UNITED STATES DISTRICT
COURT EASTERN DISTRICT OF
NEW YORK
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People of the State of New York, by ERIC T. SCHNEIDERMAN, Attorney General of the State of New York,

Plaintiff,

v.

Kenneth Griepp, Ronald George, Patricia Musco, Randall Doe, Osayinwense N. Okuonghae, Anne Kaminsky, Brian George, Sharon Doe, Deborah M. Ryan, Angela Braxton, Jasmine LaLande, Dorothy Rothar, Prisca Joseph, and Scott Fitchett, Jr.

Defendants.
----------X

MEMORANDUM IN SUPPORT OF MOTION TO DISMISS

CAUSE NO. 1:17-CV-3706

Defendant Angela Braxton, by and through her attorney, Jay R. Combs, moves the Court to dismiss Plaintiff's complaint pursuant to Fed. R. Civ. P. 12(b)(1) and Fed. R. Civ. P. 12(b)(6). As grounds for this motion she states:

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I. INTRODUCTION

Plaintiff alleges three causes of action against Defendant Angela Braxton (Defendant) for: (1) violation of 18 U.S.C. § 248, the Freedom of Access to Clinic Entrances ("FACE") Act; (2) violation of New York Penal Law §240.70, criminal interference with health care services or religious worship in the second degree (N.Y. Criminal Interference Act); and (3) violation of New York City Administrative Code §§ 8-803 and 8-804, prohibition of activities to prevent access to reproductive health care facilities (N.Y. City Admin. Code). The Complaint was filed on June 20, 2017 and the Defendant was served on June 24, 2017. The instant case against the Defendant should be dismissed for four reasons. First, the Court lacks subject matter jurisdiction because Plaintiff lacks standing to bring actions in federal court under FACE, the N.Y. Criminal Interference Act, or the N.Y. City Admin. Code. Second, the bare allegations relating to the Defendant do not rise to a violation of FACE. Plaintiff's complaint mentions the actions of the Defendant only in 14 paragraphs but does not allege any specific date, time, or victim related to any alleged violations by Defendant. Complaint, ¶¶ 25, 50, 53, 54, 59, 61, 67, 68, 70, 72, 79, 81, 83 and 109. Third, given that there is no properly pleaded claim under federal law, the Court should decline to exercise supplemental jurisdiction over the other two alleged violations of State and Local law. Finally, the N.Y. City Admin. Code is unconstitutionally vague and overbroad.

II. THE PLAINTIFF LACKS STANDING TO ALLEGE ANY OF THE INSTANT ACTIONS IN FEDERAL COURT.

Where a plaintiff lacks standing to bring suit in Federal court, his cause of action must be dismissed for lack of subject matter jurisdiction pursuant to Fed. R. Civ. P. 12(b)(1). *All. for Envtl. Renewal, Inc.*, 436 F.3d 82, 88 n.6 (2d Cir. 2006). In this case, the Complaint should be dismissed because the Plaintiff lacks standing to bring any of the three causes of action.

A. The Plaintiff Lacks Standing to Allege a Claim against the Defendant under FACE.

The Plaintiff purports to bring the first cause of action under 18 U.S.C. § 248(c)(3)(A) which provides that the Attorney General of a State may bring a civil action under the statute "as *parens patriae* on behalf of natural persons residing in such State." *Id.* It is not sufficient under the statute to simply allege that the action is being brought pursuant to *parens patriae* authority, it must also contain sufficient facts to allege that it is being brought on behalf of natural persons who reside in the state. Despite the clear language of the statute, the Plaintiff's Complaint does not list a single natural person alleged to be residing in the State. This is fatal to the Plaintiff's claimed standing to bring the instant action.

In language that is virtually identical to the *parens patriae* authority in 18 U.S.C. § 248(c)(3)(A), Congress, in 15 U.S.C. § 15c(a)(1) (the Sherman Act) stated that an "attorney general of a State may bring a civil action in the name of such State, as *parens patriae* on behalf of natural persons residing in such State." The courts evaluating the attorney generals' authority under the Sherman Act have made it clear that the requirement that the suit be brought on behalf of "natural persons residing in such State" is not mere surplusage. Instead, "[t]he plaintiff must show, in addition to authority to sue as *parens patriae*, **that the natural persons in the state sustained (1) injury (2) to their property 'by reason of' a violation** of the [act]." *In re Coordinated Pretrial Proceedings*, 497 F. Supp. 218, 224 (C.D.CA. 1980) (emphasis added); *See also, In re Montgomery County Real Estate Antitrust Litig.*, 452 F. Supp. 54, 56 (D.Md. 1978) (The attorney generals' authority was to sue "on behalf of their states' natural citizens where those citizens were injured by violations of the Sherman Act."); *New York v. Dairylea Coop., Inc.*, 570 F. Supp. 1213, 1215 (S.D.N.Y. 1983) ("Pursuant to the *parens patriae* statute . . . the Attorney General must stand in the shoes of the consumers on whose behalf he sues.")

In the instant case, the Attorney General certainly cannot stand in the shoes of hypothetical or unnamed individuals. Further, he cannot show that the individuals on whose behalf he purports to sue are citizens of the state or have incurred a concrete injury under the statute without naming those individuals and properly pleading their state of residence and their injury. The statute requires no less. Having failed to plead sufficient facts to cross even this modest threshold, the Plaintiff lacks standing under FACE and the cause of action should be dismissed.

