

The following brief was joined by James E. Andrews, as Stated Clerk of the General Assembly of the Presbyterian Church (U.S.A.). It was filed in the Supreme Court in the State of New York on January 19, 1996.

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: SECOND DEPARTMENT

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	:	
LONG ISLAND GYNECOLOGICAL SERVICES, P.C.,	:	
	:	
Plaintiff-Appellant;	:	
Cross-Respondent,	:	
	:	
-against-	:	Docket Nos.
	:	95-10358 and
1103 STEWART AVENUE ASSOCIATES LIMITED	:	95-10986
PARTNERSHIP,	:	
	:	
Defendant-Respondent-	:	
Cross Appellant.	:	
	:	

BRIEF OF THE AMICI CURIAE
NOW LEGAL DEFENSE AND EDUCATION FUND
IN SUPPORT OF APPELLANT
(Additional Amici Listed Inside Cover)

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Nassau County Clerk's Index No. 95-4890

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AMERICAN ASSOCIATION OF UNIVERSITY WOMEN NEW YORK STATE
THE AMERICAN JEWISH CONGRESS COMMISSION FOR WOMEN'S EQUALITY
AMERICAN MEDICAL WOMEN'S ASSOCIATION
AMERICAN VETERAN'S COMMITTEE, INC.
ANTI-DEFAMATION LEAGUE
BALFOUR BRICKNER
THE CENTER FOR CONSTITUTIONAL RIGHTS
THE CENTER FOR REPRODUCTIVE LAW AND POLICY
CHOICES WOMEN'S MEDICAL CENTER, INC.
COALITION OF LABOR UNION WOMEN
CORNELL UNIVERSITY ADJUNCT FACULTY FEDERATION, LOCAL 4228, NEW YORK
STATE UNITED TEACHERS, AFT, AFL-CIO
CORTLAND COUNTY HEALTH DEPARTMENT, THE JACOBUS CENTER FOR
REPRODUCTIVE HEALTH
EQUAL RIGHTS ADVOCATES, INC.
ETHICAL CULTURE SOCIETY OF QUEENS
FAMILY PLANNING ADVOCATES OF NEW YORK STATE, INC.
THE FIRST UNITARIAN CHURCH OF BROOKLYN
JESSIE SMITH NOYES FOUNDATION
LAMBDA LEGAL DEFENSE AND EDUCATION FUND
MY SISTERS' PLACE
NATIONAL ABORTION FEDERATION
NATIONAL CENTER FOR THE PRO CHOICE MAJORITY
NATIONAL COUNCIL OF JEWISH WOMEN NEW YORK SECTION
NATIONAL COUNCIL OF JEWISH WOMEN, NEW YORK STATE PUBLIC AFFAIRS
THE NATIONAL EMERGENCY CIVIL LIBERTIES COMMITTEE
NATIONAL ORGANIZATION FOR WOMEN FOUNDATION, INC.
NATIONAL WOMEN'S LAW CENTER
NEW YORK COUNTY CHAPTER OF AMERICAN ACADEMY OF FAMILY PHYSICIANS
PLANNED PARENTHOOD OF NASSAU COUNTY
PLANNED PARENTHOOD OF NEW YORK CITY
PLANNED PARENTHOOD OF ROCHESTER AND THE GENESSEE VALLEY
PLANNED PARENTHOOD OF SUFFOLK COUNTY, INC.
PLANNED PARENTHOOD OF TOMPKINS COUNTY
PLANNED PARENTHOOD OF WESTCHESTER AND ROCKLAND, INC.
PRESBYTERIAN CHURCH (U.S.A.)

PROCHOICE RESOURCE CENTER
PUERTO RICAN LEGAL DEFENSE AND EDUCATION FUND, INC.
RELIGIOUS COALITION FOR REPRODUCTIVE CHOICE, NEW YORK METRO AREA
SEXUALITY INFORMATION AND EDUCATION COUNCIL OF THE UNITED STATES
UPPER HUDSON PLANNED PARENTHOOD
VOTERS FOR CHOICE
WESTCHESTER COALITION FOR LEGAL ABORTION
WOMANCARE HEALTH CENTER
WOMEN EMPLOYED
WOMEN'S ALLIANCE FOR THEOLOGY, ETHICS, AND RITUAL
WHAM, WOMEN'S HEALTH ACTION MOBILIZATION
WOMEN'S LEGAL DEFENSE FUND

BRIEF OF AMICI CURIAE IN SUPPORT OF APPELLANT

PRELIMINARY STATEMENT

This Court must decide whether a private landlord may be permitted to evict a reproductive health facility and prohibit its lawful and constitutionally protected performance of abortion services solely in response to anti-choice violence. The decision of the court below, which upheld building rules designed to ban the provision of abortion services and authorized the commencement of eviction proceedings, seriously interferes with the constitutional right of reproductive choice and contravenes the national public policy of protecting access to reproductive health facilities. Moreover, the ruling undermines the safety and security of all

tenants and rewards acts of violence, leaving tenants vulnerable to eviction based on the unlawful conduct of third parties beyond their control.

