No. 90-985

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

JAYNE BRAY, *et al.*,
Petitioners,

v.

ALEXANDRIA WOMEN'S HEALTH CLINIC, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF FOR PETITIONERS

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QUESTIONS PRESENTED

1. Do "women seeking abortions" constitute a valid class for purposes of the "class animus" requirement of 42 U.S.C. § 1985(3)?

2. Is opposition to abortion *per se* discrimination against women for purposes of the "class animus" requirement of 42 U.S.C. § 1985(3)?

3. Do purely private actors who hinder access to an abortion facility violate a federal constitutional right to interstate travel merely because some patrons of the facility come from out of state?

4. Are respondents' claims under 42 U.S.C. § 1985(3) so insubstantial as to deprive the federal courts of subject matter jurisdiction?

5. Did the court of appeals err by sustaining an award of attorney's fees against petitioners?

PARTIES

The petitioners are as follows: Jayne Bray, Michael Bray, Clifford Gannett, Patrick Mahoney, Michael McMonagle, Randall Terry, and Operation Rescue.*

The petitioners were each defendants in the district court and appellants and cross-appellees in the court of appeals. The following were also named as defendants in the district court but were not parties in the court of appeals: Project Rescue, the D.C. Project, and Veterans Campaign for Life.

The respondents are as follows: Alexandria Women's Health Clinic, Commonwealth Women's Clinic, Gynecare Associates, Metro Medical Center, Inc., d/b/a Annandale Women's Center, Nova Women's Medical Center, Planned Parenthood of Metropolitan Washington, DC, Inc., Prince William Women's Clinic, National Organization for Women, Maryland National Organization for Women, Virginia National Organization for Women, and 51st State National Organization for Women.

The respondents were each plaintiffs in the district court and appellees and cross-appellants in the court of appeals. The following were also plaintiffs in the district court and cross-appellants in the court of appeals, but were not appellees in the court of appeals: Capitol Women's Center, Inc., Hillcrest Women's Surgi-Center, and Metropolitan Family Planning Institute. The following was also named as a plaintiff in the district court but was not a party in the court of appeals: National Abortion Federation.

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* Pursuant to Rule 29.1, petitioners state that none of the petitioners is a corporation.

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BRIEF FOR PETITIONERS

DECISIONS BELOW

The decision of the district court is reported as *National Organization for Women v. Operation Rescue*, 726 F. Supp. 1483 (E.D. Va. 1989). The decision of the court of appeals is reported as *National Organization for Women v. Operation Rescue*, 914 F.2d 582 (4th Cir. 1990).

JURISDICTION

The judgment of the United States Court of Appeals for the Fourth Circuit in this case was entered on September 19, 1990. Petitioners filed their petition for a writ of certiorari on December 18, 1990. This Court granted the petition on February 25, 1991. *Bray v. Alexandria Women's Health Clinic*, 111 S. Ct. 1070 (1991). This Court has jurisdiction, under 28 U.S.C. § 1254(1), to review the judgment of the court of appeals.

STATUTORY PROVISIONS

42 U.S.C. § 1985(3) provides as follows:

> If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice President, or as a Member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators.

42 U.S.C. § 1988 provides in pertinent part as follows:

> In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, or title V of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

STATEMENT OF THE CASE

The underlying action in this case is a suit for declaratory and injunctive relief under federal and state law. Respondents—plaintiffs in the district court—are abortion facilities and organizations advocating a legal right to abortion. Petitioners—defendants in the district court—are six individuals and an organization opposed to abortion.

Respondents alleged that petitioners have engaged in illegal activities, and threaten to continue to do so, in order to stop abortions. There are, however, no allegations that any of the petitioners have violated the injunction which the district court granted in the case at bar.

Respondents have asserted two federal causes of action: first, a conspiracy to violate a right to travel under 42 U.S.C. § 1985(3); and second, a conspiracy to violate a privacy right to abortion, also under § 1985(3). JA [1] 15-16 (Amended Complaint ¶¶ 38-41). Respondents also asserted three pendent state causes of action: trespass, public nuisance, and tortious interference with business relationships. JA 16-18 (Amended Complaint ¶¶ 42-51). Federal jurisdiction in the district court was invoked under 28 U.S.C. §§ 1331, 1342. JA 7 (Amended Complaint ¶ 3).

1. Statement of Facts

As the district court found, "[i]t is indisputable that all [of the petitioners] share a deep commitment to the goals of stopping the practice of abortion and reversing its legalization." 726 F. Supp. at 1488 (Pet. App. 20a). The district court found that "[t]o achieve these goals," each of the individual petitioners acted "through and in concert with Operation Rescue" to organize "rescue"

[1] In this brief, the abbreviation "JA" refers to the Joint Appendix, and the abbreviation "Pet. App." refers to the Appendix to the Petition for Writ of Certiorari.

events, *id.*, some of which included trespassing and obstruction of ingress and egress at abortion facilities, *id.* at 1489 (Pet. App. 21a).

The district court made the following findings of fact regarding the "purpose" of petitioners' "rescue" activities:

> The purpose of these "rescue" demonstrations is to disrupt operations at the target clinic and indeed ultimately to cause the clinic to cease operations entirely. No one has put this point any better than defendant Terry, who in an affidavit, states that "while the child-killing facility is blockaded, no one is permitted to enter past the rescuers . . . Doctors, nurses, patients, staff, abortion-bound women—all are prevented from entering the abortuary while the rescue is in progress." [JA 25.] Operation Rescue's literature defines "rescues" as "*physically* blockading abortion mills with [human] bodies, to intervene between abortionists and the innocent victims." *Operation Rescue, National Day of Rescue—October 29, 1988* (1988) (emphasis in original). [JA 22.] By disrupting and blockading family planning and abortion clinics, defendants and their followers hope (i) to prevent abortions, (ii) to dissuade women from seeking a clinic's abortion services and (iii) to impress upon members of society the moral righteousness and intensity of their anti-abortion views.

726 F. Supp. at 1488 (Pet. App. 20a). The district court did not find, and respondents neither argued nor attempted to prove, that petitioners had any motivation for trying to stop abortions other than sincere opposition to the killing of unborn children.

The term "rescue" can refer to a variety of activities directed toward stopping abortion (i.e., *rescuing* the unborn child from abortion). The term can include not only physical obstruction of access to abortion facilities, but also a variety of distinct, expressive activities protected

under the free speech guarantee of the first amendment, such as picketing, distributing literature, and verbally seeking to persuade pregnant women entering abortion facilities to carry their children to term.[2] Under this broad definition of "rescues," respondent Commonwealth Women's Clinic, in Falls Church, Virginia, has, as the district court found, been "on almost a weekly basis . . . the target of 'rescue' demonstrations . . . ." 726 F. Supp. at 1489 (Pet. App. 22a).[3]

The term "rescue" also can refer more particularly to efforts physically to block access to an abortion business. *Id.* at 1488 (Pet. App. 20a) (citing definition of "rescue" in Operation Rescue literature). In the narrow sense of an actual physical blockade, the district court found that one rescue had occurred, a year prior to the court's order granting an injunction against petitioners, at the Commonwealth Women's Clinic in Virginia. *Id.* at 1489 (Pet. App. 22a) (October 29, 1988). The court also found that rescues have occurred at a number of other locations outside of Virginia, *id.* at 1490 (Pet. App. 23a), including the Washington Metropolitan area, *id.* (April 1989 rescue in the District of Columbia); *id.* (additional rescues in the District of Columbia and Maryland).

The district court found there to be a "substantial likelihood" of blockades at abortion facilities in the

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[2] Respondents' witness Nancy Dickinson-Collins, for example, used the term "rescue" to encompass a wide range of anti-abortion activities, Trans. of Nov. 16, 1989 hearing (morning session) at 35-38, 40-41, including not only physical blockades but also such free speech activities as chanting from the sidewalk that abortion is murder, *id.* at 36; offering help to women entering abortion facilities, *id.*; urging pregnant women to choose adoption, *id.*; and offering literature, *id.* at 37.