B. The Plaintiff Lacks Standing to Allege a Claim against the Defendant under New York Penal Law §240.70.

The second cause of action alleged by the Plaintiff is a violation of New York Penal Law §240.70, criminal interference with health care services or religious worship in the second degree (N.Y. Criminal Interference Act). Complaint ¶¶103-106. The N.Y. Criminal Interference Act is a criminal statute which "is a class A misdemeanor." N.Y. Penal Law § 240.70. Being a criminal statute, the Attorney General is without authority to bring the action because "[i]t is well settled that the Attorney General [of New York] is given no general prosecutorial authority, and, except where specifically permitted by statute, has no power to prosecute criminal actions." *People v. Gilmour*, 284 A.D.2d 341 (N.Y. App. Div. 2001). Because, the charged statute does not specifically allow the Attorney General to bring this action, he is without authority to do so.

Moreover, New York law "contemplates that violations and misdemeanors will be tried in local criminal courts." *People v. Correa*, 933 N.E.2d 705, 713 (N.Y. 2010). Clearly, this Court is not a local criminal court. Even if the Attorney General could bring this action, the Federal Courts would be without authority to hear it. The authority for Federal Courts to hear state criminal cases arises under a very limited class of cases. "[S]tate criminal prosecution may be removed to federal court in the following circumstances: (1) when it is against the United States, a federal officer, an officer of the courts of the United States, or an officer of either House of Congress, if

certain requirements are met; (2) when it is against a property holder whose title is derived from any officer of the United States or its agencies, and the prosecution affects the validity of any law of the United States; and (3) when it involves a member of the armed forces, if certain requirements are met." *La. State v. Hunter*, 2014 U.S. Dist. LEXIS 173041, *16-17 (E.D. LA. 2014).

Finally, although the Plaintiff, in the introduction to his complaint (Complaint ¶ 8 and FN 1) cites to the N.Y. Civil Rights Law § 79-m (providing for the authority of the Attorney General to seek an injunction where there has been a violation of N.Y. Penal Law § 240.70), such citation does not save this cause of action because the limited authority under § 79-m only applies to the narrow category of cases where an injury is alleged, not where (as here) only interference or intimidation are alleged.. Under N.Y. Penal Law § 240.70, a defendant may violate the statute if "he or she intentionally **injures**, intimidates or interferes with, or attempts to injure, intimidate or interfere with, another person" in violation of the act." *Id.* at 1.(a) and (b) (emphasis added). Although the penal law allows for violation in three possible manners (injury, intimidation, or interference), the N.Y. Civil Rights law only allows the Attorney General to seek injunctive relief where "any person or group of persons is being, has been, or may be **injured** by conduct" in violation of § 240.70. N.Y. Civil Rights Law § 79-m. (emphasis added). There is no right of injunctive action by the Attorney General where the conduct involves intimidation or interference. In the instant case, the Plaintiff has not alleged injury, only intimidation and interference. *See* Complaint ¶¶ 104, 105. Accordingly, because injury has not been alleged, any purported rights to sue under N.Y. Civil Rights law § 79-m are unavailing and the Plaintiff is without standing to bring the Second cause of action in this Court and this Court is without jurisdiction to hear it.

C. The Plaintiff Lacks Standing to Allege a Claim against the Defendant under New York City Administrative Code §§ 8-803 and 8-804.

The third cause of action alleged by the Plaintiff is a violation of New York City Administrative Code §§ 8-803 and 8-804, prohibition of activities to prevent access to reproductive health care facilities (N.Y. City Admin. Code). Like the N.Y. Penal Code discussed above, the New York City Administrative Code contains a bifurcated cause of action where § 8-803 is a criminal statute providing for penalties of up to one year imprisonment and § 8-804 provides for a civil cause of action "[w]here there has been a violation of subdivision (a) of section 8-803." The Plaintiff's cause of action under these city codes fails for two reasons.

First, the civil cause of action under § 8-804 only lies "[w]here there has been a violation" of the criminal statute. In a recent United States District Court Case in the Western District of New York, the court examined a New York statute providing for civil damages against attorneys guilty of a misdemeanor deceit statute. The court held that "[i]f the statute does not allow a factfinder to reach criminal or civil remedies before first reaching a misdemeanor conviction then any civil remedies under [the statute] must require a misdemeanor conviction as a prerequisite." *Bounkhoun v. Barnes*, 2017 U.S. Dist. LEXIS 57167, *26 (W.D.N.Y. 2017). A criminal conviction under § 8-803 is a prerequisite to a civil cause of action under § 8-804 because, by its terms, §8-804 only allows a civil cause of action where a violation of § 8-803 has been established. The only proper way of establishing a violation of a criminal statute is through the criminal process. Since no such criminal conviction has been pled or proven, the Plaintiff has failed to meet this threshold and his action must be dismissed.

Second, the civil cause of action code, by its terms, limits the class of persons who have standing to bring suit to the following: (1) "any person whose ability to access a reproductive health care facility has been interfered with"; (2) "any owner or operator of a reproductive health care facility"; or (3) the "owner of a building in which such a facility is located." N.Y.C. Admin.