Violent anti-abortion activities clearly are at the heart of the instant controversy. The record demonstrates that since 1993 and throughout 1994, plaintiff-appellant-cross respondent Long Island Gynecological Services, P.C. ("Tenant") has been the target of violent protests and attacks -- including random shootings at windows and assaults of clinic staff outside Tenant's facility. (See Appellant's Brief ("Appellant's Br.") at 5-6, 9-10.) In response to some of the early activity, defendant-respondent-cross appellant 1103 Stewart Avenue Associates Limited Partnership ("Landlord") obtained a Temporary Restraining Order ("TRO") barring protesters from assembling or demonstrating on its property. (See id. at 5.) Although the violence continued to escalate following the issuance of the TRO in January of 1994, Landlord took no steps to enforce the TRO, or to obtain permanent injunctive relief. (See id. at 6.) Instead, Landlord launched a campaign to ban Tenant's lawful and constitutionally protected performance of abortion procedures by issuing unreasonable building rules (see id. at 10-12);¹ sabotaged

¹ The first of Landlord's rules, issued on January 11, 1994 (the "January 11 Rule"), expressly prohibited Tenant from performing abortion procedures, stating:

Please be advised that, effective immediately, no tenant

Tenant's attempts to provide additional building security at its own expense (id. at 8-9); and sought to terminate Tenant's lease solely based on "the continued performance of abortion procedures" (id. at 15-16) (quoting Notice of Termination, February 13, 1995). The building regulations represent the culmination of several months of Landlord's attempts to oust Tenant from the premises. (See id. at 6.)

It is not disputed that Landlord's attempts to prohibit Tenant from providing abortion services stem purely from the onslaught of illegal threats, intimidation and violence aimed at Tenant's facility. Although Tenant and its patients have been the primary targets of this terrorism, abortion foes also have threatened Landlord, its employees, and other persons who work in the building. (See id. at 9-10.) The parties and the Court also have presumed that abortion foes are behind the bomb threats, shootings and vandalism. (See id. at 9 n.2.) Abortion foes have similarly threatened other

of 1103 Stewart Avenue shall perform any abortions or other medical services in any way related to pregnancy terminations. This rule is being made effective immediately in order to . . . preserve the Building against external dangers. * * * Any Tenant's failure to comply with the foregoing rule shall constitute a default under the Tenant's lease and be grounds for an eviction.

(See Appellant's Br. at 10) (emphasis added). Although Landlord ultimately withdrew and "revised" the January 11 Rule upon the advice of its counsel -- apparently concluding that such a rule was inherently unreasonable and unenforceable -- it issued revised rules that admittedly sought to "adjust the language" to accomplish the same result. (Id. at 10-12.)

abortion providers in Nassau County. During the weekend of January 7, 1995, a death threat posted on the door of 1103 Stewart Avenue also appeared at three other Nassau County facilities that provide abortions. The notices warned: "Danger. This is a war zone. People are being killed here -- like in Boston. You risk injury or death if you are caught on or near these premises." (See id. at 9-10.) These threats, occurring within a week after the brutal murder of two clinic employees in Brookline, Massachusetts, have been credited with achieving their desired goal in at least one other Nassau County facility. The Alternatives for Women Center, which provided abortions only two days each week, reportedly was evicted from its offices as a result of threats by anti-choice radicals. See Sylvia Addock, Abortion Clinics Losing Leases; Landlords Complain of Protesters' Threats, Newsday, March 3, 1995, at A7.

If allowed to stand, Amici believe that the ruling below will have serious ramifications for the constitutional rights of abortion providers and their patients and will permit criminal anti-choice conduct to unlawfully interfere with women's access to reproductive health care. Furthermore, if the decision below is not overturned, Amici comprising civil rights advocacy organizations, religious institutions, labor unions and other groups that, due to their status or beliefs, may become targets of violence, could well find themselves vulnerable to eviction as a result of conduct by hostile

third parties.

