Thomas More SOCIETY

309 West Washington Street Suite 1250
Chicago, IL 60606

The "FACE Act"

Freedom of **A**ccess to **C**linic **E**ntrances Act of 1994

18 U.S. Code § 248

I. HISTORICAL CONTEXT OF THE FACE ACT.

Following *Roe v. Wade,* 110 U.S. 113 (1973), pro-life advocates adopted a variety of approaches to protect the lives of the unborn as they worked to overturn the *Roe* decision. Early mainstream pro-life organizations like the National Right to Life Committee pursued public education and legislative change. One example of early legislation was the Hyde Amendment which limited public funding of abortion. *See generally, Abolishing Abortion: The History of the Pro-Life Movement in America*.

More activist pro-life groups sought to end abortion through public protest activities, including peaceful acts of "civil disobedience," taking their cue from Dr. Martin Luther King's espousal of "peaceable non-violent direct action" *See, Letter from Birmingham Jail (*April, 1963). Instead of staging lunch counter sit-ins, which were a staple tactic of the late Fifties' and Sixties' civil rights protesters, the pro-lifers who opted for "direct action" began to block access to abortion providers by sitting in front of abortion facility entrances, singing hymns, chanting prayers and slogans, etc. Led by a young Evangelical preacher from Binghampton, New York, namely, Randall Terry, several large-scale demonstrations were staged in Cherry Hill, PA, New York City, and elsewhere, under the banner of "Operation Rescue."

These actions called "rescues" multiplied and began to proliferate throughout the country, sponsored by many different groups, including the Pro-Life Action League headed by Joseph

Scheidler, often involving up to hundreds of activists blocking access to abortion facilities. The abortion industry struck back, filing a nationwide class action lawsuit, initially invoking the federal antitrust laws, charging that Joseph Scheidler's organizing protesters on a national basis constituted an unreasonable and "anti-competitive" restraint of trade as he was trying to "shut down" the entire abortion industry. Later, the abortion forces added Randall Terry and his group called "Operation Rescue" as defendants, charging that Terry and Scheidler, were systematically staging acts of "extortion" – by taking "property" away from abortion providers by means of these clinic blockades, which allegedly involved physical "force and threats." This "pattern" of "extortion" and other acts, the abortionists alleged, constituted a violation of the Racketeer Influenced & Corrupt Organizations Act or "RICO," which was enacted in 1970. See 18 U.S.C. §§1961-1968.

This antitrust and RICO litigation, called *NOW v. Scheidler*, was filed in 1986, lasted 28 years, and went before the U.S. Supreme Court three times. Initially dismissed by lower courts on the ground that abortion protests were non-economic and political, the case was reinstated by a 9-0 ruling when the high Court held that non-economic "associations" could also be held violative of RICO equally as economically motivated groups. See *NOW v. Scheidler,* 510 U.S. 249 (1994)).

Later, in successive appeals that followed a long 1998 jury trial, the Supreme Court held 8-1 in 2003 that "rescues" did not constitute extortion as no "property" of the abortion providers was sought or "obtained" by the rescuers. *Id.,* 537 U.S. 393.

A third appeal followed when the abortionists argued in the Seventh Circuit Court of Appeals that the Supreme Court had "overlooked" facts (four "acts of violence" unspecified as to time or place or identity of perpetrators) found by jurors at the 1998 trial that could be held by themselves to qualify as a pattern of "extortion" under an even broader reading of the federal extortion law (the Hobbs Act, 18 U.S.C. §1951) and RICO (18 U.S.C. §§ 1961–68).

But the Justices rebuffed the abortionists' latest new extortion theory by 8-0 (O'Connor, J. having retired and Alito, J. not having heard the oral argument before his appointment to replace her.) *Id.*, 547 U.S. 9 (2006).

Thus, the abortionists had failed in their effort to outlaw peaceful albeit aggressive acts of civil disobedience as either "antitrust violations" or as "extortionate" or "violent" acts of "racketeering," even though some pro-life leaders used especially aggressive rhetoric. For

example, Terry was quoted as urging an end to abortion "through any means necessary." And Scheidler said he didn't weep when hearing that merely bricks and mortar used as an abortion clinic had been destroyed. But Scheidler qualified his comments by pointing out that every bombing or arson, even those done after midnight, put passersby, police, and firefighters at risk. For this reason, he opposed any form of violence as an appropriate pro-life tactic. And the courts in the RICO litigation, *supra*, specifically ruled against the abortionists' claim that Scheidler himself was somehow personally guilty of, or an advocate for, any violence.

But during the 1980s, some purportedly "pro-life" extremists did turn to explicit advocacy of violence, calling it "justifiable homicide," and in many cases acts of serious violence were committed. By 1994, over 100 abortion clinics were alleged to have been bombed or burned to the ground. There were also alleged to have been over 1,000 documented acts of violence against abortion facility staff. *See*, National Abortion Federation, NAF Violence and Disruption Statistics: Incidents of Violence and Disruption Against Abortion Providers in U.S. & Canada.

The murders of abortion providers Dr. George Tiller, Dr. Bernard Slepian, Dr. David Gunn and Dr. John Britton, as well as a clinic receptionist, and serious injury to an abortion nurse, gained national media attention. *See,* A look at fatal attacks in anti-abortion violence in the US | AP News.

It was against this backdrop that the FACE Act was passed in 1994.

II. ANALYSIS OF THE FACE ACT.

A. What does the FACE Act *protect*?

It protects *people*, *property*, and *facilities* – including pregnancy resource centers and their staff.

1. *People* "obtaining or providing reproductive health services." 18 U.S.C. §248(a)(1).

   a) "The term 'Reproductive health services' means reproductive health services provided in a hospital, clinic, physician's office, or other facility, and includes medical, surgical, counselling or referral services relating to the human reproductive system, including services relating to pregnancy or the termination of a pregnancy." 18 U.S.C. §248(e)(5).

2. *People* exercising or seeking to exercise their religious freedom *at a place of religious worship*. 18 U.S.C. §248(a)(2).

3. *Property* of a place of religious worship. 18 U.S.C. §248(a)(4).

4. *Facilities* that provide reproductive health services. ***"Facility"*** includes a hospital, clinic, physician's office, or other facility that provides reproductive health services, and includes the building or structure in which the facility is located. 18 U.S.C. §248(e)(1).

B. What does the FACE Act *prohibit*?

It prohibits three (3) things:

1. Using force, threat of force, or physical obstruction, to intentionally injure, intimidate, or interfere with (or attempt to do the same) any person because that person is or has been obtaining, seeking to obtain, or providing reproductive health services, or to intimidate such person from obtaining or providing the same. 18 U.S.C § 248 (a)(1).