Code § 8-804. The code does not provide for the authority of the Attorney General to bring suit. The Plaintiff has claimed his authority under the common-law theory of *parens patriae*. The Supreme Court has set forth a three-prong test to determine if a state has such authority in *Alfred L. Snapp & Son, Inc. v. Puerto Rico*, 458 U.S. 592 (1982). The three requirements for *parens patriae* standing under *Snapp* are: (a) the state "must articulate an interest apart from the interests of particular private parties, i.e., the State must be more than a nominal party"; (b) the state "must express a quasi-sovereign interest"; and (c) the State must have "alleged injury to a sufficiently substantial segment of its population." *Alfred L. Snapp & Son, Inc.*, *45*8 U.S. at 607. The Second Circuit has added a fourth requirement: "*Parens patriae* standing also requires a finding that individuals could not obtain complete relief through a private suit." *People by Abrams v. 11 Cornwell Co.*, 695 F.2d 34, 40 (2d Cir. 1982) *modified on other grounds*, 718 F.2d 22 (2d Cir. 1983).

The fourth element, found in *Abrams*, is the most evident prohibition towards *parens patriae* standing in the instant case. The statute in question (N.Y.C. Administrative Code §8-804) explicitly provides for a cause of action to be brought by affected individuals. There has been no showing that any party has attempted to seek such relief and been thwarted or has been otherwise unsuccessful or discouraged from seeking such relief. As such, there is no evidence that "individuals could not obtain complete relief through a private suit." *Abrams*, 695 F.2d at 40. Moreover, where, as here, the statute in question provides for treble damages, attorneys' fees, and costs, the showing is much harder because the private individuals actually have a significant incentive to bring their own private suit. *See Connecticut v. Physicians Health Servs. of Conn., Inc.*, 103 F. Supp. 2d 495, 508 (D. Conn. 2000) (finding that the fourth factor weighs against *parens patriae* authority where attorneys' fees and costs provisions provide "an economic

incentive for private attorneys who have the resources and stamina for the type of prolonged litigation contemplated by the State.")

III. THE COMPLAINT FAILS TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED.

Under the standard of review applied to a motion to dismiss for failure to state a claim, the Court must accept as true the Plaintiff's well-pleaded factual allegations and construe them in a light most favorable to plaintiff. *LaFaro v. N.Y. Cardiothoracic Grp.*, 570 F.3d 471, 475 (2d Cir. 2009). "Only a complaint that states a plausible claim for relief survives a motion to dismiss." *Id.* at 476. When deciding a Rule 12(b)(6) motion to dismiss, the Court is required take all facts alleged in the complaint as true and draw all reasonable inferences in favor of plaintiff. *Morrison v. Nat'l Austl. Bank Ltd.*, 547 F.3d 167, 170 (2d Cir. 2008). Nevertheless, a cause of action asserted under FACE should be dismissed when it fails to state a claim. *Sharpe v. Conole*, 386 F.3d 482 (2d Cir.2004) (affirming dismissal of FACE claim).

A. The Elements of a FACE Claim[1]

Under subsection (a) of 18 U.S.C. § 248, there are three distinct categories of prohibited conduct. Neither paragraph (2) (interference with the right to worship) nor paragraph (3) (destruction of property) are alleged here. Instead, Plaintiff brings its first cause of action against the Defendant under 18 U.S.C. § 248(a)(1), which states:

[1] Although the discussion of the elements of the offense here concern a cause of action under FACE, the same analysis applies to the New York Clinic Access Act. "Since the language of the Clinic Access Act is almost identical to FACE, the standards for proving a violation of the Clinic Access Act is [sic] the same as those for proving a violation of FACE." *New York v. Kraeger,* 160 F. Supp.2d 360, 372 (N.D.N.Y. 2001). Similarly, the N.Y. City Admin. Code violation pled in Cause of Action Three, requires physical contact resulting obstruction, (§8-803a(1)); impeding access by blocking or obstruction (§8-803a(2); and intimidation (§8-803a(4)). As such, three of the four possible methods of proving a violation under the City Code are so similar to the requirements of FACE that a cause of action which fails to allege a violation of FACE would also fail under the New York or New York City provisions as well. The only portion of the New York City Code that is not analogous to that in FACE is §8-803a(3), which prevents harassment within 15 feet of the premises of an abortion clinic. That provision will be addressed separately below.

> Whoever – (1) by force or threat of force or by physical obstruction, intentionally injures, intimidates or interferes with or attempts to injure, intimidate or interfere with any person because that person is or has been, or in order to intimidate such person or any other person or any class of persons from, obtaining or providing reproductive health services; . . . shall be subject to the penalties provided in subsection (b) and the civil remedies provided in subsection (c) . . .

Thus, there are three elements to a violation of FACE: First, the defendant must act with force, threat of force, or physical obstruction; Second, the acts must be intentionally undertaken to injure, intimidate, or interfere with a person; and Third, the intentional acts must be undertaken because that person is or has been obtaining or providing reproductive health services, or in order to intimidate a person or class of persons from obtaining or providing those services. See *New York v. Cain,* 418 F.Supp.2d 457, 473 (S.D. N.Y. 2006). The statute defines the terms "interfere with" and "intimidate" as follows: "(2) Interfere with. The term 'interfere with' means to restrict a person's freedom of movement; (3) Intimidate. The term 'intimidate' means to place a person in reasonable apprehension of bodily harm to him- or herself or to another." 18 U.S.C. § 248(e)(2) and (3).