SUMMARY OF ARGUMENT

Building rules that are designed to evict a reproductive health care facility and prohibit its performance of abortions, notwithstanding the existence of a lease that expressly authorizes its use of the premises to provide such services, are unreasonable and judicially unenforceable. The Landlord's efforts to justify such regulations as a measure necessary to protect the safety and security of the building's tenants from "pro-life" violence do not make them reasonable under New York common law. Such efforts uniquely deprive reproductive health providers of the protections of binding contractual agreements, leaving them vulnerable to eviction even though they have complied with the terms of a lease.

Moreover, to sustain such regulations, as did the ruling below, would contravene several important public policies. It rewards anti-choice criminal activity, thereby encouraging lawless interference with the constitutional right of reproductive choice. The closure of a major provider, such as Tenant, exacerbates the already severe shortage of reproductive health care providers. Such closure also can cause needless delays in the provision of services and thereby seriously jeopardize women's health. Upholding the ruling below sends an unmistakable message to anti-choice terrorists that they can freely intimidate landlords into evicting providers, and more

importantly, that the courts will implicitly sanction such tactics. As discussed more fully below, such efforts undermine the constitutional right of reproductive choice and directly contravene the national public policy of protecting access to reproductive health facilities embodied in the Freedom of Access to Clinic Entrances Act ("FACE"), 18 U.S.C. § 248 (1994). Accordingly, this Court should reverse the ruling below and invalidate Landlord's rules as unreasonable and judicially unenforceable.

ARGUMENT

I. BUILDING RULES THAT INFRINGE UPON CONSTITUTIONAL RIGHTS AND ARE INCONSISTENT WITH PUBLIC POLICY ARE UNREASONABLE AND JUDICIALLY UNENFORCEABLE.

A. Building Rules That Unilaterally Seek to Prohibit An Authorized Activity Contrary to the Terms of a Lease Are Unreasonable and Invalid Under New York Common Law.

Amici adopt Appellant's argument that, to be valid and enforceable under New York common law, building rules and regulations must be reasonable. (See Appellant's Br. at 19-24.) Moreover, building rules that unilaterally alter the terms and conditions of a lease and unreasonably attempt to prohibit an activity that is permitted by the lease are unreasonable. (See id. at 21-24.)

Landlord's rules in the instant case prohibit Tenant's performance of abortions, an activity that is expressly authorized under the lease. (See id. at 4-5.) Indeed, the lease specifically provides for Tenant's use of the facility as "medical offices." (See id. at 4.) What is more, Tenant must use and occupy the premises "for no other purpose." (See id.) Tenant has been performing abortions, which represent 60 to 70 percent of its services, since the inception of its tenancy in 1992. (See id. at 4-5.) When Landlord acquired the building in 1993, it was fully aware that Tenant provided abortion services and that anti-abortion protests were held outside the building. (See id. at 5.) Nevertheless, Landlord has sought to unilaterally change the material conditions of the lease and prohibit Tenant from engaging in this authorized use by promulgating unreasonable building rules. A ruling that permits Landlord to accomplish unilaterally through building rules what it could not otherwise accomplish without Tenant's consent, would be a triumph of form over substance. Because such rules unilaterally change the material terms and conditions of the lease, they are by definition unreasonable under New York common law.

- B. A Judicial Decision that Upholds Unreasonable Building Rules That Permit a Landlord to Evict a Reproductive Health Facility and Prohibit Its Lawful Provision of Abortion Services Seriously Interferes With the Constitutional Right to Reproductive Choice.

The constitutional right to reproductive choice is well-

established. Roe v. Wade, 410 U.S. 113 (1973). The United States Supreme Court recently reaffirmed that a woman's right to terminate a pregnancy, first articulated in Roe, is a cornerstone of constitutional liberty. Planned Parenthood of Southeastern Pennsylvania v. Casey, 112 S. Ct. 2791, 2817 (1992) ("[The right to choose] . . . is the most central principle of Roe v. Wade. It is a rule of law and a component of liberty we cannot renounce."). This constitutional protection extends to a person's most private decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education. 112 S. Ct. at 2807. The Court has recognized that women's ability to control their reproductive decisionmaking has enabled them to participate equally in the economic and social fabric of our society. Id. at 2809.² Accordingly, governmental regulation that has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion is unconstitutional. Id. at 2820.