[3] There is no evidence to support any claim (and respondents have made no such claim) that the Commonwealth Clinic has been subject to weekly blockades. On the contrary, blockades are clearly special events.

Northern Virginia area "in the immediate future." *Id.* (Pet. App. 25a). There was no direct evidence, however, of "current plans for 'rescue' demonstrations at clinics in the Northern Virginia area," *id.* (Pet. App. 24a), and the court's conclusion about the threat of future blockades rested entirely on an inference from the "established history" of blockades "in the Washington Metropolitan area and elsewhere," *id.* (Pet. App. 25a), together with the refusal of petitioners specifically "to report to the Court that 'rescue' demonstrations designed to close clinics would not be carried out against Northern Virginia clinics in the future," *id.*

The district court found that physical obstruction of abortion facilities hinders or prevents abortions from taking place at such facilities. *Id.* at 1489-90 (Pet. App. 21a-23a). The court also found that "[s]ubstantial numbers of women" seeking abortion in the Washington Metropolitan Area "travel interstate to reach the clinics." *Id.* at 1489 (Pet. App. 22a). In particular, the court found that "approximately twenty (20) to thirty (30) percent" of the patrons of the Commonwealth Women's Clinic in Virginia "come from out of state." *Id.*

The district court did not find, and respondents neither argued nor attempted to prove, that the place of residence of women coming to abortion facilities made any difference to petitioners' efforts to stop abortion; that petitioners discriminated in any way between women traveling interstate and women traveling intrastate; or that petitioners interfered with any "travel" other than access to a particular abortion facility.

Finally, respondents' counsel conceded before trial that "we are not alleging and don't plan to prove State action, and we stand or fall on that." Trans. of Nov. 16, 1989 hearing (morning session) at 13.

2. Course of Proceedings

At the close of trial, the district court granted a permanent injunction.[4] The district court ruled in favor of respondents on their first federal claim (conspiracy to violate a right to travel), and on two of their pendent state claims (trespass and public nuisance). The court declined to address respondents' remaining federal claim (conspiracy to violate a right to abortion) and state claim (tortious interference with business relationships). *National Organization for Women v. Operation Rescue*, 726 F. Supp. 1483, 1493-96 (E.D. Va. 1989) (Pet. App. 31a-36a).

The district court acknowledged the requirement, under 42 U.S.C. § 1985(3), that the offending parties act with a "class-based discriminatory animus." 726 F. Supp. at 1492 (Pet. App. 28a). The district court held that "gender-based animus" satisfies this requirement. *Id.* The court further held that statute applicable on the facts of this case because "women seeking abortions" are a "subset of a gender-based class," *id.* at 1492-93 (Pet. App. 29a). The court recognized a conflict among the federal courts on this issue, *id.*, but found the "majority" view persuasive, *id.*

With respect to the requirement of an independently existing right secured under § 1985(3), the district court relied upon a federal constitutional right to interstate travel. *Id.* at 1493 (Pet. App. 30a). The court held that because abortion businesses in Northern Virginia have clients "who travel from out of state," *id.*, blocking access to these businesses "interfere[s] with these person's [sic] right to unimpeded interstate travel,"

[4] The district court provided that the "permanent" injunction would expire on July 31, 1990, unless the plaintiffs were to show good cause for its extension. 726 F. Supp. at 1498 (Pet. App. 41a). The district court subsequently extended the injunction, which is currently set to expire on September 24, 1991. *See National Organization for Women v. Operation Rescue*, No. 89-1558-A, slip op. at 2, 5 (E.D. Va. Sept. 21, 1990) (Pet. App. 58a, 60a).

id. The court rejected petitioners' argument that such blockades "affect only intra-state travel, from the street to the doors of the clinics." *Id.*

The court also held that this "right to interstate travel is protected from purely private as well as governmental interference," and therefore no showing of state action was necessary. *Id.*

The district court declined to reach respondents' claim that petitioners were violating a constitutional right to abortion that is enforceable against purely private action. *Id.* at 1493-94 (Pet. App. 32a-33a). Observing that such a claim is "problematic" and "novel," the court held that it would be "unnecessary and imprudent to venture into this thicket." *Id.* at 1494 (Pet. App. 32a-33a).

Petitioners appealed to the United States of Appeals for the Fourth Circuit. Respondents cross-appealed, challenging certain limitations on the scope and duration of the injunction.

The district court subsequently awarded costs and attorneys fees to respondents. *National Organization for Women v. Operation Rescue*, No. 89-1558-A (E.D. Va. Feb. 13, 1990) (Pet. App. 43a). Petitioners appealed from this order as well, and the court of appeals consolidated this appeal with the previous appeal and cross-appeal.

The court of appeals affirmed the judgment of the district court in all respects (including denial of respondents' cross-appeal). *National Organization for Women v. Operation Rescue*, 914 F.2d 582 (4th Cir. 1990) (per curiam) (Pet. App. 1a).

The court of appeals decided the case solely on the basis of the federal legal issues. *Id.* at 585-86 (Pet. App. 8a-9a). The court engaged in no independent analysis of the district court's rulings under § 1985(3). Rather, the court simply noted that the "legal premises under which the district court operated are . . . consistent with the

law of the circuits." *Id.* at 585 (Pet. App. 8a). Announcing that it was reviewing the injunction under "an abuse of discretion standard," *id.*, the court of appeals held that the district court "operated in conformity with other circuits on the relevant questions of law," *id.* The court rested its disposition of the appeal specifically upon "the federal question raised by appellants [petitioners]," and therefore declined to address the propriety of pendent jurisdiction over respondents' state claims. *Id.* at 586 (Pet. App. 9a). Finally, the court upheld the award of attorneys fees. *Id.*

SUMMARY OF ARGUMENT

In the case at bar, respondents have attempted to convert a state-law action for injunctive relief against trespass into a federal civil rights conspiracy claim under 42 U.S.C. § 1985(3). Respondents' § 1985(3) claim, however, fails on its merits—indeed, the claim is not even sufficiently substantial to confer federal subject matter jurisdiction. With the failure of this federal cause of action, respondents' claim to an award of attorneys' fees must also fall.

Respondents are abortion facilities and organizational proponents of legalized abortion. Petitioners—six individuals (one woman and five men) and an organization—consider abortion to be the wrongful destruction of innocent unborn human offspring. Petitioners allegedly threaten to engage in "rescue" activities, i.e., "sit-ins" or physical blockades designed to stop abortions by preventing access to abortion facilities.

Respondents invoked § 1985(3) against petitioners on the basis of these threatened "rescues." Respondents' claim to relief under § 1985(3) must fail, however, for two fundamental reasons: first, absence of the necessary statutory element of "invidiously discriminatory class-based animus"; and second, absence of a protected right secured under § 1985(3).

1. Under this Court's decisions in *Griffin v. Breckenridge*, 403 U.S. 88 (1971), and *United Brotherhood of Carpenters and Joiners of America v. Scott*, 463 U.S. 825 (1983), a party bringing suit under § 1985(3) must establish a "class-based, invidiously discriminatory animus behind the conspirators' action." *Griffin*, 403 U.S. at 102 (footnote omitted); *Scott*, 463 U.S. at 834-35. In the present case, respondents rest their claim upon a charge of invidious animus against "women seeking abortions."

Respondents' accusation of animus against "women seeking abortions" must fail. This "animus" claim depends entirely upon two faulty legal propositions: first, that "women seeking abortions" is a proper class for purposes of "class-based animus" under § 1985(3); and second, that opposition to abortion is, *per se*, the legal equivalent to anti-female animus. Neither proposition withstands considered analysis.

"Women seeking abortions" cannot be a proper class under § 1985(3) because it is not really a class at all; rather, it is an *activity* dressed up to look like a class. Anti-abortion "rescues" target the *practice* of abortion itself; hence, "rescuers" bar access to *all* those involved in the practice of abortion—physicians, staff, abortion-bound women and their companions. The true "class," if any, obstructed by a "rescue" is "persons participating in the practice of abortion." Respondents' artificial selection of a sub-class of "women seeking abortions" is arbitrary, under-inclusive, and misleading. In essence, respondents' designation of the class as "women seeking abortions" represents an attempt, by semantic sleight-of-hand, to mischaracterize petitioners' undisputed actual motive—sincere opposition to the *practice* of abortion—as discrimination against a *class*.