B. The Factual Allegations in the Complaint.

The Complaint is entirely lacking in factual detail regarding the Defendant. Below are all of the particular allegations against the Defendant, Angela Braxton:

> a. Complaint, ¶ 25 (introducing Ms. Braxton and stating that she has "engaged in illegal conduct" for approximately four years without mentioning a single discrete victim, date of offense (not even the year in which the alleged offense occurred), or the time of offense);
>
> b. Complaint, ¶ 50 (claiming that Ms. Braxton "routinely" collides with escorts and "regularly" shoves or steps on escorts but failing to describe even a single discrete victim, date of offense, or the time of offense);
>
> c. Complaint, ¶ 53, (claiming that Ms. Braxton touches or grabs patients in order to get their attention but failing to allege that the touching was injurious, intimidating, obstructive and utterly failing to describe even a single discrete victim, date of offense, or the time of offense);
>
> d. Complaint, ¶ 54, (baldly asserting that Ms. Braxton "pins" patients against walls or forces them to walk in the street by chasing them, but failing to allege any touching of

the patients, and completely failing to describe even a single discrete victim, date of offense, or the time of offense);

e. Complaint, ¶ 59, (This is the sole paragraph naming Ms. Braxton that states a discrete act (alleging threats that occurred on February 27, and June 18, 2016). However, the threats were made by alleged acquaintances of Ms. Braxton and the paragraph does not allege that Ms. Braxton knew about or participated in the statements made by her supposed acquaintance);

f. Complaint, ¶ 61, (claiming that Ms. Braxton filmed patients and staff in public locations but failing to describe how that act is illegal or provide a single discrete victim, date of the filming, or the time of filming);

g. Complaint, ¶ 67, (claiming that Ms. Braxton, and others, "swarm" patients and yell at them but failing to describe even a single discrete victim, date of offense, or the time of offense);

h. Complaint, ¶ 68, (claiming that Ms. Braxton crowds patients arriving by car, stand next to car doors to prevent opening, and leans into open windows to provide literature, but failing to describe even a single discrete victim, date of offense, or the time of offense);

i. Complaint, ¶ 70, (claiming that Ms. Braxton follows and harasses patients as they approach within 15 feet of the premises but failing to describe even a single discrete victim, date of offense, or the time of offense);

j. Complaint, ¶ 72, (claiming that Ms. Braxton follows patients to the building door and shouts into the building but failing to describe even a single discrete victim, date of offense, or the time of offense);

k. Complaint, ¶ 79, (claiming that Ms. Braxton follows and harasses minor children accompanying patients by handing them literature as they approach the building but failing to describe even a single discrete victim, date of offense, or the time of offense);

l. Complaint, ¶ 81, (claiming that Ms. Braxton disseminates false medical information to patients as they walk toward the clinic but failing to describe even a single discrete victim, date of offense, or the time of offense);

m. Complaint, ¶ 83, (claiming that Ms. Braxton disseminates allegedly false medical information to patients as they walk toward the clinic but failing to describe even a single discrete victim, date of offense, or the time of offense);

n. Complaint, ¶ 109. (claiming that Ms. Braxton repeatedly entered within 15 feet of the clinic, but failing to describe even a single discrete victim, date of offense, or the time of offense).

C. The Bald Allegations Against Ms. Braxton Are Insufficient to State a Claim.

When deciding Rule 12(b)(6) motions, the Supreme Court has held that although a complaint "does not need detailed factual allegations" to survive a motion to dismiss, "a plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Bell Atl.*

Corp. v. Twombly, 550 U.S. 544, 555 (2007) (alteration in original) (citations omitted). The Supreme Court stressed that "[f]actual allegations must be enough to raise a right to relief above the speculative level," *Id.*, and that "once a claim has been stated adequately, it may be supported by showing any set of facts consistent with the allegations in the complaint," *Id.* at 563. A plaintiff must allege "only enough facts to state a claim to relief that is plausible on its face." *Id.* at 570. But if a plaintiff has "not nudged his claims across the line from conceivable to plausible, the[] complaint must be dismissed." *Id.; see also Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009) ("Determining whether a complaint states a plausible claim for relief will . . . be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense. But where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged—but it has not 'show[n]'—'that the pleader is entitled to relief.'" (alteration in original) (citation omitted) (quoting Fed. R. Civ. P. 8(a)(2)). "Nor does a complaint suffice if it tenders 'naked assertion[s]' devoid of 'further factual enhancement.'" *Id.* at 678 (alteration in original).