Moreover, the New York Constitution safeguards reproductive choice independent of the federal guarantee. Hope v. Perales, 83 N.Y.2d 563, 575, 634 N.E.2d 183, 186, 611 N.Y.S.2d 811 (1994) ("[T]he fundamental right of reproductive choice, inherent in the due

² Indeed, the Supreme Court has recognized that for more than two decades, "people have organized intimate relationships and made choices that define their views of themselves and their places in society, in reliance on the availability of abortion in the event that contraception should fail." Id.

process liberty right guaranteed by our State Constitution, is at least as extensive as the Federal Constitutional right . . . ") (citations omitted). Indeed, New York's long history of solicitude for liberty and bodily autonomy under the State Constitution provides a firm basis for the fundamental right of privacy. See, e.g., Rivers v. Katz, 67 N.Y.S.2d 485, 493-94, 495 N.E.2d 337, 341-42, 504 N.Y.S.2d 74, 78-79 (1986); Cooper v. Morin, 49 N.Y.2d 69, 79-80, 399 N.E.2d 1188, 1194-95, 424 N.Y.S.2d 168, 175 (1979), cert. denied, 466 U.S. 984 (1980).

If Landlord is successful in its attempts to evict Tenant and ban abortion services at Tenant's facility, it would seriously impede women's access to reproductive health care. Landlord admittedly issued its building rules with the express intent of prohibiting Tenant from performing abortions. (See Appellant's Br. at 10-12.) Landlord's Notice of Termination could not have been more clear: The sole reason for Tenant's eviction was "the continued performance of abortion procedures." (See id. at 15-16.) In both purpose and effect, Landlord's rules would place a substantial obstacle in the path of women seeking to terminate a pregnancy. Unless the decision below is overturned, Landlord would, through unilateral private rules, be permitted to frustrate the constitutional rights of Tenant's patients. A judicial decision that upholds Landlord's rules, therefore, would officially sanction private efforts to

undermine constitutional rights. See Shelley v. Kraemer, 334 U.S. 1, 19 (1948). Such judicial approval of conduct that thwarts women's constitutional rights is contrary to public policy. See Rosenthal v. Harwood, 35 N.Y.2d 469, 474, 323 N.E.2d 179, 182, 363 N.Y.S.2d 937, 942 (1974) (court refused to sanction a political party rule that would have commanded unethical conduct by candidate for judicial office) (citing Shelley, 334 U.S. at 19). In Rosenthal, the Court of Appeals recognized that a political party rule that would compel a judicial candidate to become involved too deeply in the political process violated a canon of judicial ethics and thereby violated public policy. Id. Accordingly, the Court held that permitting such unethical conduct to stand "would be tantamount to the law's lending its sanction to a violation of public policy." Id. As the Court of Appeals did in Rosenthal, this Court should refuse to uphold Landlord's building rules because they impede the exercise of constitutional rights. As a matter of public policy, such building rules are unreasonable and judicially unenforceable. See Eagle Spring Water Co. v. Webb & Knapp, Inc., 236 N.Y.S.2d 266, 277 (N.Y. Sup. Ct., N.Y. County 1962)(while a lessor may impose conditions in a lease such restrictions must be reasonable and not contrary to the public interest) (citations omitted).

Indeed, a ruling that upholds Landlord's rules not only would affect the fundamental rights of Tenant and its patients, it also

would create serious implications for reproductive health facilities across New York State and nationwide. If Tenant is forced to close its doors and cease providing needed services as a result of anti-choice violence, landlords everywhere would feel free to evict abortion providers who become the targets of continued violence, harassment and intimidation by proclaimed "pro-life" radicals. A judicially sanctioned eviction strategy aimed at providers, however, clearly is contrary to public policy. As Congress and numerous courts have recognized, the adverse effects of anti-choice violence must be addressed by sanctioning the perpetrators of criminal conduct.³

If Tenant is precluded from providing abortions, Nassau County women who rely on Tenant's services will be forced to seek abortions elsewhere, resulting in needless delays that pose serious risks to their health. The closure of Tenant's facility would eliminate the largest provider of abortion services in Nassau County, resulting in the loss of fully half of the county's providers.⁴ Thus, the loss of even one facility that performs abortions would seriously jeopardize Nassau County women's health. Even if most women ultimately are able

³ See discussion of Congressional and judicial responses to anti-choice violence at Section I.B., infra.

⁴ This number excludes private physicians' offices, other nonhospital facilities, and hospitals which perform a relatively small proportion of the county's abortions.

to obtain an abortion elsewhere, the loss of a major clinic will cause serious delays in the provision of services.