2. Using force, threat of force, or physical obstruction to intentionally injure, intimidate or interfere with (or attempt to do the same) any person lawfully exercising or seeking to exercise the First Amendment right of religious freedom at a place of religious worship. 18 U.S.C. §248(a)(2).

   a) Definitions, 18 U.S.C. §§ 248(e)(2)-(4).

      (2) "Interfere with" — to restrict a person's freedom of movement.

      (3) "Intimidate" — to place a person in reasonable apprehension of bodily harm to him- or herself or to another.

      (4) "Physical obstruction" —rendering impassable ingress to or egress from a facility that provides reproductive health services or to or from a place of religious worship or rendering passage to or from such a facility or place of religious worship unreasonably difficult or hazardous.

3. The intentional damaging or destruction of the property of a facility or attempting to do so because such facility provides reproductive health services or is a place of religious worship. 18 U.S.C. §248(a)(3).

C. What does the FACE Act *not* prohibit?

It does not prohibit, "any expressive conduct (including peaceful picketing or other peaceful demonstration) protected from legal prohibition by the First Amendment to the Constitution." 18 U.S.C. §§248(d)(1)-(2).

D. How is the FACE Act enforced?

1. Criminal Prosecution

a) Who can prosecute?

(1) The U.S. Attorney General can enforce criminal violations of the FACE Act in federal court. 18 U.S.C. §248(a)(3).

b) What are the penalties for violating the FACE Act?

Penalties for violating the FACE Act include both fines and prison time, with penalties more severe if violence was used.

(1) First-time non-violent physical obstruction offense:

(a) Fine up to $10,000,

(b) Prison for up to six months, or both. 18 U.S.C. §248(b)(2)

(2) Second and every subsequent non-violent physical obstruction offense:

(a) Fine up to $25,000,

(b) Prison for up to 18 months, or both. 18 U.S.C. §248(b)(2).

(3) First-time violent offense:

(a) Fine up to $100,000, 18 U.S.C. §3571(b)(5),

(b) Prison for up to a year, or both. 18 U.S.C. §248(b)(2).

(4) Second and every subsequent violent offense:

(a) Fine up to $250,000, 18 U.S.C. §3571(b)(3),

(b) Prison for up to 3 years, or both. 18 U.S.C. §248(b)(2).

(5) If bodily injury results from a violation, the length of imprisonment shall be up to 10 years. 18 U.S.C. §248(b)(2).

(6) If death results from a violation, the length of imprisonment shall be for any term of years or for life in prison. 18 U.S.C. §248(b)(2).

c) What must be proven?

(1) With respect to reproductive health services, the elements of *intent* and *motive* must both be proven.

(a) As to intent, the Act prohibits use of force, threat of force, or physical obstruction with the *specific intent* to injure, intimidate, or interfere with one obtaining or providing reproductive health services. Mere force or physical obstruction is not enough. 18 U.S.C. §§248(a)(1), (2), (3).

(b) As to motive, the conduct must occur "because" the person is obtaining or providing "reproductive health services," or "in order to intimidate" someone from obtaining or providing "reproductive health services." This means the alleged assailant must possess not only the intent to injure, etc., but also the specific motive of stopping someone from providing reproductive health services, or of physically obstructing them because they provide such services. In other words, the FACE Act requires that defendants have this *specific motive* in order to be guilty of the crime or liable in a civil lawsuit. Mere commission of physical obstruction, with intent to injure, etc., is not enough. 18 U.S.C.§§248(a)(1),(3).

For example, in *United States v. Mark Houck*, U.S. Dist. Ct. E.D. Pa, Case No. 22-cr-323, the federal district court judge instructed the jury on motive as follows:

> In this context, the term "because" requires the government to prove that the defendant would not have acted but for the fact that Mr. Love [the

abortion clinic escort and alleged victim] was or had been providing reproductive health services. While you need not find it to be the sole motivation for the defendant's actions, the government must prove that Mr. Love's provision of reproductive health services was a determinative factor in the defendant's decision to act. If you find that Mr. Love's provision of reproductive health services was not a factor in the defendant's conduct, or that the defendant's conduct would have occurred regardless of whether Mr. Love was providing or had provided reproductive health services, then the government has not proven beyond a reasonable doubt that the defendant acted "because" Mr. Love was or had been providing reproductive health services.

2. Civil Enforcement

a) Who may sue?

(1) The *U.S. Attorney General* can enforce the FACE Act by filing civil lawsuits in Federal District Court, but only if he or she has reasonable cause to believe an injury has or may result from a violation of the FACE Act. 18 U.S.C. §248(c)(2).

(2) *State Attorneys General* can file civil lawsuits to enforce the FACE Act but only in federal court and only if they have reasonable cause to believe an injury has or may result from a violation of the FACE Act. 18 U.S.C. § 248(c)(3).

(3) *Any person* involved in providing or seeking to provide, or obtaining or seeking to obtain, services in a facility that provides reproductive health services who is "aggrieved" by one who, 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 can file a civil lawsuit to enforce the FACE Act. 18 U.S.C. § 248(c)(1).

(4) Any person lawfully exercising or seeking to exercise the First Amendment right of religious freedom at a place of religious worship or the entity that owns or operates such place of religious worship if "aggrieved" by one who 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 lawfully exercising or seeking to exercise the First Amendment right of religious freedom at a place of religious worship can file a civil lawsuit to enforce the FACE Act. *Id.*

b) Who may *not* sue?

Clinic Escorts. The Act's legislative history confirms that it never contemplated, and by its terms does not permit, lawsuits arising out of disputes between escorts and sidewalk advocates on the sidewalks, consistent with its express text. In particular, the FACE Act prohibits obstruction of "reproductive health services," defined to mean relevant services provided "in a . . . facility." 18 USC § 248(e)(5). The legislative history confirms that "in a facility" was intended to specifically prohibit escorts from bringing civil suits (and concomitantly, under the proper interpretation, from being the subject of a criminal prosecution) under the FACE Act. Senator Kennedy crafted the relevant language and declared that it meant "demonstrators, clinic defenders, escorts, and other persons not involved in obtaining or providing services *in the facility* may not bring such a cause of action." See 18 USC § 248(c)(1)(a), regarding civil actions. The qualifier "in a facility" specifically means that "escorts" are excluded. The Act's all-important definition of "reproductive health services" contains the same qualifier. Of course, violence against someone on the sidewalk could be prohibited if the motive is to intimidate someone,

e.g., an abortionist, from providing reproductive health services *inside* the facility, *e.g.*, if violence was against the abortionist himself as he was walking from his car to the facility.

c) Available Civil Remedies.

(1) For all civil plaintiffs other than U.S. and States' Attorneys General:

(a) Injunctive relief whether temporary, preliminary, or permanent, and either:

(b) Compensatory damages, or

(c) Statutory damages of $5,000 for each offense.