In the instant case, the allegations against Ms. Braxton contain merely naked assertions that are completely devoid of further factual enhancement. These types of bare recitations with no names, dates, times, or other pertinent factual details have repeatedly been found to be insufficient in the Second Circuit. *See Dejesus v. Hf Mgmt Servs.*, LLC, 726 F.3d 85, 89 (2d Cir. 2013) (affirming the dismissal of a claim where the plaintiff's allegation merely recited that in '"some or all weeks' she worked more than 'forty hours' a week without being paid '1.5' times her rate of compensation"); *Ayala v. Looks Great Servs., Inc.*, 2015 U.S. Dirt. Lexis 96790 (E.D.N.Y 2015) (finding that the statement, ""[t]hroughout [the Plaintiffs'] employment by [the] Defendants, [the] Plaintiffs worked more than ten (10) hours from Monday through Saturday every workweek," (*Id.*

at *19) alleged "no particular facts sufficient to raise a plausible inference of an FLSA overtime violation." (*Id.* at *20)); *Jacobs v. Carnival Corp.*, 2009 U.S. Dist. LEXIS 31374, *14-16 (S.D.N.Y. Mar. 25, 2009) (Copyright owners who alleged that cruise lines violated copyrights in musical play by presenting public performances of play did not satisfy pleading requirements of Fed. R. Civ. P. 8(a)(2) because owners did not specify both the time period in which alleged performances occurred and the place where ships were when alleged performances took place).

(1) Without Alleging Details, the Plaintiff Cannot Show That There was Force, Threat of Force or Physical Obstruction.

The first element of a FACE claim requires Plaintiff to plead that Ms. Braxton acted with "force or threat of force or by physical obstruction." In *New York ex rel. Spitzer v. Cain*, 418 F. Supp. 2d 457, 473 (S.D.N.Y. 2006), the court stated that "force is broadly defined as 'power, violence, or pressure directed against a person or thing.'" *Id.* citing *Dickson v. Ashcroft*, 346 F.3d 44, 50 (2d Cir. 2003). *See also Cheffer v. Reno*, 55 F.3d 1517, 1519 (11th Cir. 1995) ("We agree with the Fourth Circuit that the clear meaning of 'force' in this statute is 'physical force.'").

The only paragraphs in which the Plaintiff alleges that Ms. Braxton either used force or threatened the use of force are as follows: ¶ 50 (claiming that the Defendant "routinely" collides with escorts and "regularly" shoves or steps on escorts); ¶ 53, (claiming that the Defendant touches or grabs patients in order to get their attention); and Complaint, ¶ 54, (asserting that the Defendant "pins" patients against walls or forces them to walk in the street by chasing them).

With respect to the allegation of colliding with escorts or shoving and stepping on them. This activity, without further factual detail is insufficient to properly allege the use of force or the threat of the use of force. The actions of colliding/shoving/and stepping on shoes are of course undertaken by tens of thousands of people every day as they traverse the sidewalks and subways in New York City. With respect to the allegation that Ms. Braxton touches or grabs patients in

order to get their attention, under no reasonable construction of the term could this activity be construed as "force." Indeed, a person might touch or grab a person to alert them to danger as they approach a tripping hazard. Finally, as to the allegation that Ms. Braxton "pins" patients against walls or forces them to walk into the street, because there is no discrete incident named or described, it is impossible to know how Ms. Braxton is alleged to have engaged in these actions. If a passerby choses to walk close to a wall or walk to the other side of the street in order to avoid another pedestrian, the passerby might describe him or herself as being pinned against a wall or forced out into the street, yet it was their choice and not another's force that provoked their actions. In each of these cases, the allegations are simply too conclusory, utterly lacking in concrete detail, to properly allege the use or threatened use of force.

This conclusion becomes more evident in light of the cases where real force was found actually to have been employed. In *New York v. Kraeger*, 160 F. Supp. 2d 360 (N.D.N.Y. 2001), where the plaintiffs had particularized evidence of acts on certain dates against named escorts, the court held that "hitting, pushing, shoving, kicking, and knocking over an escort" constituted force. *Id.* at 372. In contrast to the particularized acts of violence pled in *Kraeger*, there are no allegations pled in the complaint which support an inference that Ms. Braxton's alleged actions entailed the sort of power, violence or pressure contemplated by the statute. All of the generalized descriptions of force or threat of force could accurately describe encounters that happen millions of times each day on the sidewalks of New York.

Without more than bald allegations, there is simply no way to know whether or not the actions fell within the purview of the statute. "In enacting FACE, Congress did not forbid harassment, rudeness, or intimidation, unless the conduct constitutes 'force, threat of force, or physical obstruction.' Conduct and speech can be deeply disturbing, offensive, and intrusive

without amounting to a threat of force." *United States v. Lindgren*, 883 F. Supp. 1321, 1330n (D.N.D. 1995). Congress did not intend to proscribe all touching of any kind. The broad descriptions in the Complaint do not sufficiently describe the acts that allegedly violated the statute to determine whether or not the line between touching and force has been crossed.

The first element of a FACE violation may also be met by showing that the defendant physically obstructed an individual. Physical obstruction is defined in 18 U.S.C. § 248(e)(4) as "rendering impassible ingress to or egress from a facility that provides reproductive health services . . . or rendering passage to or from such a facility . . . unreasonably difficult or hazardous." With respect to paragraph 68 (claiming that the Defendant crowds patients arriving by car, stands next to car doors to prevent opening, and leans into open windows to provide literature), the Plaintiff alleges that Ms. Braxton's conduct constitutes physical obstruction. The Plaintiff's claim that the alleged actions were taken with the intent to physically obstruct a patient also fail for a lack of factual support. Without knowing the date, time, victim name, witness name, and other relevant circumstances surrounding the alleged obstruction, the Plaintiff's claims are legal conclusions, not factual allegations. As with other paragraphs, the allegations in paragraph 68 do not exclude the possibility that Ms. Braxton was standing near a car door engaged in a consensual conversation with a prospective patient rather than obstructing the patient.