There is no evidence that petitioners—one of whom is a woman—were motivated by any anti-female animus; on the contrary, the district court explicitly found that

petitioners were motivated by a deep commitment to defending the lives of the "innocent victims" of abortion—i.e., unborn children. Thus, the decision of the court of appeals necessarily rests upon the proposition that opposition to abortion, in and of itself, translates *as a matter of law* into animus against women.

Opposition to abortion, however, cannot be deemed the *per se* legal equivalent of invidious sex discrimination. Women (and men) are deeply and sincerely divided over the issue of abortion, and the stance of respondents on this controversy cannot be categorically pronounced "pro-woman" while the contrary views of petitioners and other opponents of abortion are categorically condemned as "anti-woman."

2. Under this Court's decisions in *Great American Federal Savings & Loan Ass'n v. Novotny*, 442 U.S. 366 (1972), and *United Brotherhood of Carpenters v. Scott*, a claimant under § 1985(3) must satisfy an additional statutory requirement: the claimant must identify some independently existing right or rights which the alleged conspiracy threatens to deny. *Novotny*, 442 U.S. at 372; *Scott*, 463 U.S. at 833.

Respondents assert that "rescue" activities threaten to deny two federal constitutional rights: a right to interstate travel and a right to abortion. Neither right, however, is implicated in the present case.

An anti-abortion "rescue" or sit-in does no more than hinder *intrastate* travel—i.e., from the sidewalk to the interior of an abortion facility. The federal constitutional right to interstate travel, however, does not encompass a general federal tort of obstruction. Where, as here, there is no discrimination on the basis of the residence of would-be abortion patrons, and no blockade of border passage, the right to interstate travel is simply not implicated by the purely incidental fact that some patrons come from across state lines.

Respondents' assertion of a right to abortion is also unavailing. Respondents have conceded the absence of state action in the present case; hence, there can be no infringement, under the Fourteenth Amendment, of any abortion right previously articulated by this Court. Necessarily, then, respondents' abortion claim must rest upon an invitation to the federal judiciary to create a new constitutional right to abortion that is effective against purely private action. This Court should decline respondents' call for such a dramatic expansion of current abortion jurisprudence.

Under *Hagans v. Lavine*, 415 U.S. 528 (1974), and numerous other precedents of this Court, a federal claim that is patently insubstantial cannot serve as a basis for federal subject matter jurisdiction. Respondents' manifestly deficient federal claim under § 1985(3) fails the *Hagans* test; hence, the courts below lacked federal subject matter jurisdiction over respondents' suit.

Finally, given the failure of respondents' only federal cause of action, the award of attorneys' fees to respondents under 42 U.S.C. § 1988 must fall.

ARGUMENT

The present case does not belong in federal court. As the district court acknowledged, the respondents' suit "was, essentially, a simple trespass action," *National Organization for Women v. Operation Rescue*, No. 89-1558-A, slip op. at 5 (E.D. Va. Feb. 13, 1990) (Pet. App. 46a); moreover, the federal claims respondents have asserted simply cannot survive reasoned analysis.

The court of appeals erred in sustaining respondents' federal action under 42 U.S.C. § 1985(3). Indeed, respondents' federal claims are so patently insubstantial as to be insufficient to confer federal subject matter jurisdiction. Furthermore, the award of costs and attorneys fees to respondents must fall with the rejection of respondents' federal claims. Thus, this Court should reverse the judgment of the court of appeals.

I. THE COURT OF APPEALS ERRED IN HOLDING THAT RESPONDENTS ARE ENTITLED TO RELIEF UNDER 42 U.S.C. § 1985(3).

The court of appeals erred by sustaining the use of 42 U.S.C. § 1985(3) against petitioners. Respondents failed, as a matter of law, to establish that petitioners acted with an invidiously discriminatory animus against any class protected under § 1985(3). Furthermore, respondents have failed, as a matter of law, to establish that petitioners violated any protected right that would trigger § 1985(3).

This Court has clearly identified several basic elements of a claim under § 1985(3). *See United Brotherhood of Carpenters and Joiners of America v. Scott*, 463 U.S. 825 (1983); *Griffin v. Breckinridge*, 403 U.S. 88 (1971).[5] Two crucial requirements for a § 1985(3) claim are dispositive in the present case. First, a plaintiff must allege and prove a "class-based, invidiously discriminatory animus behind the conspirators' action." *Griffin*, 403 U.S. at 102 (footnote omitted); *Carpenters v. Scott*, 463 U.S. at 834-35. Second, a plaintiff must identify some independently existing right or rights which the defendants allegedly have violated or threaten to violate. *Great American Federal Savings & Loan Ass'n v. Novotny*, 442 U.S. 366, 372 (1979); *Scott*, 463 U.S. at 833. In the

[5] The Court has held that

> to make out a violation of § 1985(3), the plaintiff must allege and prove four elements: (1) a conspiracy; (2) for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; and (3) an act in furtherance of the conspiracy; (4) whereby a person is either injured in his person or property or deprived of any right or privilege of a citizen of the United States.

United Brotherhood of Carpenters v. Scott, 463 U.S. at 828-29.

present case, respondents' claim fails to satisfy either of these statutory requirements.

A. Respondents Have Not Established the Requisite Class-Based Animus Under § 1985(3).

The court below erred in holding that respondents' claim satisfies the statutory requirement, under § 1985 (3), of class-based invidiously discriminatory animus.

The need to establish an invidious, class-based animus behind the actions of the alleged conspirators marks an important boundary for the reach of § 1985(3). As this Court recognized in *Griffin*, the "enormous sweep of the original language" of the bill that produced § 1985(3) "led to pressures for amendment" in the form of limiting language. 403 U.S. at 100. Explanations of the resulting amendment "centered entirely on the animus or motivation that would be required," *id.*; this "animus" requirement served as a crucial means of preventing § 1985(3) from becoming a general federal prohibition of private conspiracies, *id.* at 102.

Thus, in enacting § 1985(3), Congress "did not provide a federal remedy for 'all tortious, conspiratorial interferences with the rights of others.'" *Carpenters v. Scott*, 463 U.S. at 834 (quoting *Griffin*, 403 U.S. at 101). On the contrary, Congress passed this law with the very specific purpose of targeting *invidious discrimination*. As this Court explained in *Griffin*, the text of § 1985(3) must be construed with this "target" in mind:

> The constitutional shoals that would lie in the path of interpreting § 1985(3) as a general federal tort law can be avoided by giving full effect to the congressional purpose—by requiring, as an element of the cause of action, the kind of *invidiously discriminatory motivation* stressed by the sponsors of the limiting amendment. . . . The language requiring intent to deprive of *equal* protection, or *equal* privileges and immunities, means that there must be some racial, or perhaps otherwise *class-based, invidiously discriminatory animus* behind the conspirators' action.

Griffin, 403 U.S. at 102 (emphasis added in part; footnote and citation omitted) (quoted in *Scott*, 463 U.S. at 834-35).

The decision of the court of appeals, holding the necessary class-based animus to be present in the case at bar, rests upon two faulty legal premises: first, that "women seeking abortions" is a proper class under § 1985 (3); and second, that anti-abortion activities *per se* manifest a discriminatory animus against women. Neither premise survives reasoned analysis.

1. *"Women seeking abortions" is not a valid class under § 1985(3).*

"Women seeking abortions" is not a class cognizable under § 1985(3); rather, this supposed group really represents an improper attempt by respondents to dress up opposition to an *activity*—the practice of human abortion—to look like opposition to a *class*.