18 U.S.C. §248(c)(1)(B).

(2) For U.S. and States' Attorneys General:

All the remedies available to all civil plaintiffs, plus:

(a) In lieu of actual damages, a civil penalty of up to $10,000 for first-time *nonviolent* violators who *physically obstruct,*

(b) In lieu of actual damages, a civil penalty of up to $15,000 for other first-time violations,

(c) In lieu of actual damages, a civil penalty of up to $15,000 for a subsequent *nonviolent physical obstruction violation,* and

(d) In lieu of actual damages, a civil penalty of up to $25,000 for any *other subsequent* violation.

18 U.S.C. § 248(c)(2)(B).

III. GOVERNMENT ABUSE OF THE FACE ACT:

SELECT THOMAS MORE SOCIETY CASES.

A. ***United States of America v. Norman Weslin,*** **2007 WL 7121988 (D. Neb. 2007).**

Fr. Norman Weslin was praying outside the clinic of the notorious late term abortionist LeRoy Carhart on April 24, 2006, when the Spirit moved him to enter the clinic, drop to his knees and pray for those in the clinic. He also offered support to the women inside if they kept their babies and offered to help the clinic staff find other jobs. He was arrested and charged – not under state or local law for trespassing or disturbing the peace – but by the Federal DOJ for a felony violation of the FACE Act. Fr. Weslin's testimony directly contradicted the testimony of the clinic workers who claimed that he blocked the door and obstructed their access. Fr. Weslin testified that he just knelt and prayed, moving out of the way whenever necessary to leave space for patients and clinic staff to walk around him. The jury deliberated for just over two hours before unanimously finding him not guilty.

B. ***United States v. Scott*****, Civil Action No. 11-cv-01430-PAB-MEH, (D. Colo. Jan. 25, 2012)**.

Ken Scott was (and still is) a sidewalk counselor who, at the time, offered pro-life literature, advice about nearby pregnancy resource centers, and other pro-life counseling and advocacy to individuals patronizing the Planned Parenthood of the Rocky Mountains abortion facility in Denver. *United States v. Scott* was one of many FACE Act lawsuits brought by the Obama Administration and its Attorney General, Eric Holder, against sidewalk counselors across the country. The AG's primary legal theory was that a car that stops in a clinic's driveway to speak to a sidewalk counselor constitutes a "physical obstruction" of access to an abortion facility and, by conversing with the driver, sidewalk counselors caused the obstruction and violated the FACE Act, exposing themselves to hefty fines and injunctions against sidewalk counseling at a particular facility. After hearing all the evidence, the judge ruled that the brief delays experienced by cars waiting for others who stopped to converse with Ken Scott were not "obstructions" of the

clinic entrance, but instead were a product of Scott's exercise of protected free speech rights on the public right of way. At the close of the Government's case, the trial judge told the USDOJ prosecutors that if they had no further proof of obstruction and yet kept on with their prosecution through the rest of the trial, he would entertain a defense motion for sanctions. The USDOJ prosecutors thereupon dismissed the charge on their own motion.

C. *Allentown Women's Ctr., Inc. v. Sulpizio*, 403 F. Supp. 3d 461, 468 (E.D. Pa. 2019).

The Allentown Women's Center abortion clinic filed a civil lawsuit under the FACE Act against three sidewalk counselors on April 11, 2019, in the United States District Court for the Eastern District of Pennsylvania, accusing the three of physically obstructing access to the clinic as well as "threatening, harassing, and insulting employees." The allegations were supported by several abortionists and facility staff whose accusations were delivered while using pseudonyms – Dr. Roe, Nurse Executive Doe, Employee Number 1, Escort Smith and Escort Stiles. The Allentown Women's Center asked the court to impose a 25-foot buffer zone around each of the clinic's entrances. The clinic's theory was the same one the DOJ relied upon when prosecuting Ken Scott – that counselors obstructed the clinic entrance in violation of the FACE Act when they stood on the public sidewalk and induced drivers to stop on the driveway to roll their window down to converse and receive a pamphlet. The court properly rejected these arguments, recognizing that the defendants have a First Amendment right to be in the public right of way, and drivers have a right to stop if they wish to receive literature and engage in speech with them. The evidence showed that the defendants did not stand in front of vehicles or keep them from proceeding forward, in no way obstructed entry into the clinic and did not cause by their actions any unreasonably difficult or hazardous condition, meaning there was no basis to enjoin them or impose a buffer zone to keep them off the clinic entry way. After hearing testimony and viewing video of the defendants' interactions with drivers, the judge concluded that "the Court does not find that the behavior evidenced on

the videos constitutes physical obstruction under FACE." *Allentown Women's Center, Inc. v. Sulpizio*, 403 F. Supp. 3d. 461, 471 (E.D. Pa. 2019).

The Court further concluded, "The Court finds that none of the videos evidence either Defendant rendering ingress or egress to the AWC unreasonably difficult or hazardous. *See* 18 U.S.C. § 248(e)(4). The Court therefore finds that Plaintiff has failed to show a reasonable probability of eventual success in proving that Defendants physically obstructed the entrance of the AWC in violation of FACE." *Id.* The judge noted a single instance in which, as shown on video, Sulpizio and an escort were "in each other's face, neither backing off" when fleeting physical contact occurred. *Id.* at 468.

Regarding the physical contact, the judge held:

> Furthermore, even if the Court were to find that Sulpizio engaged in "force" against Escort Stiles, the video shows that Sulpizio did not use force *because* Escort Stiles was providing reproductive health services, but instead used force in connection with a mutual argument over Sulpizio's positioning and the time he was spending exercising what he believed to be his Constitutional rights. Therefore, the Court does not find that Plaintiff has shown a reasonable probability of eventual success in proving that Defendant Sulpizio violated FACE by using force to intentionally injure or intimidate or attempt to injure or intimidate a person because that person is providing reproductive health services. *Id.*

As for the clinic's allegation that Sulpizio had used foul and insulting language that amounted to a threat of violence prohibited by the FACE Act, the judge held:

> This contempt[i]ble language is irresponsible and repugnant. The Constitution anticipates that people will act responsibly, yet protects repugnant, repulsive, and irresponsible speech, as long as the speech does not involve force or threat of force. *See* [*U.S. v.*] *Gregg,* [226 F.3d 253] at 267-268 ("Activities that injure, threaten, or obstruct are not protected by the First Amendment, whether or not such conduct communicates a message.")

> Because the Court does not find that these comments constitute threats of force, which, as stated previously, are a necessary precedent to "intimidat[ing]" a person in violation of FACE because that person is obtaining or providing reproductive health services, the Court concludes Plaintiff has failed to show a reasonable probability of eventual success on its claim against Sulpizio for threats of force in violation of FACE. *Id.* at 470.