The delay women will experience in obtaining a timely abortion is compounded by the fact that abortion providers, like Tenant, often schedule abortions for only certain days a week. See generally Stanley K. Henshaw, Factors Hindering Access to Abortion Services, 27 Fam. Plan. Persps. 54, 57 (1995) ("[a] certain amount of delay is inevitable if facilities perform abortions only a few days a week . . .").⁵ Even if Nassau County women travel to New York City in the hope of obtaining an expeditious abortion, many facilities in New York City still report significant delays. The New York City Office of Women's Health has reported abortion delays of up to five weeks in city hospitals. Office of Women's Health, Women's Health Survey, Table 6F, Overview of Abortion Services (on file with the Office of Women's Health) (Oct. 1992). This figure does not include the additional delay of up to four working days when a sonogram is required. Id. Delays at private hospitals are less severe, but still exist. See Elisabeth Rosenthal, Finances and Fear Spurring

⁵ Of all nonhospital providers surveyed nationwide, 11% performed abortions on only one day per week, 15% on two days, and 38% on five or more days per week. Id. A woman seeking services from a provider that performs abortions only one day a week might have to wait up to six days for an appointment if the facility has appointment slots available on the next scheduled service day, and longer if the appointments are all taken. Id.

Hospitals to Drop Abortions, N.Y. Times, Feb. 20, 1995, at A1, col. 1, B2. Even if a woman eventually locates another abortion provider, services may not be available to her from that provider if her pregnancy has passed the earliest stages. Henshaw, supra, at 56.⁶ In some cases, the delay has forced women who otherwise could have obtained first trimester abortions to undergo more risky, onerous, and costly second trimester procedures. Planned Parenthood of New York City and Columbia University School of Public Health, Consequences of the Provider Shortage: A New York City Survey, 49 J. Am. Women's Ass'n 152 (1994).

Delay has serious health consequences for women. With each week of delay after the eighth week of pregnancy, the risk of mortality associated with abortion increases by 50 percent and the risk of serious complications increases by 15-30 percent. Rachel B. Gold, Abortion and Women's Health: A Turning Point for America? 28-29 (1990); Willard Cates & David Grimes, Morbidity and Abortion in the United States, in Abortion and Sterilization: Medical and Social Aspects 158, 172 (Jane Hodgson, ed., 1981).

In addition to causing serious health risks, delay increases the cost of abortion procedures, thereby impeding access to services

⁶ "The later in gestation an abortion is performed, the more cervical dilation is needed, the more complex the procedure and the greater the risk of complications; not all providers choose to perform these more difficult procedures." Id.

for women with limited economic means. The average nonhospital facility nationwide charged \$341 in 1993 for an abortion at ten weeks with local anesthesia. Henshaw, supra, at 57 & Table 3. Prices increase sharply with gestation after about twelve weeks. In 1993, on average, nonhospital providers charged \$604 for an abortion at sixteen weeks and \$1,067 at twenty weeks. Fees ranged as high as \$2,500 at sixteen weeks and \$3,015 at twenty weeks. Id.

The delay in services that Tenant's patients would be forced to undergo is exacerbated by the serious decline in abortion providers in New York State and nationwide. New York, generally viewed as a safe haven for abortion services, has experienced a severe provider shortage. During 1992, New York lost sixteen providers, the second highest net loss of abortion providers in the nation. Stanley K. Henshaw and Jennifer Van Vort, Abortion Services in the United States, 1991 and 1992, 26 Fam. Plan. Persps. 100, 104 (1994). Twenty-five of the state's sixty-two counties -- fully 40 percent -- have no provider. Id. at 105, Table 4. Moreover, because abortion providers tend to be clustered in or near urban centers such as New York City, large rural expanses of the state are left without providers. To obtain an abortion in most areas of the state, therefore, women must often travel long distances, spend large additional amounts of money for travel and lodging, and endure risky delays. National Abortion Federation, Recommendations From a

National Symposium: Who Will Provide Abortions? Ensuring the Availability of Qualified Providers 4 (1990).

There has been an accelerating decline in providers nationwide during the past several years. Indeed, 84 percent of counties across the United States have no abortion provider. Henshaw and Van Vort, supra, at 104, Table 4. The loss of providers nationwide increased from an average of thirty-three lost per year between 1985 to 1988, to an average of fifty-one lost per year from 1988 to 1992. Id. at 104. Anti-abortion harassment and violence has been a significant factor contributing to the provider shortage. See S. Rep. No. 117, 103rd Cong., 1st Sess. 2, 17 (1993) ("Sen. Rep."). Consequently, the dearth of providers, in New York as in the rest of the country, has contributed to a crisis in women's access to reproductive health services.

A ruling that would authorize the eviction of a reproductive health facility through private building rules and the consequent elimination of abortion services would contribute yet another factor to the severe decline in providers. Not only would such a ruling impede women's exercise of their constitutional rights, it would lead to unnecessary and costly delays in the provision of services that pose serious risks to women's health. As a matter of public policy, the ruling below should be overturned.