This Court has repeatedly counseled restraint in the face of calls for expansive enumeration of potential classes under § 1985(3). Thus, in *Scott*, the Court observed that "it is a close question whether § 1985(3) was intended to reach *any* class-based animus other than animus against Negroes and those who championed their cause, most notably Republicans." *Scott*, 463 U.S. at 836 (emphasis added). This Court has repeatedly "withheld judgment on the question whether § 1985(3), as enacted, went any farther than its central concern—combating the violent and other efforts of the Klan and its allies to resist and frustrate the intended effects of the Thirteenth, Fourteenth, and Fifteenth Amendments." *Id.* at 837.[6]

[6] In a similar vein, the Seventh Circuit explained the wisdom of a cautious approach to novel § 1985(3) claims:

The purported class of "women seeking abortions" in the case at bar provides no occasion for departure from this explicit and deliberate practice of interpretive restraint. This supposed class is not really a class at all, but is instead an *activity*—abortion—presented in the guise of a class.[7]

That respondents have artificially designed this class appears immediately from the uncontested fact that the true "class," if any, targeted by anti-abortion "rescues" is "people participating in the practice of human abortion."[8] As the undisputed factual record shows, "while

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> The question of the classes protected under the provision is one of statutory construction. As construed in *Griffin* and *Scott*, § 1985(3) was enacted to fulfill a highly specific purpose and to meet an unusual condition in the Reconstruction era. Since its decision in *Griffin*, the Court has not expressly provided a remedy to a group or class other than blacks. The import of both *Griffin* and *Scott* is that the legislative history of § 1985(3) does not support extending the statute to include conspiracies other than those motivated by a racial, class-based animus against "Negroes and their supporters."

Grimes v. Smith, 776 F.2d 1359, 1366 (7th Cir. 1985).

[7] The class of "woman seeking abortions" suffers from the same flaw as the class proposed and rejected in the *Scott* case. As the dissenting judges in the court of appeals in *Scott* contended,

> This class is one newly defined by this case, not one having any previous discernible jurisprudential identity. It is not a "class" marked by historical oppression, by minority status, by any social or political animus directed against it, by any political or religious belief, or by any of the indicia usually used to identify a class of persons who must be accorded special protection. The animus here was not directed at the membership of the plaintiffs in such a class or at their association together either as persons or in some . . . group campaign, but at their *activities* . . . .

Scott v. Moore, 680 F.2d 979, 1018 (5th Cir. 1982) (dissenting opinion) (emphasis in original), *rev'd*, 463 U.S. 825 (1983).

[8] This "class," of course, is simply a more accurate—if nonetheless misleading—attempt to translate the opposition of petitioners to an *activity* (abortion) into an animus against a *class*. As a class, "people participating in abortion" fails to satisfy the class requirement of § 1985(3) because it merely identifies those people affected by the alleged conspiracy. Any tortious conduct will necessarily have an impact on some "class" of individuals. But the class animus requirement would become meaningless if the class were to be defined simply as those persons injured by the conspiracy.

the child-killing facility is blockaded, *no one* is permitted to enter past the rescuers. *Neither women nor men.* Doctors, nurses, patients, staff, abortion-bound women—*all* are prevented from entering the abortuary while the rescue is in progress." JA 25 (Plaintiffs' Trial Exhibit 12: Affidavit of Randall A. Terry) (emphasis changed). *See* 726 F. Supp. at 1488 (Pet. App. 20a) (quoting from the Terry affidavit and finding that "[n]o one has put this point any better than [petitioner] Terry"). In the present case, then, as in *Mississippi Women's Medical Clinic v. McMillan*, 866 F.2d 788 (5th Cir. 1989), respondents have "designated a class that is so under-inclusive as to mischaracterize the dispute." *Id.* at 794 (lead opinion of Gee, J.) (rejecting the class of "women of child-bearing age who seek medical attention from the [plaintiff abortion facility]").

Respondents' selection of a sub-class designated "women seeking abortions" is entirely arbitrary. Respondents might just as well have designated a sub-class of "physicians seeking to induce abortions" or, for that matter, a racial sub-class of "black women seeking abortions" or "white women seeking abortions."[9] All such artificial class designations, however, represent improper efforts to conjure "classes" into being purely by means of definitional manipulation.

The supposed class in this case does share a common feature—the members are each "seeking abortions"—but this feature represents an *activity* and not the sort

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[9] Were a group of individuals actually to blockade an abortion facility and permit *only* black women to enter and abort their offspring, there would, of course, be genuine discrimination on the basis of *race*. Such is not the case here.

of *characteristic* (immutable or otherwise) necessary to define a proper class. To hold otherwise would be to open the doors to claims limited only by the semantic creativity of attorneys, *e.g.*, "investors seeking interest" as the "class" targeted by those committing securities fraud; "adults seeking alcoholic beverages" as the "class" targeted by temperance activists; "non-vegetarians seeking to eat meat" as the "class" targeted by "animal rights" proponents; and so forth. Allowing such claims would effectively eliminate the requirement of "class-based" animus and convert § 1985(3) into a general federal tortious conspiracy statute.

That some might characterize the activity at issue here—seeking abortion—as a "right" makes no difference. As the United States Court of Appeals for the Ninth Circuit explained in *Lopez v. Arrowhead Ranches*, 523 F.2d 924 (9th Cir. 1974), the complainants

> have not [alleged] and cannot allege, as they must if they would succeed, anything to distinguish them as intended victims other than that they belong to the class possessing the rights deprived—a circumstance true of all potential [targets of the alleged illegal conspiracy]. Under *Griffin* we think *the class status providing the motivating animus must be created by a fact other than possession of the right deprived—otherwise virtually every conspiratorial deprivation of a primary right would be actionable under § 1985(3) regardless of the pertinent statutory enforcement provisions.*

Id. at 928 (emphasis added).

Nor can respondents salvage their claim by arguing that because "women seeking abortions" is a subset of the broader class of "women," that this subset should partake of any protection afforded under § 1985(3) against gender-based animus.[10] As one district court perceptively observed,

> if the animus is directed at a particular class of women, then, by definition, it is not directed at other classes of women or at women as a class. If that is so, then the discrimination cannot be gender-based, because it separates persons of the same gender from each other and, obviously, on a basis other than by gender.

National Abortion Federation v. Operation Rescue, 721 F. Supp. 1168, 1171 (C.D. Cal. 1989), *appeal pending*, No. 90-55199 (9th Cir. argued May 11, 1990).

Thus, respondents' designation of the class as "women seeking abortions" appears ultimately as a disingenuous and improper attempt to mischaracterize petitioners' sincere opposition to an activity—the practice of human abortion—as opposition to a class of people. Such verbal legerdemain cannot suffice to convert anti-abortion activism into "sex discrimination."

2. *Opposition to abortion is not the legal equivalent of discrimination against women.*

Any attempt to interpret the animus in question as gender-based animus must also fail. Petitioners' conscientious opposition to abortion, standing alone, simply does not translate into sex discrimination.

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[10] The question whether § 1985(3) applies not only to racial animus but also to gender-based animus raises a host of thorny issues. This Court has explicitly reserved the question whether classifications based upon gender are, like racial classifications, "inherently suspect." *Mississippi University for Women v. Hogan*, 458 U.S. 718, 724 n.9 (1982). Indeed, this Court has recognized that gender can serve as a defensible basis for discrimination even in the context of *government* action, and even in situations in which racial discrimination would be patently unconstitutional. *E.g.*, *Rostker v. Goldberg*, 453 U.S. 57 (1981) (registration for military draft); *Michael M. v. Superior Court*, 450 U.S. 464 (1981) (statutory rape laws). Construing § 1985(3) to forbid even *private* discrimination on the basis of sex, with the same force as the current ban on racial discrimination, would be to open a statutory Pandora's Box. *Cf.* Brief Amicus Curiae of American Victims of Abortion §§ II, III(A)-(C) (concluding that "women seeking abortion" is not a suspect class under either congressional enactments or the Equal Protection Clause of the fourteenth amendment).

For a § 1985(3) claim to succeed, there must be some "class-based, invidiously discriminatory animus behind the conspirators' action." *Griffin v. Breckenridge*, 403 U.S. at 102. Thus, "[i]n order to prove [their] claim under § 1985(3), [respondents] must show that the *protestors were motivated* by a (1) class-based (2) invidiously discriminatory animus." *Mississippi Women's Medical Clinic v. McMillan*, 866 F.2d 788, 793 (5th Cir. 1989) (lead opinion) (emphasis in original) (citing *Griffin*, 403 U.S. at 102). Respondents have shown no such motivation.