The preliminary injunction was denied, and the case was ultimately dismissed.

D. *People of the State of New York v. Griepp*, 997 F.3d 1258 (2d Cir. 2021).

Merle Hoffman, the "Millionaire Abortionist," who is widely known as an outspoken public advocate for abortion rights in New York City and its environs, owns Choices, an abortion facility located in Jamaica, Queens, New York. Ms. Hoffman complained to, and worked with, New York's Attorney General, who prosecuted a civil lawsuit under the FACE Act against a peaceful church group that prayed and counseled on the sidewalks outside Choices. Among the defendants were the senior Pastor, Ken Griepp, and nine other members of the very diverse and devout congregation of the Church@theRock in Brooklyn, New York. Since 2012, Griepp and his fellow believers have conducted a ministry on the public sidewalk outside of Choices, to offer support to desperate abortion-minded women who want to keep their babies. Before going to Choices, the Church@theRock folks researched the law to try to ensure that their advocacy activities were lawful. Their activities include preaching, talking to patients, their companions, and escorts, handing out literature, and holding signs.

The AG and the facility set up a surveillance camera in June 2016 to surveil and record the Defendants' sidewalk advocacy tactics. In addition, undercover AG investigators approached the facility, pretending to be patients and their companions, wearing hidden cameras recording video and audio. The AG did not call any of the investigators as witnesses and did not rely on any of the investigative reports in support of the AG's claims. The AG also outfitted two Choices escorts with hidden recording devices on one or two occasions each. One of the escorts set up a fake Facebook account, pretending to be a pro-life activist

named “Shelly Walker,” who “friended” some of the Defendants, thereby obtaining personal information and effectively cyber-stalking them. The escort shared with the AG information about Defendants that the escort obtained through the fake Facebook account. That escort and another also created a “protestor dossier” containing extensive personal information about each of the Defendants. The AG’s undercover and surveillance work was conducted pursuant to a “TAC Plan,” written by the AG’s attorneys. In its list of supposed illegal activities, the TAC plan included: advocates simply being within 15 feet of the facility; following an individual up to the facility; and engaging in a demonstration within 15 feet of the facility.

After a year of surveilling and recording the pro-life advocates and working closely with and obtaining several additional years’ worth of surveillance from the facility, the AG opted not to file criminal charges. Instead, the AG filed a civil lawsuit alleging violations of the FACE Act, the New York Clinic Access Act, N.Y. Civ. Rights Law § 79-m, and the New York City Access to Reproductive Health Care Facilities Act, N.Y.C. Admin. Code §§ 8-803 and 8-804. On the day when suit was filed, then-New York AG Eric Schneiderman held a press conference and, standing with Hoffman, the facility’s owner, and with the current New York AG Letitia James, stated that this is “not a nation where you can choose your point of view” and that pro-life “protestors… run their mouth” with “unlawful, un-American rhetoric.”

Before the hearing on the AG’s motion for preliminary injunction, the parties conducted extensive discovery, including exchanging documents and taking depositions. In February and March 2018, the district court held a 14-day hearing, and heard testimony from 17 witnesses, including the AG’s seven witnesses. The AG’s evidence included multiple terabytes of videos and photos.

The video evidence included footage from six years of the facility’s surveillance, one year of the AG’s surveillance, and several videos taken by escorts, AG undercover investigators, and some Defendants. The photos included pictures taken by escorts and Defendants. The court also received pre- and post-hearing briefing and heard oral argument from the parties.

Based on internal inconsistencies in their testimony, inconsistencies between their testimony and videos and photos, and/or their demeanor on the witness stand, the district court judged five of the AG's primary witnesses to be "not entirely credible." *Id.* at *6, 7, 8.

In July 2018, the District Court entered a 103-page detailed order and opinion denying the AG's motion for preliminary injunction and including detailed Findings of Fact. *People of New York v. Griepp*, Case No. 17-cv-3706 (E.D. N.Y. July 20, 2018), 2018 WL 3518527. The court gave the video evidence "significant weight." *Id.* at *5.

The AG appealed to the Second Circuit Court of Appeals, which initially vacated the District Court's order (New York v. Griepp, 991 F.3d 81 (2nd Cir. 2021)), only to vacate its own order upon consideration of Defendants' petition for rehearing *en banc*. *New York v. Griepp*, 11 F.4th 174 (2nd Cir. 2021). According to the Second Circuit Court of Appeals' final order in the matter, the order of the District Court stands, and the lawsuit was dismissed leaving Church@theRock's victory fully intact.

E. *United States of America v. Mark Houck*, Case No. 22-323 (E.D. Pa. 2023).

Mark Houck's legal drama began in October 2021 when he was sidewalk counseling with his 12-year-old son outside an abortion clinic in Philadelphia. One of the clinic volunteers, Bruce Love, aggressively confronted Houck's son multiple times, even after Houck told him to stop. Houck finally pushed him away because of his refusal to stop harassing and haranguing his son with obscenities. The local police were called and interviewed the witnesses, viewed the video of the encounter, and decided not to press charges. But almost a year later, on September 23, 2022, approximately 25 heavily armed FBI and other law enforcement agents raided the Houck home and made an early morning SWAT-style arrest, terrifying Houck's wife and seven young children. Houck was arrested in this manner notwithstanding that Houck's TMS attorney had written to the Justice Department's prosecutor offering that, in the event the DOJ insisted on pressing charges, he and Houck would accept a summons and bring Mr. Houck in

to surrender voluntarily and peaceably. Ignoring a reminder of the recent ruling of the district court just down the road from Philadelphia in Allentown, in the *Sulpizio* case (*supra*), the DOJ charged Houck with two felony violations of the FACE Act, convictions on which would put him at risk of spending 11 years in a federal penitentiary. Having made its highly publicized "show arrest" of Houck, on the eve of the jury trial held in January 2023, the DOJ suddenly offered Houck a plea deal: no fine, no prison time, and no probation in exchange for a guilty plea. Houck refused and we took the case to a jury trial. The government failed to convince the jury that Houck was acting "because" Mr. Love was "providing reproductive health services" – rather than acting in defense of his young son – when he shoved away the aggressive escort. In fact, it took a Philadelphia jury less than an hour to unanimously find Houck "not guilty" on both counts.