C. Building Rules That Permit Landlords to Evict Reproductive

Health Clinics Based on Anti-choice Violence Violate the
National Public Policy Embodied
in the Freedom of Access to Clinic Entrances Act.

The violence experienced by Tenant and other Nassau County reproductive health facilities is not an isolated occurrence. Indeed, tactics employed by anti-choice extremists nationwide have included blockades, arson, bombings, death threats, harassment of clinic personnel, and even murder. Sen. Rep. at 2. The effect of this campaign of terrorism has been dramatic. Over 80 percent of the nation's counties have no abortion providers in part because facilities have been forced to close rather than risk the safety of their employees, patients and property. Stanley K. Henshaw and Jennifer Van Vort, Abortion Services in the United States, 1987 and 1988, 22 Fam. Plan. Persps. 102, 106-107 (1990); Sen. Rep. at 17.

In 1994, the United States Congress enacted the Freedom of Access to Clinic Entrances Act ("FACE"), 18 U.S.C. § 248 (1994), to "prevent the use of blockades, violence and other forceful or threatening tactics against medical facilities and health care personnel who provide abortion-related services." Sen. Rep. at 2. FACE was enacted in response to the national escalation of violence at reproductive health centers, and the brutal harassment of both health care providers and their patients. After conducting extensive hearings in conjunction with FACE, Congress concluded:

An interstate campaign of violent, threatening, obstructive and destructive conduct aimed at providers of reproductive health services across the nation has injured providers of such services and their patients, and the extent and interstate nature of this conduct place it beyond the ability of any single state or local jurisdiction to control; . . . Such conduct, which has included blockades and invasions of medical facilities, arson and other destruction of property, assaults, death threats, attempted murder and murder, infringes upon the exercise of rights secured by federal and state law, both statutory and constitutional.

H.R. Conf. Rep. No. 488, 103rd Cong., 2nd Sess. 7 (1994), reprinted in 1994 U.S.C.C.A.N. 699, 724 ("Conf. Rep.").

From 1977 to August, 1995, the nationwide escalation of harassment and violence by anti-choice extremists against women seeking abortions and their health care providers has resulted in over 600 clinic blockades in the United States, sixteen incidents of murder or attempted murder, close to 250 death threats, almost 100 physical assaults on providers, and more than 200 attempted or completed arsons, firebombings and bombings of abortion-related medical facilities. National Abortion Federation, Incidents of Violence & Disruption Against Abortion Providers, 1995, Aug. 29, 1995. Abortion providers also have experienced more than 600 incidents of vandalism, and have reported receiving nearly 2,000 harassing telephone calls and pieces of hate mail. Id. Indeed, concentrated, regionalized attacks on providers similar to those experienced by Nassau County facilities have been documented elsewhere in the country. In Michigan, fourteen clinics were hit

with butyric acid within a two-week period in September, 1992. And on March 9, 1993, five clinics in San Diego were sprayed with butyric acid causing four people to be taken to hospitals. Sen. Rep. at 6.

The stated purpose and undeniable consequence of anti-abortion harassment is to intimidate practitioners from continuing to provide comprehensive reproductive health services and to prevent women from obtaining such services. Anti-choice militants testified before Congress that since they have been unable to change the laws to prevent women from obtaining abortions, it is their goal to make abortion unavailable: "We may not get laws changed or be able to change people's minds, . . . [b]ut if there is no one willing to conduct abortions, there are no abortions. Id. at 11.

In addition to Congress, courts, including those in New York, have acknowledged the serious threat to reproductive rights, medical safety, and public safety caused by violent anti-choice conduct directed at reproductive health facilities. See, e.g., Madsen v. Women's Health Center, 512 U.S. ____, 114 S. Ct. 2516 (1994); Pro-Choice Network of Western New York, et al. v. Schenck, 67 F.3d 377 (2d Cir. 1995) (en banc). In Schenck, for example, the record revealed well-documented evidence of blockades targeted at Buffalo, New York reproductive health facilities. The blockades were staged by demonstrators who "intend[ed] to prevent abortions, dissuade women from seeking abortion services, and impress upon the public the

morality of its 'pro-life' views." 67 F.3d at 382. The protesters physically blocked patients' access to the facilities and "constructively" blockaded the clinics by forcing patients and clinic staff to "run a gauntlet of harassment and intimidation." Id. at 383. The court recounted:

At times, demonstrators yell at patients, patient escorts and medical staff entering and leaving the health care facilities. The demonstrators also crowd around people trying to enter the facilities in an intimidating and obstructing manner, and grab, push and shove the patients, patient escorts and staff.