The conclusory allegations of intimidation in paragraphs 25[2], 50, 53, and 54 completely fail to competently allege the first element, that is that Ms. Braxton used force or threat of force. Similarly, the claimed physical obstruction in paragraph 68 is so devoid of factual detail as to be

[2] Complaint ¶ 25, merely introduces Ms. Braxton and restates the contents of all of the remaining paragraphs. There is no unique information in that paragraph that is not otherwise discussed in the treatment of the other paragraphs.

meaningless. The remaining allegations relating to Ms. Braxton (in paragraphs 59[3], 61[4], 67, 68, 70, 72, 79, 81, and 83) seem not to allege the first element at all in that they, at best, obliquely hint at rather than actually allege intimidation, threats, or physical obstruction. Accordingly, in each paragraph involving Ms. Braxton, the Plaintiff has failed to plead the first element of a FACE violation so the entire allegation of a violation of FACE must fail.

(2) Without Alleging Details, the Plaintiff Cannot Show that there was Intentional Injury, Intimidation, or Interference.

The second element of a FACE violation is that the defendant "intentionally injures, intimidates or interferes with or attempts to injure, intimidate or interfere with any person." There was no injury or attempt to injure pled here, so the only issue is whether Ms. Braxton intended to intimidate or interfere with the unspecified patients or unspecified employees. "Interfere" means to restrict a person's freedom of movement, and "intimidate" means to place a person in reasonable apprehension of bodily harm. 18 U.S.C. § 248(e)(2) and (3).

In *New York ex rel. Spitzer v. Cain*, supra, the court explained the "intent" element of a FACE claim:

> [The] defendant must act with the "intent to injure, intimidate, or interfere," *Id.*, (or to attempt to do so, see 18 U.S.C. § 248(a)(1)) with another person. This intent is lacking in several incidents in which the defendants have bumped into escorts or patients while following them to the Center door . . . while such contact may be inappropriate, it is not illegal under FACE if it is not motivated by an intent to restrict freedom of movement or place another in reasonable apprehension of bodily harm. The plaintiffs have not shown

[3] Complaint ¶ 59, mentions the conduct of two uncharged individuals and attempts to impute their conduct to Ms. Braxton because Plaintiff alleges that she is acquainted with them. There is no indication what Plaintiff's purpose for inserting this paragraph was or how it assists Plaintiff's legal theory. Should this Court fail to completely dismiss the Complaint against Ms. Braxton, she hereby moves that this paragraph be stricken as immaterial in accordance with Fed. R. Civ. Pro. 12(f)(2).

[4] Complaint ¶ 61, alleges that Ms. Braxton films patients, escorts, and staff in the public areas outside of the clinic. Should this Court fail to completely dismiss the Complaint against Ms. Braxton, she hereby moves that this paragraph be stricken as immaterial in accordance with Fed. R. Civ. Pro. 12(f)(2). "[P]laintiffs assert that a woman's right to privacy in seeking an abortion extends to her travel on a public street outside of an abortion clinic. Never before has such a constitutional right been recognized . . . the court declines to expand the boundaries of our constitutional jurisprudence to recognize this privacy interest." *United States v. Vazquez*, 31 F. Supp. 2d 85, 89 (D. Conn. 1998).

> that each instance where a defendant bumps into a patient or escort is motivated by this intent.

Id., 418 F.Supp.2d at 474 (emphasis added).

Thus, even when there is actual force employed such as the "bumps" at issue in *Cain*, if the requisite specific intent is missing, the force is not actionable. In this case, the Plaintiff must plead facts that would lead to an inference that Ms. Braxton's touching of a patient or escort was specifically "motivated by an intent to restrict freedom of movement or place another in reasonable apprehension of bodily harm." Plaintiff has failed to properly plead this element of a claim. As is discussed above, the pleaded "facts" with respect to paragraph 50 (colliding, shoving or stepping on escorts), paragraph 53, (touching or grabbing patients in order to get their attention), and paragraph 54, (pinning patients against walls or forcing them to walk in the street by chasing them) are so lacking in context and supporting detail that they are actually conclusions rather than facts.

Similarly, the allegations in paragraphs 67, 68, 70, 72, 79, 81, and 83 are so lacking in context and supporting detail that they are actually conclusions rather than facts and thus fail to properly allege a violation of FACE. For instance, the allegations that Ms. Braxton disseminates allegedly false medical information and (¶¶ 81 and 83), yells at patients (¶ 67), and follows and harasses patients or their family members (¶¶ 70, 72, and 79), fail to address the question of whether any person (escort or patient) was intimidated within the meaning of 18 U.S.C. § 248(e)(3). That is, the Plaintiffs fail to allege sufficient facts to indicate that any person was placed in reasonable apprehension of bodily harm because of Ms. Braxton's alleged conduct or that Ms. Braxton intended that they be placed in apprehension of bodily harm. Similarly, these paragraphs cannot be subject to a reading that they state a claim for interference because there is no reasonable reading of these paragraphs which would support an allegation that Ms. Braxton's alleged actions restricted any person's freedom of movement.