F. *United States of America v. Paul Vaughn,* Case No. 3:22-CR-00327 (M.D. Tenn).

On October 5, 2022, FBI agents swarmed Paul Vaughn's Centerville, Tennessee farmhouse with guns drawn, terrified his wife and 11 children and dragged him away. The heavy-handed DOJ/FBI raid came less than two weeks after a similar strike force stormed the home of Mark Houck. Vaughn and ten others were charged with violating the FACE Act at an abortion facility in Mount Juliet, Tennessee in March of 2021 – over a year and a half prior to the arrest. Police responded to find a group of pro-life advocates sitting in a hallway in an office building outside of an abortion clinic singing Christian hymns, reading scripture, and praying. During the incident, Vaughn, who was never arrested by the local police, recorded the protest and served as a liaison between the pro-life advocates and the police to ensure the safety of all involved. No one was hurt and no property was damaged. The DOJ claimed that Vaughn, the President of Tennessee Personhood, violated the Ku Klux Klan Act (18 U.S.C. §241 (up to 10 years in prison if convicted)) by engaging in a "conspiracy against rights secured by the FACE Act" and violated the FACE Act itself, even though he never obstructed anyone. The U.S. Attorney's Office indicted Vaughn and six others for

conspiracy, and four other individuals for violations of the FACE Act. The case is pending. A trial date has not been set as of this writing.

IV. CASE STUDY: COMPASSCARE.

CompassCare operates pregnancy resource centers in upstate New York and elsewhere. One center is located in Amherst, New York, a suburb of Buffalo, and has an M.D. Medical Director who supervises the medical work of a number of RNs as well as other nurses. The nurses provide medical services to CompassCare's clients, including pregnancy testing, ultrasound, STD testing and treatment, abortion pill reversal therapy, counselling regarding pregnancy options, counselling regarding abortion procedures, including its risks and side effects, as well as referrals for further medical care, social care and insurance. All services are provided for free.

CompassCare's Amherst clinic was firebombed in the early morning hours of June 7, 2022. The fire and smoke caused extensive damage to the interior of the building, its door, its equipment and furnishings. Two large windows were broken, and two Molotov cocktails were found inside the building. Several fire departments and police were dispatched to fight the fire. Two firefighters were overcome while fighting the fire and were admitted to the hospital with minor injuries.

In addition, graffiti saying, "Jane was here" was spray painted on the exterior wall of the building. Authorities concluded that the fire and vandalism caused $150,000 of damage to the building and its contents.

Similar crimes against pregnancy resource centers bearing the hallmarks of Jane's Revenge occurred in quick succession in cities all across the nation after the leak of the draft of the *Dobbs* decision. Those crimes also included an attack on the home of one of CompassCare's attorneys, which resulted in destruction of property.

All these additional attacks were marked by graffiti including the name "Jane's Revenge." Many of the graffiti messages also included the ominous warning, "If abortions aren't safe, then neither are you." *See generally,* TRACKER: Pro-abortion attacks in the U.S. continue (updated) | Catholic News Agency

A. The FACE Act Protects Pregnancy Resource Centers.

A fundamental question regarding the application of the FACE Act to the attack on CompassCare is whether a PRC can qualify under the statutory definition of a protected "reproductive health care facility." The FACE Act defines "facility" to include "a hospital, clinic, physician's office, or other facility that provides reproductive health services, and includes the building or structure in which the facility is located." 18 U.S.C. § 248(e)(1). It defines "reproductive health services as "reproductive health services provided in a hospital, clinic, physician's office, or other facility, and includes medical, surgical, counseling or referral services relating to the human reproductive system, including services relating to pregnancy or the termination of a pregnancy." 18 U.S.C. § 248(e)(5).

CompassCare, where nurses provide medical services to patients under the supervision of MDs, is a clinical setting. Even if not held to be a "clinic," CompassCare would still qualify as a "facility" under the catch-all provision "other facility that provides reproductive health services," so long as the services CompassCare provides meet the statutory definition of "reproductive health services."

CompassCare's provision of pregnancy tests, STD testing and treatment, ultrasounds, and abortion pill reversal therapy are undeniably medical services. Further they are "related to the human reproductive system, including …. pregnancy or the termination of pregnancy." Moreover, the counselling and referral services provided by CompassCare are pregnancy related.

B. The FACE Act Prohibits Attacks on Pregnancy Resource Centers.

Subsection (a)(1) of the FACE Act protects persons seeking to obtain *or provide* reproductive health care at health care facilities from force or threats of force intended to cause injury, intimidation or interference. In the context of the attack on CompassCare, this section means that one who uses force or the threat of force to intentionally intimidate any person because that person is or has been providing reproductive health services; or one who uses force or threat of force to

intentionally intimidate any person from providing reproductive health services in the future, is subject to the civil remedies provided in subsection (c).

As previously noted, the vandalism perpetrated against CompassCare included the use of two Molotov cocktails that caused extensive fires in two areas of the building. Windows were smashed and an exterior door was badly damaged in an apparent attempt to pry it open. These actions evidence the use of force. Further, the graffiti ("Jane was here") clearly constituted a threat of physical force and violence. Reference to "Jane" suggests that an extreme leftist group known as Jane's Revenge was responsible for the attack. Jane's Revenge issued a manifesto of sorts on March 30, 2022, calling for a "night of rage" on the day the *Dobbs* decision is handed down and declaring, "If abortion isn't safe, you aren't either." On May 12, 2022, Jane's Revenge issued a communique related to its arson and vandalism at a Madison, Wisconsin pro-life organization's headquarters. The communique read in part:

> As you continue to bomb clinics and assassinate doctors with impunity, so too shall we adopt increasingly extreme tactics to maintain freedom over our bodies. We are forced to adopt a minimum military requirement for a political struggle. Again, this was only a warning. Next time the infrastructure of the enslavers will not survive. Medical imperialism will not face a passive enemy.

By leaving behind the message, "Jane was here", the CompassCare arsonists expressed a thinly veiled threat of force and violence in line with the tactics suggested in Jane's Revenge's March 30 and May 12 published missives.

Those actors intended to intimidate (statutorily defined as creating "a reasonable apprehension of bodily harm"). 18 U.S.C. §248(e)(3). Again, by referring to Jane's Revenge in their graffiti, the actors showed an intent to identify with the radical leftist group and its extreme rhetoric – a reference that was designed to instill fear. Further the use of Molotov cocktails indicates that the actors intended to seriously damage whatever (and whoever) was in the building. Two firefighters were, in fact, injured in the fire. These actions would cause a reasonable person to feel justifiably threatened about his or her physical safety.

Finally, Compass Care was targeted (as were many other PRCs) specifically because they provide pro-life reproductive health care services. This statutory motive requirement is met by the fact that Jane's Revenge has a solitary purpose – to stop all anti-abortion efforts by any means necessary. The messages written on the walls of the other PRCs state their opposition to anti-abortion organizations and their championing of abortion at all costs ("If abortions aren't safe then neither are you!"; and "You're anti-choice not pro-life"; and "No forced births"). This vandalism was motivated by a desire to punish CompassCare for providing pro-life reproductive health services in the past and to prevent or at least deter CompassCare from providing pro-life reproductive health services in the future.