The true motivation of petitioner Jayne Bray and her fellow petitioners is obvious: the desire to discourage or prevent abortions. *See* JA 25 (Plaintiffs' Trial Exhibit 12: Affidavit of Randall A. Terry). *See generally* 726 F. Supp. at 1487-88 (Pet. App. 18a-20a) (findings of district court). Respondents have neither argued nor attempted to prove that any of the petitioners harbored the least bit of hostility toward women. Indeed, petitioner Jayne Bray *is* a woman. Furthermore, it is common knowledge that countless women are involved in anti-abortion activities of different kinds, including "rescue" efforts to block access to abortion facilities. *See* JA 22 (Plaintiffs' Trial Exhibit 7) (speech by woman rescuer) ("I have been in the forefront of a movement [Operation Rescue] which had led 20,000 women like me to risk imprisonment in this country").

The undisputed findings of the district court clearly establish the fact that Jayne Bray and her co-petitioners were motivated by genuine, conscientious opposition to the killing of unborn children in abortion. Thus, the district court found that:

> — " 'rescuers' view their blockading efforts as '*rescues' of fetuses* scheduled for abortion," 726 F. Supp. at 1487 (Pet. App. 18a) (emphasis added);
>
> — "[t]he individual defendants [petitioners] are persons who are opposed to abortion and its legalization and who are deeply committed to taking active steps to advance their views . . .," *id.* at 1488 (Pet. App. 19a);
>
> — "[i]t is indisputable that all defendants [petitioners] share a deep commitment to the goals of stopping the practice of abortion and reversing its legalization. To achieve these goals, . . . [petitioners] organize, coordinate and participate in 'rescue' demonstrations . . .," *id.* (Pet. App. 20a);
>
> — "[t]he purpose of these 'rescue' demonstrations is to disrupt operations at the target clinic and indeed ultimately to cause the clinic to cease operations entirely. *No one has put this point any better than defendant [petitioner] Terry*, who . . . states *"while the child-killing facility is blockaded, no one is permitted to enter* past the rescuers . . . Doctors, nurses, patients, staff, abortion-bound women, families of abortion-bound women—all are prevented from entering the abortuary while the rescue is in progress,' " *id.* (emphasis added; ellipsis in district court opinion) (*see also* JA 24-27: full text of Terry affidavit);
>
> — "[petitioner] Operation Rescue's literature defines 'rescues' as '*physically* blockading abortion mills with [human] bodies, to *intervene between abortionists and the innocent victims.' Operation Rescue, National Day of Rescue—October 29, 1988* (1988)," *id.* (first emphasis in original literature; second emphasis added) (quoting JA 22);
>
> — "[b]y disrupting and blockading . . . abortion clinics, defendants [petitioners] hope (i) to prevent abortions, (ii) to dissuade women from seeking a clinic's abortion services and (iii) to impress upon members of society the moral righteousness and intensity of their anti-abortion views," *id.*

Respondents' own evidence only further supports the obvious fact that the "animus" of petitioners is opposition to *abortion*, not opposition to *women*. Thus, in Plaintiffs' Trial Exhibit 1, Operation Rescue literature de-

scribes rescues as "heroic attempts by God-fearing people *to save babies and mothers from abortion*" (JA 22) (emphasis added). Plaintiffs' Trial Exhibit 7 contains a speech from a woman rescue leader decrying the accusations of "my sisters in the National Organization for Women" and explaining that "[w]e try to protect the 800,000 women whom the N.O.W. wants to see butchered in their own mothers' wombs." (JA 22). Plaintiffs' Trial Exhibit 12 is an affidavit in which petitioner Randall Terry explains his desire "to rescue those who are being dragged to their death" at a "child-killing facility" (JA 25). Terry rebuts at length the accusation of invidious sex discrimination by documenting that his religious beliefs forbid him to condemn others, including "abortion-bound women;" that he has a loving relationship with his wife and daughters; that he works along with women to help other women who face crisis pregnancies; and that "rescues" aim at stopping the *business of abortion itself* by preventing entry of *anyone* into the abortion facility. (JA 24-27.)

In short, the explicit factual findings of the district court and the uniform factual record in this case clearly confirm, as a matter of *fact*, that the "animus" of petitioners is sincere opposition to human abortion.

The decision of the court of appeals in the present case, therefore, must rest on the premise that opposition to abortion is, as a matter of *law*, the *per se* equivalent of opposition to women.[11] While this may be the sincere

[11] In *New York State National Organization for Women v. Terry*, 886 F.2d 1339 (2d Cir. 1989), *cert. denied*, 110 S. Ct. 2206 (1990), a panel of the Second Circuit stated, without authority, that activities designed to stop abortions "reveal an attitude or animus based on gender." *id.* at 1359. This is equivalent to maintaining that efforts to stop child abuse "reveal an attitude or animus based on parental status." Such a strained, highly attenuated argument falls far short of meeting the discriminatory *motivation* requirement of § 1985(3).

belief of some proponents of legalized abortion, it is by no means a self-evident legal proposition. On the contrary, respondents' charge of sex discrimination represents an affront to the sincerity of countless women and men—including judges, legislators, scholars, and a multitude of others—who regard human abortion as the killing of innocent persons.

The petitioners in this case tried to stop women from having abortions, not because these women are *women*, but because petitioners believe that *abortion* is an atrocity. As in *Mississippi Women's Medical Clinic*, the

> protestors (who are made up of both men and women) confront and try to persuade to their point of view all groups—men, women of all ages, doctors, nurses, staff, the female security guards, etc. In fact, [the record] indicates that the animus of the protestors is to dissuade *anyone* who contributes to the incidence of abortions. It is useful to reiterate that the legislative history indicates that Congress wanted to evaluate "class-based invidious discrimination" through the lens of "animus or motivation," not impact.

866 F.2d at 794 (lead opinion of Gee, J.) (emphasis in original) (citing *Scott*, 463 U.S. at 834-35). Thus, petitioners did not act with "a class-based animus, that is a prejudice against a group of persons or against a particular person *because of his membership in that group.*" *Roe v. Abortion Abolition Society*, 811 F.2d 931, 934 (5th Cir.) (emphasis added), *cert denied*, 484 U.S. 848 (1987).

Respondents' claim would require this Court to make a logical leap that is both unsupported and untrue: namely, that opposition to abortion is, as a matter of law, the *per se* equivalent of discrimination against women. This Court has never suggested that it is the business of a federal court to embrace, *as a matter of law*, the political stance and rhetoric of an advocacy group like respondent National Organization for Women. This

Court should decline respondents' invitation to label the entire pro-life movement, as a matter of law, as "sexist." *See generally* Brief for the Southern Center for Law & Ethics as Amicus Curiae (courts below erred by holding opposition to abortion to be the *per se* legal equivalent of sex discrimination).[12]

B. Respondents Have Not Established the Requisite Violation of a Right Protected Under § 1985(3).

Respondents have also failed to establish that petitioners violated, or threatened to violate, some independently existing right secured under 42 U.S.C. § 1985(3). As this Court has explicitly held, "[s]ection 1985(3) provides no substantive rights itself; it merely provides a remedy for violation of the rights it designates." *Great American Savings & Loan Ass'n v. Novotny*, 442 U.S. 366, 372 (1979). "The rights, privileges, and immunities that § 1985(3) vindicates must be found elsewhere . . . ." *Carpenters v. Scott*, 463 U.S. at 833.