Id. (citation omitted). The court recognized the harmful health effects caused by anti-choice intimidation and harassment, noting that patients often enter the medical facilities shaken and severely distressed. Id. at 384.

Courts also have acknowledged that anti-choice violence and harassment -- like that which sparked the instant controversy -- has caused women to suffer a delay in obtaining abortion services, thereby increasing their health risks. In Schenck, for example, the Second Circuit Court of Appeals recognized that

delay may move the pregnancy from the first trimester to the second trimester during which the risks associated with the procedure increase. Other women who are seeking a post-abortion check-up might delay their appointment or simply cancel it altogether, thereby enhancing the possibility of complications. For some women who elect to undergo an abortion, clinic medical personnel prescribe and insert a device known as pre-abortion laminaria to achieve cervical dilation. In these instances, timely removal of the laminaria is necessary to avoid infection,

bleeding and other potentially serious complications. If a woman returning to have the laminaria removed finds that her access to the clinic entrance is blocked or impeded ... the above-mentioned complications may result.

Id. at 383 (citation omitted). Moreover, the court acknowledged that the health risks associated with an abortion procedure increase if the woman is forced to undergo additional stress and anxiety, potentially causing patients to endure elevated blood pressure, hyperventilate, require sedation, or require special counseling and attention before they are able to obtain health care. Id. at 384. Many women simply are unable to proceed with their scheduled procedures and postpone their appointments, leading to risky and costly delays. Id.

As a result, a number of courts have fashioned injunctive remedies, including "buffer zones," to protect clinics, patients and staff from well-documented incidents of anti-choice violence. See, e.g., Madsen, 114 S. Ct. 2516 (upholding a 36-foot buffer zone around an abortion clinic); Schenck, 67 F.3d 377 (upholding a 15-foot buffer zone around a Buffalo, New York abortion clinic that includes a "cease and desist" provision requiring sidewalk counselors to retreat from the buffer zone upon a patient's expression to be let alone); New York State NOW v. Terry, 697 F. Supp. 1324 (S.D.N.Y. 1988) and 704 F. Supp. 1247 (S.D.N.Y.), appeals consolidated and aff'd as modified, 886 F.2d 1339 (2d Cir. 1989), cert. denied, 495 U.S. 947

(1990) (affirming a permanent injunction preventing protesters from impeding ingress into and egress from medical facilities that perform abortions and from tortiously harassing persons entering or leaving such facilities in the City of New York, Nassau, Suffolk or Westchester counties); Cousins v. Terry, 721 F. Supp. 426 (N.D.N.Y. 1989) (upholding a preliminary injunction issued pursuant to several state law claims and an action under 42 U.S.C. §1985(3), preventing protesters from blockading at two clinics in Broom County); Parkmed Co. v. Pro-Life Counseling, Inc., et al., 91 A.D.2d 551, 457 N.Y.S.2d 27 (N.Y. App. Div., 1st Dep't 1982) (though limiting its scope, upholding preliminary injunction preventing demonstrators from blocking ingress and egress or disrupting the normal activities of a clinic located on Park Avenue South in Manhattan).

The criminal activity that gives rise to this lawsuit is precisely the type of threat to providers, their patients, and the constitutional right of reproductive choice that FACE was enacted to prevent.⁷ To permit the ruling below to stand and authorize the Landlord to evict Tenant and cease the provision of abortion services would reward this illegal behavior and directly

⁷ Despite repeated attempts by anti-choice groups and others to invalidate FACE, the statute consistently has withstood constitutional challenges. See, e.g., American Life League, Inc. v. Reno, 47 F.3d 642 (4th Cir.), cert. denied, 116 S. Ct. 55 (1995); U.S. v. Wilson, No. 95-1871 (7th Cir. Dec. 29, 1995); Cheffer v. Reno, 55 F.3d 1517 (11th Cir. 1995).

contravene the Congressional public policy reflected in FACE.⁸

II. A RULING THAT PERMITS A LANDLORD TO EVICT A TENANT BASED ON THE CRIMINAL ACTIONS OF HOSTILE THIRD PARTIES BEYOND THE TENANT'S CONTROL UNDERMINES THE SAFETY AND SECURITY OF ALL TENANTS AND REWARDS ACTS OF VIOLENCE.