C. The Arson and Vandalism at CompassCare Are Precisely the Types of Threats and Property Damage that the FACE Act Prohibits.

18 U.S.C. § 248(a)(3) of the FACE Act addresses malicious property damage to reproductive health care facilities. It reads in pertinent part, "Whoever, intentionally damages or destroys the property of a facility because such facility provides reproductive health services … shall be subject to … the civil remedies provided in subsection (c)...." *Id.* As discussed above, there was extensive actual damage to the property of CompassCare (a reproductive health service facility) and because the fire was started by Molotov cocktails, the damage was clearly intentional. Also as previously discussed, CompassCare was selected as a target for vandalism specifically because it provided pro-life reproductive health services which was antithetical to Jane's Revenge's singular purpose of eliminating all opposition to abortion. Jane's Revenge has been proudly public about its desire to destroy all pro-life organizations.

D. A Civil Action Can Be Brought Against Those Who Attacked CompassCare Even if The Federal Government and Local Prosecutors Take No Action.

Given that the attack on CompassCare meets the elements of both 18 U.S.C. §§ 248(a)(1) and (a)(3), a person involved in the provision of services at CompassCare who is aggrieved by the vandalism, threats, and physical damage may bring a private civil action if a proper defendant can be identified.

E. The Lack of Government Enforcement May Amount to Unconstitutional Viewpoint Discrimination.

Among the many ways that the FACE Act is currently being abused by government prosecutors is discriminatory enforcement – freely using FACE against pro-life protesters and counselors while largely failing to arrest or prosecute anti-PRC and anti-Church perpetrators of violence – thus engaging in impermissible as-applied viewpoint discrimination. Inexplicably, the USDOJ has engaged in many FACE Act prosecutions against pro-lifers, even after the *Dobbs* ruling reversing *Roe v. Wade*, while failing to arrest or prosecute the perpetrators of major violence against CompassCare, other pro-life PRCs, or churches.

While prosecutorial discretion serves an important function in our criminal justice system, established precedent is clear that where there is a pattern and practice of enforcement against only one of two or more opposing political viewpoints, the ordinary discretion accorded to prosecutors has exceeded its boundaries. At that point, the doctrine of prosecutorial discretion must cede and give way to the demands of the First Amendment, forbidding such blatant political discrimination and abuse of government power. See *e.g.*, *Foti v. City of Menlo*, 146 F.3d 629, 635 ("[A] litigant may separately argue that discriminatory enforcement of a speech restriction amounts to viewpoint discrimination in violation of the First Amendment....")

At a hearing of the Senate Homeland Security and Governmental Affairs Committee held on November 17, 2022, FBI Director Christopher Wray testified that most cases of violence involving abortion are against *pro-life organization*s.

See, Pro-life centers targeted by 70% of abortion-related violent threats since Dobbs decision: FBI | Fox News; User Clip: FBI Director Wray Admits Most Abortion Violence Cases Are Against Pro-Life Orgs | C-SPAN.org

The Family Research Council produced a list of attacks against pro-life organizations, property and people that occurred between the leak of the *Dobbs* draft on May 2, 2022, and May 19, 2023, documenting 39 attacks against churches, 67 attacks against pro-life organizations/PRCs, and 24 other acts of violence or vandalism. (Attacks on Churches, Pro-Life Organizations, Property,

and People Since the Dobbs Leak on May 2, 2022 *See,* https://downloads.frc.org/EF/EF22F17.pdf.

CompassCare made sharply worded public criticisms about the lack of government investigation or prosecution of crimes against PRCs and the Thomas More Society argued in its briefs in its FACE Act cases this point about USDOJ's discriminatory failure to prosecute pro-abortion terrorists, while the FBI was aggressively investigating, and USDOJ was aggressively prosecuting, pro-life protesters until the FBI finally offered and publicized rewards for the apprehension of pro-abortion vandals and firebombers, etc., and USDOJ finally began to respond and bring FACE Act prosecutions against a few perpetrators of pro-abortion violence against pregnancy centers.

On January 24, 2023, Caleb Freestone and Amber Smith-Stewart, were charged under the FACE Act pursuant to the first ever FACE Act indictments of pro-abortion activists attacking pro-life pregnancy resource centers. (*CV Update: FACE Act Indictments*, Catholic Vote (Feb. 23, 2023)). On March 22, 2023, a Superseding Indictment was filed adding two additional defendants: Annarella Rivera and Gabriella Victoria Oropesa. *See,* United States v. Freestone, 8:23-cr-00025 – CourtListener.com.

And, on July 5, 2023, the DOJ charged a Bowling Green State University Student, Whitney Durant, with a misdemeanor violation of the FACE Act for defacing the building that houses HerChoice, a pregnancy care center located in Bowling Green, Ohio with spray paint because the clinic provides reproductive health services. Graffiti included "Liars," "Fake Clinic," "Jane's Revenge," and "Abort God." *See,* Northern District of Ohio | Bowling Green State University Student Charged with FACE Act Violation | United States Department of Justice.

Nonetheless, these few prosecutions of pro-abortion violence under the FACE Act, done only after and probably in response to our motions and briefing contending that the DOJ is engaged in impermissible as-applied viewpoint discrimination are not enough to rebut our assertion that the DOJ is discriminating when compared to the many aggressive prosecutions of pro-lifers whose conduct did not violate the FACE Act and the large number of pro-abortion FACE Act

violations that have occurred, especially since the leak of the draft of the *Dobbs* Supreme Court opinion in May of 2022.

V. COMPELLING REASONS EXIST TO ATTACK THE CONSTITUTIONALITY OF THE FACE ACT, ESPECIALLY AFTER THE *DOBBS* DECISION.

Although several federal courts of appeals have upheld the constitutionality of the FACE Act, the United States Supreme Court has never taken up the matter. *E.g.*, *United States v. Weslin*, 156 F.3d 292 (2d Cir. 1998), *cert. denied*, 525 U.S. 1071 (1999); *Norton v. Ashcroft*, 298 F.3d 546 (6th Cir. 2002), *cert. denied*, 537 U.S. 1172 (2003); *United States v. Gregg*, 226 F.3d 253 (3d Cir. 2000), *cert. denied*, 532 U.S. 971 (2001); *United States v. Bird*, 124 F.3d 667 (5th Cir. 1997); *Terry v. Reno*, 101 F.3d 1412 (D.C.Cir.1996), *cert. denied*, 520 U.S. 1264 (1997); *United States v. Dinwiddie*, 76 F.3d 913 (8th Cir.), *cert. denied*, 519 U.S. 1043 (1996); *United States v. Wilson*, 73 F.3d 675 (7th Cir.1995), *cert. denied*, 519 U.S. 806 (1996); *Cheffer v. Reno*, 55 F.3d 1517 (11th Cir.1995); *American Life League, Inc. v. Reno*, 47 F.3d 642 (4th Cir.), *cert. denied*, 516 U.S. 809 (1995).