Respondents alleged the violation of two rights for purposes of triggering § 1985(3): a "right to interstate travel," and a "right to abortion." No such rights

[12] The necessary "discriminatory" animus is also absent in the present case for the simple reason that anti-abortion "rescues" do not discriminate—i.e., rescuers do not seek to prevent only *some* women from aborting while permitting *others* to go ahead and abort:

> The mere deprivation of a right, however fundamental, is not a deprivation of *equal* protection. For a denial of equality to be the conspiratorial objective, the conspirators must seek to permit some persons to enjoy the protected right and to deny it to others. The reprobated objectives alleged in *Griffin* included, for example, the denial of the right of black persons to " 'travel the public highways without restraint in the same terms as white citizens in Kemper County, Mississippi.' " 403 U.S. at 92 (quoting the complaint). The proof in this case shows no comparable objective; the defendants did not seek to deny the right [in question] to the individual plaintiffs *while according that right to others.*

Scott v. Moore, 680 F.2d 979, 1014-15 (5th Cir. 1982) (dissenting opinion) (emphasis in original), *rev'd*, 463 U.S. 825 (1983).

are implicated in the case at bar. The constitutional right to interstate travel does not prohibit the physical obstruction of a facility simply because some patrons of that facility come from outside of the state. Nor is there a right to abortion in the absence of state action.

1. *Respondents have not established a violation of any right to interstate travel.*

The decision of the court of appeals in the present case rests upon the premise that private parties violate a federal constitutional right to travel whenever they block access to an establishment that serves at least some people who come from out of state. *See* 914 F.2d at 585 (Pet. App. 18a); *see also* 726 F. Supp. at 1493 (Pet. App. 30a). This premise represents a radical departure from the prior teachings of this Court. *See generally* Brief Amici Curiae of Daniel Berrigan, S.J. et al. [hereinafter, Berrigan Amicus Brief] (containing thorough analysis of Supreme Court decisions on the right to travel).

The implications of the holding of the court of appeals are astounding. Virtually every business located in a city situated near a state border (e.g., New York, Philadelphia, Washington, D.C., Chicago, Portland, St. Louis, Minneapolis, and so forth), as well as every business located on a major interstate route or in the vicinity of a tourist site or commercial center, will serve numerous out-of-state customers on a regular basis. According to the holding of the court below, any sit-in or mass picketing at such a business would be a federal constitutional violation.

Indeed, in the highly mobile modern American society, only the most remotely situated or parochially specialized business will not serve at least some out-of-state clients. Thus, the holding of the court below is tantamount to recognizing a general federal constitutional tort of obstruction valid for virtually every business establishment in the country.

This Court has never recognized a constitutional right to travel of such all-encompassing scope.

True, this Court has held that there is a "constitutional right to travel from one State to another," *United States v. Guest*, 383 U.S. 745, 757 (1966); the Court has further held that, at least in the context of racial discrimination, this right applies against private as well as government interference, *Griffin v. Breckinridge*, 403 U.S. 88, 105 (1971); *Guest*, 383 U.S. at 759 n.17.[13]

The right to travel, however, is not an unlimited right to mere physical movement. Rather, it is a "right of free *interstate migration*," *Attorney General of New York v. Soto-Lopez*, 476 U.S. 898, 902 (1986) (plurality opinion) (emphasis added), or, as Justice O'Connor would characterize it, a right to freedom from impermissibly burdensome discrimination between state residents, *id.* at 920 (O'Connor, J., dissenting). *See* Berrigan Amicus Brief § I (right to interstate travel is right to freedom from discrimination against nonresidents). There is no general federal constitutional tort of obstruction of public or private passage.[14]

[13] This Court has never sustained the assertion of a constitutional right to travel, *in the absence of state action*, outside of the context of racial discrimination. *Guest* and *Griffin* may therefore be explained as predicated upon a right to travel flowing from the prohibitions of the Thirteenth Amendment, which applies against private action, *see Griffin*, 403 U.S. at 105. Any assertion of a general right to travel effective against purely private action would encounter serious constitutional difficulties. *See Guest*, 383 U.S. at 763-74 (Harlan, J., dissenting).

[14] As one court accurately observed,

> Supreme Court decisions finding a violation of the fundamental right to interstate travel . . . involved a provision requiring that the citizen be a resident for a certain length of time or at a certain time before the individual could receive a privilege or exercise a right. The cases that have recognized a fundamental right of interstate travel have done so vis-a-vis durational residency requirements. *See Dunn v. Blumstein*, 405 U.S. 330 (1972) (one-year residency requirement to vote) (impinged upon both fundamental right to vote and to interstate travel). *Id.* at 335; *Memorial Hospital v. Maricopa*, 415 U.S. 250 (1974) (one-year residency requirement to receive nonemergency hospitalization or medical care at the county's expense); *Shapiro v. Thompson*, 394 U.S. 618 (1969) (required an individual to reside within the state for one year before he/she could file an application for AFDC); *Attorney General of New York v. Soto-Lopez*, 476 U.S. 898 (1986) (giving a preference in civil service employment opportunities to resident veterans who lived in New York at the time they entered military service).

Eldridge v. Bouchard, 645 F. Supp. 749, 753 (W.D. Va. 1986). In the present case, as in *Eldridge*, "the challenged action does not impinge the fundamental right to interstate travel because the . . . primary objective" of the challenged conduct—here, anti-abortion blockade "is . . . not to impede travel," but to achieve some other goal—here, to stop abortions—and there is no *discrimination* that would "penalize the exercise of the right to travel." *Id.*

The right to interstate travel guarantees *equal* freedom to travel as between interstate and intrastate travelers. If the obstacle in question applies to *both* interstate and intrastate travelers, then the right to interstate travel is not implicated:

> Where, for example, an interstate migrant loses his driver's license because the new State has a higher age requirement, a different constitutional question is presented. For in such a case, the new State's age requirement is not a *penalty* imposed solely because the newcomer is a new resident; instead, all residents, old and new, must be of a prescribed age to drive.

Dunn v. Blumstein, 405 U.S. 330, 342 n.12 (1972) (citation omitted; emphasis in original). Thus, in *Dunn* this Court struck down a one-year residency requirement for voting which "penalized those persons, *and only those persons*, who have gone from one jurisdiction to another during the qualifying time period." *Id.* at 338 (emphasis added).[15] But in *Village of Belle Terre v. Boraas*, 416

[15] The residency restriction at issue in *Doe v. Bolton*, 410 U.S. 179 (1973), forbade abortions for nonresidents of Georgia *while allowing abortions for residents*. *Id.* at 202. This restriction there-

U.S. 1 (1974), by contrast, this Court sustained a single-family zoning restriction which was "not *aimed* at transients." *Id.* at 7 (emphasis added).[16]

The Constitution does not *give special privileges* to interstate travelers. *See Califano v. Torres*, 435 U.S. 1, 4-5 (1978) (per curiam) (rejecting argument that right to travel requires person who travels into a state to be given benefits superior to those who already reside there: "the broader implications of such a doctrine in other areas of substantive law would bid fair to destroy the independent power of each State under our Constitution to enact laws uniformly applicable to all of its residents"). *See also* Berrigan Amicus Brief § II (right to interstate travel does not confer rights on nonresidents that exceed the rights of residents). On the contrary, the right to interstate travel *forbids special hindrances* of interstate movement.

> Thus, for example, a conspiracy to rob an interstate traveler would not, of itself, violate [18 U.S.C.] § 241[, the criminal counterpart of § 1985(3)]. But if the *predominant purpose* of the conspiracy is *to impede or prevent the exercise of the right* of interstate travel, *or to oppress a person because of his exercise of that right*, then . . . the conspiracy becomes a proper object of the federal law . . . .

Guest, 383 U.S. at 760 (emphasis added).

Petitioners' alleged obstruction of access to abortion businesses simply does not implicate the federal constitutional right to interstate travel under any traditional understanding of that right. Such obstruction hinders *all* comers, whether from Virginia or from out-of-state. *See* JA 25 (Plaintiffs' Trial Exhibit 12: Affidavit of Randall A. Terry) ("while the child-killing facility is blockaded, *no one* is permitted to enter past the rescuers") (emphasis added). Respondents did not establish, and could not establish, that anti-abortion rescues single out interstate travelers, penalize out-of-state patrons because of their residence,[17] or block border passage. *Cf. Attorney General of New York v. Soto-Lopez*, 476 U.S. at 902, 903 (plurality opinion) (right to "interstate migration" implicated by action that "actually deters," has the "primary objective" of deterring, or uses a "classification which serves to penalize" *interstate* migration).

