Cain*, 418 F. Supp. 2d at 477 (explaining that "written words or phrases take their character as threatening or harmless from the context in which they are used, measured by the common experience of the society in which they are published, and the same must be true for non-verbal communication." (internal quotations omitted)); *See also Kraeger*, 160 F. Supp. 2d at 373 (N.D.N.Y. 2001) (stating that "the court must analyze an alleged threat 'in the light of its entire factual context.'").

<sup>26</sup> *Kraeger*, 160 F. Supp. 2d at 375.

<sup>27</sup> *See Philip Anfinrud, et. al., Could SARS-CoV-2 be transmitted via speech droplets?*, MEDRXIV (Apr. 6, 2020), <https://www.medrxiv.org/content/10.1101/2020.04.02.20051177v1>; *see also* Lea Hamner, et. al., *High SARS-CoV-2 Attack Rate Following Exposure at a Choir Practice*, CENTERS FOR DISEASE CONTROL AND PREVENTION (May 15, 2020), <https://www.cdc.gov/mmwr/volumes/69/wr/mm6919e6.htm>.

## Clinic Access Law Enforcement

Clinic access laws can be difficult to enforce. Police officers are often unfamiliar with the history of violence outside facilities and the contours of the law and, at times, can treat patients and abortion opponents as two different sides at a protest. In addition, while police are not in the best position to enforce public health guidelines that require, for instance, wearing a mask, police are the agency authorized to enforce clinic access laws and have the ability to create and establish boundaries outside of clinics to ensure safe patient entry. Indeed, an NYPD Operations Order instructs commanding officers to create frozen zones around clinics as necessary to ensure safe, unobstructed access in situations where less restrictive means will likely be ineffective.<sup>28</sup> This policy is intended to balance patients' rights to enter clinic facilities without interference, maintain public safety and order, allow for the free flow of pedestrian traffic, and account for those who wish to express a message.<sup>29</sup>

Indeed, where facilities demonstrate a pattern of legal violations or concern for future violations, both courts and law enforcement officials can enforce clinic access laws by establishing protective perimeters outside facility entrances.<sup>30</sup> Often called buffer zones, these boundaries require physical distance between clinic opponents and clinic entrants in order to facilitate safe access to reproductive health care and allow for opportunities to engage in First Amendment protected activity. In addition, for all New York City facilities, the ARHCF creates a 15-foot zone in which clinic opponents face additional prohibitions for following and harassing clinic entrants.<sup>31</sup>

The COVID-19 pandemic wholly alters the approach and ability to access places of public accommodation. Clinics that are facing unsafe protest activity should consider their options under applicable laws. No one should be forced to choose between accessing constitutionally protected reproductive health care services and falling sick to a deadly virus.

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<sup>28</sup> *Guidelines for Demonstrations at Reproductive Health Care Facilities*, Operations Order No. 40, NEW YORK POLICE DEPARTMENT (July 13, 2016).

<sup>29</sup> *Id.*

<sup>30</sup> *See Operation Rescue Nat'l*, 273 F.3d (upholding a 15-foot nonporous no-protest buffer zone outside a reproductive health care facility).

<sup>31</sup> They may, however, engage in peaceful demonstration, including speaking to clinic visitors, holding signs, and handing out literature. ARHCF § 10-1003.