There is no general police power delegated to the federal government by the U.S. Constitution. In Section 2 of the FACE Act, 18 U.S.C § 248, Congress claimed it was given the power to enact the FACE Act's prohibitions against violence, interference, and obstruction of reproductive health care facilities and churches by the U.S. Constitution's Commerce Clause and the Fourteenth Amendment's Due Process Clause:

> Freedom of Access to Clinic Entrances Act
> **SEC. 2. PURPOSE.**
> Pursuant to the affirmative *power of Congress to enact this legislation under section 8 of article I of the Constitution*, *as well as under section 5 of the fourteenth amendment to the Constitution*, *it is the purpose of this Act to protect and promote the public safety and health and activities affecting interstate commerce* by establishing Federal criminal penalties and civil remedies for certain violent, threatening, obstructive and destructive conduct that is intended to injure, intimidate or interfere with persons seeking to obtain or provide reproductive health services. [Emphasis added.] 18 U.S.C § 248 sec. 2.

Section 8 of Article I of the Constitution contains the Commerce Clause, which provides:

> Article I, Section 8, Clause 3:
> *[The Congress shall have Power . . .] To regulate Commerce* with foreign Nations, and *among the several States*, and with the Indian Tribes…. [Emphasis added.] U.S. Const. art. I, § 8, cl.3.

Section 1 of the Fourteenth Amendment provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; *nor shall any state deprive any person of life, liberty, or property, without due process of law*; nor deny to any person within its jurisdiction the equal protection of the laws. [Emphasis added.]
> U.S. Const. amend. XIV, § 1.

Section 5 of the Fourteenth Amendment provides:

> Enforcement
> The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.
> U.S. Const. amend. XIV, § 5.

But these two proffered predicates for Congressional power to regulate what have traditionally been state and local crimes are now newly vulnerable, and powerful new arguments are now available for challenging the constitutionality of the FACE Act and having it declared void and unenforceable. Here are several arguments that may be raised.

A. The *Dobbs* Decision Negates Any Claim that the Fourteenth Amendment Empowered Congress to Enact the FACE Act.

In *Roe v. Wade*, 410 U.S. 113 (1973), the Supreme Court found a right to abortion in the Due Process Clause of the Fourteenth Amendment, which provides. "…nor shall any state deprive any person of life, liberty, or property, without due process of law."

The *Dobbs* decision, however, decisively repudiated the notion that the Fourteenth Amendment created any federal constitutional right to abortion. Furthermore, the Supreme Court has refined and advanced its Commerce Clause jurisprudence significantly since the FACE Act was passed in 1994 such that it now more clearly appears that Congress exceeded the limited powers granted to it by the Commerce Clause of the Constitution when it passed the FACE Act in 1994.

In *Dobbs*, the Supreme Court overruled *Roe v.* Wade, *supra*, and *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833 (1992), ruling that there is

no federal right to abortion. "We hold that *Roe* and *Casey* must be overruled. The Constitution makes no reference to abortion, and no such right is implicitly protected by any constitutional provision, including the one on which the defenders of *Roe* and *Casey* now chiefly rely—the Due Process Clause of the Fourteenth Amendment." *Dobbs*,___ U.S. ___, 142 S. Ct. 2228, 2242. The Court exhaustively analyzed "the critical question whether the Constitution, properly understood, confers a right to obtain an abortion" – a question that *Roe* and *Casey* "skipp[ed] over." *Id*. at 2244. It also considered whether the doctrine of *stare decisis* required continued acceptance of the judicially created "right." The Court found that "*Roe* was egregiously wrong from the start," *id*. at 2243, and that *Casey*, although reaffirming *Roe's* central holding, "revised the textual basis for the abortion right, silently abandoned *Roe's* erroneous historical narrative, and jettisoned the trimester framework." *Id*. at 2266. The majority, finding no support for the right to abortion in the text of the Constitution or in our nation's history, concluded simply: "We therefore hold that the Constitution does not confer a right to abortion. *Roe* and *Casey* must be overruled, and the authority to regulate abortion must be returned to the people and their elected representatives." *Id.* at 2279.

The creation of a constitutional right to abortion *ex nihilo* was specifically addressed by Justice Thomas in his concurrence to the *Dobbs* ruling:

> In *Roe v. Wade*, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973), the Court divined a right to abortion because it "fe[lt]" that "the Fourteenth Amendment's concept of personal liberty" included a "right of privacy" that "is broad enough to encompass a woman's decision whether or not to terminate her pregnancy." *Id*., at 153, 93 S.Ct. 705. In *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 112 S.Ct. 2791, 120 L.Ed.2d 674 (1992), the Court likewise identified an abortion guarantee in "the liberty protected by the Fourteenth Amendment," but, rather than citing *Roe's* "right of privacy," the *Casey* concurring Justices, whose opinion (authored by Kennedy, J.) was decisive, invoked an ethereal "right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life." *Id*., at 851, 112 S.Ct. 2791.

In *Dobbs*, 142 S. Ct. 2228, 2302, (Thomas, J., concurring) Justice Thomas noted that proponents of abortion continued to change their view as to the source of the purported right to abortion, and recognized: "That 50 years have passed since *Roe* and abortion advocates still cannot coherently articulate the right (or rights) at stake proves the obvious: The right to abortion is ultimately a policy goal in desperate search of a constitutional justification." *Id*. at 2303.

Whatever the opposing sides may argue about the virtues (or vices) of abortion as a policy (rather than a legal or even a constitutional) question, one thing is clear after *Dobbs* – there is no federal constitutional right to abortion, and the stated justification for the FACE Act's enactment – a nationwide protection of a federal constitutional right – no longer exists. As a result, FACE has not only lost its purpose, but also it has lost any constitutional claim to validity.

B. The *Dobbs* Decision Also Establishes that the Commerce Clause Did Not Empower Congress to Enact the FACE Act.

After the Supreme Court's decision in *Dobbs v. Jackson Women's Health Org.*, the FACE Act also has been exposed as newly vulnerable to attack on its constitutionality by virtue of the lack of Congressional authority to sustain it under the Commerce Clause. *See e.g., e.g., United States v. Coleman*, 675 F.3d 615, 620 (6th Cir. 2012) ("we regard the presence of such a jurisdictional element as the touchstone of valid congressional use of its Commerce Clause powers to regulate non-commercial activity").

Article I, section 8, clause 3 of the U.S. Constitution grants Congress the power to "regulate commerce…among the several States." This has been interpreted to reach three subjects of regulation: "the use of the channels of interstate commerce;" "the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities;" and "activities having a substantial relation to interstate commerce . . . *i.e.*, those activities that substantially affect interstate commerce[.]"