The goal and effect of petitioners' alleged activities were to stop abortion, regardless of the residency or travel history of any women seeking to abort. Under these circumstances, no right to travel is implicated.

Indeed, to adopt respondents' theory of the right to travel would be to arm interstate travelers with a discriminatory sword, instead of a shield *against* discrimination. According to respondents, a person who is blocked from entering a facility (or from passing along a street or sidewalk) would have a special *federal* cause of action if—but only if—that person was from out of

fore effectuated *discrimination* between in-state and out-of-state patrons of abortion facilities, *id.* at 200, and this Court held that the law violated the Privileges and Immunities Clause of the Constitution, U.S. Const. art. IV, § 2, *see* 410 U.S. at 200. *Doe*, therefore, has no relevance to the present case. *See* Berrigan Amicus Brief § II(B) (distinguishing *Doe v. Bolton*).

[16] The court of appeals in *New York State NOW v. Terry*, 886 F.2d 1339 (2d Cir. 1989), *cert. denied*, 110 S. Ct. 2206 (1990), erred, therefore, when it found a violation of the right to travel on the basis of the burdens—inconvenience, expense, and medical consequences—that may face out-of-state patrons who are unable to gain access to abortion facilities. *N.Y. State NOW*, 886 F.2d at 1360-61. These burdens depend upon the *distance* the patrons travel, and not upon whether patrons cross any state *borders*. The presence or absence of *interstate* travel is completely irrelevant, and therefore the right to interstate travel is not implicated.

[17] In fact, an *intrastate* traveler from the far end of Virginia will plainly face greater inconvenience from an anti-abortion blockade in Alexandria than will an *interstate* traveler who resides just minutes away in the District of Columbia.

state. In-state residents, meanwhile, would be relegated to their usual tort remedies under state law. Furthermore, under respondents' theory, conduct which would otherwise be merely tortious obstruction would become a *federal violation* purely because of the incidental fact that some of the obstructed parties had come to the site of the tort from another jurisdiction. Blockading a McDonalds, for example, would be a federal constitutional tort just because interstate travelers sometimes patronize the facility. Such a claim is patently absurd.[18]

Respondents have established no more than the incidental fact that some patrons of Northern Virginia abortion facilities come from outside of Virginia. This fact, standing alone, does not convert all tortious obstruction at an abortion facility into a violation of a federal constitutional right to travel.

2. *Respondents have not established a violation of any right to abortion.*

The courts below declined to address respondents' claim that petitioners, though private actors, had violated a right to abortion. *See* 914 F.2d at 586 (Pet. App. 9a); 726 F. Supp. at 1493-94 (Pet. App. 31a-33a). Nor does this argument have any merit. "Section 1985(3) does not . . . protect individuals against private efforts to encroach on constitutional shields . . . that protect only against official conduct." *Roe v. Abortion Abolition Society*, 811 F.2d 931, 933 (5th Cir.) (citing *Scott*, 463 U.S. at 833), *cert. denied*, 484 U.S. 848 (1987).

Regardless of whether the abortion right announced in *Roe v. Wade*, 410 U.S. 113 (1973), retains any continuing validity,[19] this asserted right simply does not apply to the case at bar. The *Roe* Court located a right to abortion in the liberty guarantees of the fourteenth amendment, and this amendment only applies against state action.

In *Roe v. Wade*, the Court held that the right of privacy "founded in the Fourteenth Amendment's concept of personal liberty and *restrictions upon state action*" includes a right to abortion. 410 U.S. at 153 (emphasis added). Based upon this holding, the Court sharply limited any "regulation by the State" or "interference by the State." *Id.* at 163.

The *Roe* Court's focus on *state* restrictions on abortion reflects the established principle that "[t]he Fourteenth Amendment protects the individual against *state action*, not against wrongs done by *individuals*." *Carpenters v. Scott*, 463 U.S. at 831 (internal quotation marks and citations omitted; emphasis in original). As the majority observed in *Webster v. Reproductive Health Services*, 109 S. Ct. 3040 (1989), there is no constitutional objection where there is "' no *governmental* obstacle' " to abortion. *Id.* at 3052 (emphasis added) (quoting *Harris v. McRae*, 448 U.S. 297, 315 (1980)).

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[18] Furthermore, if anti-abortion sit-ins violate a federal constitutional right to travel, then so did the lunch-counter and college campus sit-ins of the 1960's and 1970's, and so will the sit-ins of the 1990's and 2000's—whatever the particular social cause may be. The right to interstate travel, however, is a safeguard of civil liberty—not a means for suppressing civil disobedience.

[19] As the district court observed, "the law concerning a putative abortion right is in a state of flux." 726 F. Supp. at 1494 (Pet. App. 32a) (footnote omitted). In light of the recent decision of this Court in *Webster v. Reproductive Health Services*, 109 S. Ct. 3040 (1989), the status of the abortion right set forth in *Roe v. Wade*, 410 U.S. 113 (1973), is highly uncertain. *See* 109 S. Ct. at 3056-58 (plurality opinion) (expressing willingness to abandon the trimester framework of *Roe*); *id.* at 3063 (O'Connor, J., concurring in judgment) (questioning the trimester framework of *Roe*); *id.* at 3064 (Scalia, J., concurring) (expressing willingness to overrule *Roe*); *id.* at 3067 (Blackmun, J., dissenting) (observing that *Roe* is no longer secure). *See also* Brief Amicus Curiae of National Right to Life Committee, Inc. §§ IV, V ("right to abortion" is a liberty interest, not a fundamental right).

In the case at bar, respondents have conceded the complete absence of any state action. As respondents' counsel said in his opening statement at trial, "we are not alleging and don't plan to prove State action, and we stand or fall on that." Trans. of Nov. 16, 1989 hearing (morning session) at 13. Hence, there can be no violation of any constitutional right to abortion, and no violation of § 1985(3).

Respondents frankly conceded at trial the absence of case authority in support of their claim: "Now, I will be very candid to say to the Court I do not have a case that directly supports my position . . . ." Trans. of Nov. 16, 1989 hearing (morning session) at 10 (statement of respondents' counsel John H. Schafer). Respondents also acknowledged to the court of appeals that every court that has addressed this issue has ruled contrary to respondents. Brief for Appellees and Cross-Appellants at 22, *National Organization for Women v. Operation Rescue*, 914 F.2d 582 (4th Cir. 1990) (Nos. 90-2606, 90-2607, and 90-2651), *cert. granted sub nom. Bray v. Alexandria Women's Health Clinic*, 111 S. Ct. 1070 (1991). *See, e.g., Portland Feminist Women's Health Center v. Advocates for Life, Inc.*, 681 F. Supp. 688, 691 (D. Ore. 1988) (rejecting § 1985(3) claim predicated on abortion rights; U.S. Constitution does not protect privacy right from private interference); *Roe v. Operation Rescue*, 710 F. Supp. 577, 582-83 (E.D. Pa. 1989) (rejecting § 1985(3) claim predicated on abortion right; showing of state involvement is an "essential element[]" of the claim); *Chico Feminist Women's Health Center v. Butte Glen Medical Society*, 557 F. Supp. 1190, 1197 (E.D. Cal. 1983) (rejecting § 1985(3) claim predicated on right to privacy; claim includes "a state action requirement"); *cf. New York State NOW v. Terry*, 704 F. Supp. 1247, 1260 (S.D.N.Y.) (noting that state involvement is a requirement for a § 1985(3) claim predicated on a right to privacy, but finding state involvement on the facts of the case), *modified and aff'd on other grounds*, 886 F.2d 1339 (2d Cir. 1989), *cert. denied*, 110 S. Ct. 2206 (1990). *See also Hickman v. Group Health Plan, Inc.*, 396 N.W.2d 10, 13 (Minn. 1986) (rejecting constitutional challenge to statutory ban on wrongful birth suits; right to abortion is not implicated by "purely private conduct" of doctor).