While Landlord is justly alarmed at the violence aimed at Tenant's facility, that violence must not serve as the ground for evicting Tenant. Landlord has a duty to provide for the safety and security of all its tenants, both under the express terms of the building lease (see Appellant's Br. at 24-25), as well as under established principles of New York common law. See D'Amico v. Christie, 71 N.Y.2d 76, 85, 518 N.E.2d 896, 899-900, 524 N.Y.S.2d 1, 5 (1987) (citations omitted) (landowners have a duty to control the conduct of third persons and prevent harm to those on their property). Indeed, Landlord's obligation is particularly important, given the onslaught of violent anti-choice conduct expressly directed toward Tenant.

A case involving similar, albeit unsuccessful, efforts by a

⁸ The self-help eviction Tenant initially feared that Landlord would resort to -- a lockout -- would constitute proscribed conduct under FACE. See 18 U.S.C. § 248 (a)(1). Although illegal anti-abortion activity overwhelmingly has been the work of individuals having no formal relation to the clinics, FACE does not exempt landlords, vendors, or employees from liability for activities prohibited under the statute. Indeed, the only class of person exempted from liability for violating the provisions of FACE are parents or legal guardians whose activities are directed exclusively at their minor children. See § 248 (a); Conf. Rep. at 8 (indicating that this exception is to be construed narrowly).

landlord to evict an abortion clinic as a result of anti-choice violence is instructive. In Giuffre v. Wisconsin Women's Health Care Ctr., 514 N.W.2d 55 (table), 1993 WL 440501 (Wis. App. Nov. 2, 1993), the Wisconsin Court of Appeals dismissed the complaint of the landlord, holding that because the clinic itself did not hold or permit such protests, the landlord had failed to state a claim against the clinic. The court refused to sanction the landlord's efforts, stating that "[the clinic] cannot in any way be held responsible for the behavior of third parties who are neither their guests nor by any stretch of the imagination their invitees." 1993 WL 440501 at **2 (internal quotations omitted).

Similarly, New York courts consistently have refused to permit landlords to evict tenants based on the criminal conduct of third parties beyond their control. See Humane Society v. Joad Enterpr., Inc., 65 Misc. 2d 8, 9, 316 N.Y.S.2d 868, 869 (N.Y. Civ. Ct., N.Y. County 1970); Mobil Oil Corp. v. Burdo, 69 Misc. 2d 153, 158-59, 329 N.Y.S.2d 742, 749 (N.Y. Dist. Ct., Suffolk County 1972).

The reasoning behind these decisions is only fair and logical: A tenant should not be penalized for the criminal actions of third parties over which it has no control, especially when the tenant is the target of that criminal activity. As in Giuffre, Tenant, far from being responsible for or having any control over the anti-choice protesters, is the target of the violence. It is undisputed that

Tenant has sought to implement security measures at its own expense in response to the escalating violence -- despite Landlord's attempts to block Tenant's efforts. (See Appellant's Br. at 8-9.) Moreover, Landlord admittedly has taken no steps to enforce a TRO it obtained against the protesters, or to seek permanent injunctive relief. (See id. at 6.) Finally, if local and state measures simply were inadequate to deal with the escalating violence, Landlord could have requested federal help under FACE, which was enacted to assist clinics when local and state resources are overwhelmed by anti-choice violence. See Sen. Rep., supra, at 19-21.⁹

The ruling below impermissibly relieves Landlord of its obligation to provide for the safety and security of Tenant's facility and effectively permits Landlord to hold Tenant responsible for anti-choice violence beyond its control. Because Landlord's efforts contravene the express terms of the building lease and are contrary to established principles of New York law, this Court should refuse to sanction such efforts and reverse the opinion below.

Moreover, a ruling that authorizes landlords to evict tenants based on the criminal actions of hostile third parties has serious ramifications beyond the instant controversy. Tenants who become the targets of violent acts and harassment based on their status or

⁹ The New York Civil Liberties Union has contacted the United States Attorney for the Eastern District to seek a federal investigation under FACE.

beliefs are particularly vulnerable to further harm by possible eviction. Women subjected to domestic violence, for example, could face eviction and further harm based on the criminal conduct of their batterers if landlords deem their batterers' conduct to affect other tenants' peaceful enjoyment of their dwellings. Organizations representing unpopular or controversial views that may elicit violent protests outside their offices -- such as those representing political parties, civil rights groups, or labor unions -- could find themselves not only seeking protection from the violence but also defending their right to remain on the property. Holding tenants who become subject to attacks, vandalism, and other illegal conduct responsible impermissibly shifts the blame from the perpetrator to the target of the violence. Because authorizing such efforts would seriously undermine the safety and security of all tenants and reward acts of violence, this Court must reverse the decision below and protect vulnerable tenants from further harm.

CONCLUSION

For the reasons stated above, amici curiae respectfully request that this Court reverse the decision of the court below.

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Respectfully submitted,

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