With respect to paragraph 68 (claiming that the Defendant crowds patients arriving by car, stand next to car doors to prevent opening, and leans into open windows to provide literature), the Plaintiff alleges that Ms. Braxton's conduct intimidates and harasses[5] the patients. Notably, the Plaintiff's allegation states that the conduct of Ms. Braxton detailed in ¶ 68, amounted to intimidation (placing in reasonable apprehension of bodily harm). They did not allege that the conduct interfered with any patients (i.e. restricting a person's freedom of movement). The Plaintiff's claim of intimidation absolutely fails because there is not even a scintilla of evidence that the alleged practice of standing next to a car door or attempting to hand literature through an open window placed any person in reasonable apprehension of bodily harm or was intended to do so.

Accordingly, plaintiff has failed to plead the second element of a FACE claim.

(3) The Conclusory Allegations in the Plaintiff's Complaint Cannot Meet the Third Element, that The Alleged Victim Was Obtaining or Providing Healthcare Services.

The third element of a FACE claim requires a plaintiff to plead and prove that the defendant acted against a person "because that person is or has been, or in order to intimidate such person or any other person or any class of persons from, obtaining or providing reproductive health services." *Roe v. Aware Woman Ctr. for Choice*, 253 F.3d 678, 680 (11th Cir. 2001). In this case the complaint fails to name or otherwise identify a single victim. The Court and the Defendant are simply left to presume, as the Plaintiff apparently does, that the unspecified individuals who were allegedly victims at unspecified times were obtaining or providing reproductive health services. This will not do. *See Geer v. Brown*, 2016 U.S. Dist. LEXIS 72751, *3 (E.D.N.Y. June 3, 2016) (dismissing complaint under Fed. R. Civ. Pro. 12(b)(6) where plaintiff alleged harassment from

[5] Harass is not a term that is used or defined in FACE.

"unnamed and unspecified" officials. "These claims are conclusory: they do not identify the officers or officials responsible nor do they specify where those officials work."); *Henry v. NYC Health & Hosp. Corp.*, 18 F. Supp. 3d 396, 408 (S.D.N.Y. 2014) (dismissing discrimination claim where complaint failed "to describe who these people are, what their responsibilities were, how their workplace conduct compared to [plaintiff's], or how they were treated. Without factual amplification, the generic allegation of disparate treatment related to an unspecified class of Caucasian persons is simply not sufficient to 'nudge[ ] [her] claims across the line from conceivable to plausible,'" quoting *Twombly*, 550 U.S. at 570). Therefore, the Complaint fails to plead facts supporting the third element of a FACE violation where the Plaintiff fails to name a single escort, employee, or patient encountered by Ms. Braxton.

In order to properly plead a cause of action under any of the three statutes alleged, the Plaintiff must, as a threshold matter, properly allege that the person whose access was impeded, who was threatened, or who was injured, was victimized because he or she was seeking access to the facility in order to either obtain or provide reproductive services. The Plaintiff fails to meet this threshold under any statute because he fails to allege a single patient, prospective patient, or abortion provider, who was impeded, threatened, or injured. Instead, he refers to "patients" as a generic class of individuals throughout the Complaint. It is axiomatic that a statute cannot be violated generically, only specifically. Therefore, a generic pleading is not sufficient to state a claim. Similarly, the Plaintiff's sweeping allegations asserting obstruction, intimidation, and interference, fail because they are pled generically without reference to a single concrete event that allegedly involved Defendant Angela Braxton. For this reason, the Complaint fails against Defendant Angela Braxton and should be dismissed pursuant to Fed. R. Civ. P. 12(b)(6).

IV. BECAUSE THERE IS NO PROPERLY PLEADED CLAIM UNDER FEDERAL LAW, THE COURT SHOULD DECLINE TO EXERCISE

SUPPLEMENTAL JURISDICTION OVER THE REMAINING CLAIMS UNDER STATE AND CITY LAW.

Plaintiff's final two claims arise under state and city law (New York Penal Law §240.70 and New York City Administrative Code §§ 8-803 and 8-804). A district court may decline to exercise supplemental jurisdiction over the claims arising under state and city law if the court "has dismissed all claims over which it has original jurisdiction." 28 U.S.C. § 1367(c)(3). The Supreme Court and Second Circuit have stated that in "the usual case in which all federal-law claims are eliminated before trial . . . the balance of factors to be considered" by the district court — "judicial economy, convenience, fairness, and comity [—] will point toward declining to exercise jurisdiction over the remaining state-law claims." *Kolari v. N.Y. Presbyterian Hosp.*, 455 F.3d 118, 119 (2d Cir. 2006) (quoting *Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343, 350 n.7 (1988)); *Motorola Credit Corp. v. Uzan*, 388 F.3d 39, 56 (2d Cir. 2004) ("[O]ur Court has held, as a general proposition, that 'if [all] federal claims are dismissed *before trial* . . ., the state claims should be dismissed as well.'" (quoting *Castellano v. Bd. of Trs.*, 937 F.2d 752, 758 (2d Cir. 1991)(alteration and emphasis in the original). Should the Court grant the motion to dismiss the federal claim against Defendant on a Rule 12(b)(6) motion it would be appropriate to decline to exercise supplemental jurisdiction. *See, e.g., Cromwell-Gibbs v. Staybridge Suite Times Square*, 2017 U.S. Dist. LEXIS 95762, *8 (S.D.N.Y. 2017) (declining to exercise supplemental jurisdiction over Plaintiff's state and city claims after dismissing federal claims under Rule 12(b)(6)).