Thus, respondents are asking this Court to announce a novel constitutional doctrine by "discovering" a federal constitutional right to abortion that applies against purely private actors. Respondents' call for such a massive expansion of abortion jurisprudence is unwarranted and indefensible. *See generally* Brief Amicus Curiae of National Right to Life Committeee, Inc. § II(B) (history and precedent foreclose any argument that the ninth amendment to the U.S. Constitution secures a right to abortion). This Court must reject respondents' extraordinary claim that every private action that interferes with abortion is a federal constitutional tort.

In *Carpenter v. Scott*, this Court explicitly rejected the notion that "when the alleged conspiracy is aimed at a right that is by definition a right only against state interference the plaintiff in a § 1985(3) suit nevertheless need not prove that the conspiracy contemplated state involvement of some sort." 463 U.S. at 833. On the contrary, the Court held that when the relevant constitutional provision "restrains only official conduct, to make out their § 1985(3) case, it was necessary for respondents to prove that the State was somehow involved in or affected by the conspiracy." 463 U.S. at 833.[20]

[20] The dissenting opinion of eight judges (joined in relevant part by a ninth dissenter) of the court of appeals in *Scott v. Moore*, 680 F.2d 979 (1982), *rev'd*, 463 U.S. 825 (1983), is especially appropriate to the present case:

> The extension of § 1985(3) to protect against *private* infringement of every right protected against *governmental* action by the Constitution would create a *Bivens*-type tort action against

Respondents have not purported to show state action in the present case. Thus, their attempt to predicate a § 1985(3) claim upon a supposed right to abortion must fail.

II. RESPONDENTS' CLAIM UNDER 42 U.S.C. § 1985(3) IS TOO INSUBSTANTIAL TO SUPPORT FEDERAL SUBJECT MATTER JURISDICTION.

As demonstrated above, respondents' asserted bases for a federal cause of action are entirely meritless. When a federal claim is, like that of respondents, " 'so attenuated and unsubstantial as to be absolutely devoid of merit,' " that claim cannot suffice to confer federal jurisdiction. *Hagans v. Lavine*, 415 U.S. 528, 536 (1974) (quoting *Newberryport Water Co. v. Newberryport*, 193 U.S. 561, 579 (1904)). Hence, the courts below should have dismissed respondents' suit for lack of federal subject matter jurisdiction. *Hagans*, 415 U.S. at 537-38.

The district court in the case at bar forthrightly recognized that respondents' lawsuit "was, essentially, a simple trespass case only modestly complicated by an unsettled § 1985(3) issue." *NOW v. OR*, No. 89-1558-A, slip op. at 5 (E.D. Va. Feb. 13, 1990) (Pet. App. 46a-47a) (footnote omitted) (ruling of district court on attorney's fees). This "modest complication"—respondents' § 1985(3) claim—represented the sole basis for the invocation of federal subject matter jurisdiction. As a basis for federal jurisdiction, this claim is patently and woefully inadequate.

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every private conspiracy that affects a federal constitutional right. A citizen has a right to be secure in his property and home, but *we do not think that § 1985(3) confers a cause of action for a conspiracy by a person's neighbors to block his driveway in order to keep him from driving his automobile to his place of business.*

Id. at 1014 (footnote omitted; emphasis added in part).

As demonstrated above, *see supra* § I(A), respondents have completely failed to set out a claim of invidiously discriminatory class animus as required by § 1985(3). Respondents have not even alleged any facts to support a claim of hostility by petitioners toward women. Instead, respondents' claim of class-based, invidiously discriminatory animus rests entirely upon the artificial and improper creation of a class of "women seeking abortions" and the faulty and improper assumption that sincere opposition to the practice of human abortion is *per se* sex discrimination. As already demonstrated, each of these legal propositions suffers from obvious, major legal and logical deficiencies, with the net result that respondents' class animus claim is manifestly untenable and insubstantial.

Respondents' federal claim is also facially defective for a second reason: respondents have not presented any substantial claim that petitioners have violated or threaten to violate any right protectable under § 1985(3). *See supra* § I(B). Respondents urged that petitioners violated a right to abortion. But respondents conceded the absence of state action, a necessary predicate for any claim derived from *Roe v. Wade*, 410 U.S. 113 (1973). The suggestion that the United States Constitution forbids purely private action that hampers or threatens to hamper access to abortion—such as a mother's grounding of her pregnant daughter to prevent her from aborting, or a distraught husband's desperate blockade of his wife's entrance to the abortion operating room—is obviously frivolous. Respondents' alternative claim, resting upon an asserted right to interstate travel, is similarly insubstantial. As illustrated above, *see supra* § I(B)(1), respondents' claim boils down to an argument that any tort perpetrated against someone who happens to be from out of state, and any tort against a business which happens to serve some patrons from out of state, *ipso facto* becomes a violation of the federal constitutional right to

interstate travel. Such a patently meritless claim stretches the right to travel far beyond the constitutional breaking point; respondents' theory essentially would embrace a general federal law of torts. *See also* Berrigan Amicus Brief § IV(B) (concluding, after comprehensive review of precedents regarding the right to travel, that respondents' arguments are clearly foreclosed by previous decisions).

Respondents' claim under § 1985(3), then, "is so patently without merit as to justify . . . dismissal for want of jurisdiction." *Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 70 (1978).[21]

III. THE AWARD OF COSTS AND ATTORNEYS FEES MUST BE VACATED.

Because the judgment in favor of respondents on their federal cause of action cannot stand, the award of costs and attorneys fees to respondents must likewise fall.

Respondents need not fail on *all* of their claims (i.e., state or federal) before this Court may disturb the award of attorney fees. Rather, this award must fall with the rejection of respondents' *federal* claims, even if respondents ultimately were to prevail on their pendent state claims. The courts are unanimous, in the Fourth Circuit and elsewhere, in holding that where a plaintiff loses on a federal fee-generating claim, while winning on a pendent state claim, no award of attorneys fees is available under 42 U.S.C. § 1988. *Bunting v. City of Columbia*, 639 F.2d 1090, 1095 (4th Cir. 1981); *Haywood v. Ball*, 634 F.2d 740, 743 (4th Cir. 1980); *McDonald v. Doe*, 748 F.2d 1055, 1056-57 (5th Cir. 1984) ("This circuit . . . has recently held that the plaintiff does not . . . prevail for fee purposes under 42 U.S.C. § 1988 when his constitutional claim is decided adversely to him even though he obtains recovery on a pendent state law claim, joining the other circuits that have considered the question and have unanimously reached the same conclusion") (footnotes and citations omitted) (and cases cited), *reh'g denied*, 753 F.2d 1075 (5th Cir. 1985); *Heath v. Brown*, 807 F.2d 1229, 1233 (5th Cir. 1987) (per curiam) ("a party who wins pendent state claims while *losing* all federal claims is not entitled to fees") (emphasis in original); *Raley v. Fraser*, 747 F.2d 287, 290-92 (5th Cir. 1984); *Reel v. Arkansas Dep't of Correction*, 672 F.2d 693, 697-99 (8th Cir. 1982); *Curia Brothers & Co. v. Allen*, 672 F.2d 347, 357-58 (3d Cir. 1982); *Russo v. State of New York*, 672 F.2d 1014, 1022-23 (2d Cir. 1982).

Thus, the meritlessness of respondents' claim for relief under 42 U.S.C. § 1985(3) requires the reversal of the award of attorneys fees to respondents.

CONCLUSION

For all of the foregoing reasons, this Court should reverse the judgment of the court of appeals.

Respectfully submitted,

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[21] The mere fact that one solitary federal court of appeals—the Second Circuit, in *New York State NOW v. Terry*, 886 F.2d 1339 (2d Cir. 1989), *cert. denied*, 110 S. Ct. 2206 (1990)—and several district courts have sustained (in conflict with other federal courts, *see* Pet. for Cert. § I) claims similar to those of respondents does not strip this Court of the authority independently to scrutinize the substantiality of these claims. *See* Brief Amici Curiae of the Rutherford Institute et al. § II.