V. THE NEW YORK CITY ORDINANCE SECTION PROHIBITING, WITHOUT DEFINING, HARASSMENT IS UNCONSTITUTIONAL.

New York City Administrative Code §8-803(a)(3) makes it a crime to "follow and harass another person within 15 feet of the premises of a reproductive health care facility." *Id.* The Supreme Court recently noted this statute as a possibly less intrusive alternative to the

Massachusetts statute challenged in *McCullen v. Coakley*, 134 S. Ct. 2518, 2538 (2014). However, the Supreme Court also strongly cautioned that "[w]e do not 'give [our] approval' to this or any of the other alternatives we discuss. . . . We merely suggest that a law like the New York City ordinance could in principle constitute a permissible alternative. Whether such a law would pass constitutional muster would depend on a number of other factors, such as **whether the term 'harassment' had been authoritatively construed to avoid vagueness and overbreadth**." *Id.* at n.8 (emphasis added).

The Supreme Court's wariness about the possible vagueness and overbreadth of the term "harassment" is well placed. Although, it does not appear that any Court (state or federal) has ruled on the constitutionality of the term "harassment" in this particular New York City Administrative Code, a New York Court of Appeals decision issued after the *Coakley* case had been briefed and argued is fatal to the harassment provision of the statute under New York law. In *People v. Golb,* 23 N.Y.3d 455 (2014), the court struck down the New York Aggravated Harassment Statute (Penal Law §240.30(1)[6]) as vague and overbroad and therefore unconstitutional under both the State and Federal Constitutions. *Id.* at 468. The court objected that "'no fair reading' of this statute's 'unqualified terms supports or even suggests the constitutionally necessary limitations on its scope.'" *Id.* at 467 quoting *People v. Dietze,* 550 NY2d 47, 52 (1989). The court further pointed out the following:

> "Three federal judges have already found this statute unconstitutional (*see Vives v City of New York*, 305 F.Supp. 2d 289, 299 (S.D.N.Y. 2003, Scheindlin, J.), *rev'd on other grounds*, 405 F.3d 115 (2d Cir 2005) ("where speech is regulated or proscribed based on its content, the scope of the effected speech must be clearly defined"); *see also Vives* 405 F.3d 115, 123-124 (2d Cir 2005, Cardamone, J., dissenting in part, concurring in part) (Penal Law § 240.30 (1) unconstitutional on its face and as

[6] The relevant text of that statute provides that a person has committed the crime of aggravated harassment "when, with the intent to harass, annoy, threaten or alarm another person, he or she . . . communicates with a person, anonymously or otherwise, by telephone, by telegraph, or by mail, or by transmitting or delivering any other form of written communication, in a manner likely to cause annoyance or alarm." N.Y. Penal Law § 240.30(1)(a).

> applied); *Schlagler v Phillips*, 985 F.Supp. 419, 421 (S.D.N.Y. 1997, Brieant, J.), *rev'd on other grounds*, 166 F.3d 439 (2d Cir 1999) (statute is "utterly repugnant to the First Amendment of the United States Constitution and also unconstitutional for vagueness")).”

People v. Golb, 23 N.Y.3d 455, 467 (2014). Just as in *Golb*, there is no definition of the term “harass” in N.Y. City Admin. Code § 8-803(a)(3), leaving the scope of the restriction on speech unconstitutionally undefined. *See e.g. Vives v. City of New York*, 305 F.Supp. 2d 289, 299 (S.D.N.Y. 2003). As such, no fair reading of this unqualified term even begins to suggest the necessary constitutional limitations on statutes which regulate speech. Therefore, this provision of the Administrative Code is unconstitutionally overbroad and vague.

VI. CONCLUSION

Plaintiff's Complaint against Defendant Angela Braxton should be dismissed pursuant to Fed. R. Civ. P. 12(b)(1) because the Plaintiff lacks standing to bring actions under the FACE, the N.Y. Criminal Interference Act, or the N.Y. City Admin. Code. Further, under Fed. R. Civ. P. 12(b)(6), the conclusory allegations against her, lacking any factual detail, are insufficient to properly state a cause of action. Given that there is no properly pleaded claim under federal law, the Court should decline to exercise supplemental jurisdiction over the other two alleged violations of State and Local law. Finally, the harassment provision of the New York City Administrative Code is unconstitutionally overbroad and vague.

Respectfully submitted this 17th day of July, 2017.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing Defendant's Motion to Dismiss was filed electronically on July 17, 2017. Notice of this filing will be sent by operation of the Court's electronic filing system to all parties indicated on the electronic filing receipt including Kathleen M. O'Connell, Counsel to Defendant Sr. Dorothy Rothar, and Sandra Pullman, Esq., Ass't NYS Attorney General. Parties may access this filing through the Court's system.

/s/ Jay R. Combs
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