United States v. Lopez, 514 U.S. 549, 558-59 (1995) (internal citations omitted); *Norton v. Ashcroft*, 298 F.3d 547, 555 (6th Cir. 2002) (same).

"While this final category is broad, 'thus far in our Nation's history our cases have upheld Commerce Clause regulation of intrastate activity only where that activity is economic in nature.'" *United States v. Morrison*, 529 U.S. 598, 613 (2000) (quoting *Lopez*, 514 U.S. at 559-60); *see also United States v. Lundy*, No. 3:15-CR-146, 2016 WL 5920229, at *4 (M.D. Tenn. 2016) (discussing *Morrison* and *Lopez* in the context of Commerce Clause challenge to drug trafficking statute).

In *Norton*, the Sixth Circuit, following *Morrison*, looked to four considerations in determining the constitutionality of the FACE Act before *Dobbs*: "1) the economic nature of the activity; 2) a jurisdictional element limiting the reach of the law to a discrete set of activities that has an explicit connection with, or effect on, interstate commerce; 3) express congressional findings regarding the regulated activity's effects on interstate commerce; and (4) the link between the regulated activity and interstate commerce." *Id.* at 555-56 (citing *Morrison*, 529 U.S. at 610–12). The court also considered significant the fact that several other circuit courts had also upheld the constitutionality of the FACE Act. *Id.* at 556. The Sixth Circuit singled out the Third Circuit's analysis in *United States v. Gregg*, 226 F.3d 253 (3d Cir.2000), *cert. denied*, 532 U.S. 971 (2001) as particularly persuasive. *Id.*

C. As *Dobbs established,* abortion is not *and never was* a fundamental right protected by the U.S. Constitution.

The Third Circuit majority in *Gregg* determined, and the Sixth Circuit agreed, that although clinic blockades are not strictly economic activities, they involve "activity with an effect that is economic in nature" and that "economic activity can be understood in broad terms." *Gregg*, 226 F.3d at 262. But this conclusion was reached only by considering the "violent and obstructive acts" that were [m]otivated by *anti-abortion sentiment*" and "intimidated a number of physicians from offering *abortion services*." *Id.* (citing S.Rep. No. 103–117, at 11; H.R.Rep. No. 103–306, at 9, U.S.C.C.A.N., at 706) (emphasis added). The

Sixth Circuit in *Norton* likewise expressly acknowledged that it was abortion specifically, not "reproductive health services" generally, that undergirded the FACE Act: "Given the detailed congressional record, we are satisfied that Congress had a rational basis to conclude that the activities prohibited by the Act *disrupted the national market for abortion-related services* and decreased the availability of such services." *Norton*, 298 F.3d at 558 (emphasis added).

Thus, after *Dobbs*, protection of access to abortion and "abortion-related services" is not a valid justification for federal legislation and, therefore, the FACE Act is unconstitutional. *See*, *e.g.*, *U.S. v. McMillan*, 946 F. Supp. 1254, 1259 (S.D. Miss. 1995) ("Congress passed the FACE Act *to enforce protection of both the substantive right of women to obtain abortion-related health services* and equal protection of the law where state officials are either unable or unwilling to provide that protection," summarizing position of the plaintiff U.S. Government); *U.S. v. Wilson*, 880 F. Supp. 621, 636 (E.D. Wis.), *rev'd*, 73 F.3d 675 (7th Cir. 1995) ("Finally, the Government argues that the FACE Act is a valid exercise of *Congress' inherent power to pass laws that protect the exercise of fundamental rights, including the right to an abortion* recognized by the Supreme Court in *Roe v. Wade*, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973).") (emphasis added). But after *Dobbs,* abortion is no longer a "fundamental right." Indeed, in some states it is now legally classified in their criminal code as murder.

D. Pro-life "protest" is *political* rather than economic or commercial activity.

The Third Circuit in *Gregg* found that "the misconduct regulated by the FACE Act, although not motivated by commercial concerns, has an effect which is, at its essence, economic." *Gregg*, 226 F.3d at 262. This line of reasoning is more suggestive of the logic of *Wickard v. Filburn*, 317 U.S. 111 (1942) than *U.S. v. Lopez*, 514 U.S. 549 (1995). *Gregg* did what *Morrison* and *Lopez* said had never previously been done – upholding Commerce Clause regulation of intrastate political or moral activity even though that activity is non-economic in nature. *Gregg's* linguistic gymnastics, claiming economic activity should be understood "in broad terms," is nothing short of redefining paradigmatic non-economic

expressive conduct as economic activity. "[T]he notion that Congress can enact the FACE Act because the activities of protestors result in fewer abortions as well as less interstate movement of people and goods is really straining at gnats." *Hoffman v. Hunt*, 923 F. Supp. 791, 809 (W.D.N.C. 1996), *rev'd*, *Hoffman v. Hunt*, 126 F.3d 575 (4th Cir. 2003). "In fact, the FACE Act is not aimed at the commercial activity of abortion facilities. It is aimed at the basic freedom of individuals to engage in civil protest." *Id*. Judge Weis, dissenting in *Gregg*, made the same point: "By its plain language, the statute is directed against the conduct of those external to a clinic's operations." *Gregg*, 226 F.3d at 269-70 (Weis, J., dissenting). "[A] protestor's conduct does not involve a purchase, sale, or any exchange of value in return for the rendering of a service, and cannot in any sense be deemed economic or commercial in character." *Id.* at 270.

In *Gregg* and *Norton,* the Third and Sixth Circuit Courts of Appeal relied extensively on the interstate (or "national") market for abortion services to sustain the facial constitutionality of the FACE Act and highlight the claimed shortage of "abortion-related services . . . that is exacerbated by the misconduct proscribed by the FACE Act." *Gregg*, 226 F.3d at 263-67. The fact that abortion facilities are involved in interstate commerce is also irrelevant; the FACE Act does not regulate the facilities (except in rare cases), but rather the pro-life advocates who oppose their business activities on moral and political grounds. Regardless, after *Dobbs*, consideration of the national market for abortion or the economic activity of abortion facilities is no longer material. And there is zero evidence to support any need for the FACE Act with respect to "reproductive health services" other than abortion.

Setting aside the questionable notion that an anti-abortion "rescue" at an abortion provider's premises (or a sit-in at a segregated lunch counter) may somehow be construed to be economic activity, the purported economic impact of "anti-abortion" activity can no longer be properly considered. "Anti-abortion" activity is, by definition, directed against the protesters' perceptions and views that abortions, whether sold as marketable services or donated as a supposed charitable gift, are morally evil unjustified killings of human beings.

As Judge Weis correctly observed in dissent in *Gregg*, any doubts about the applicability of *Lopez* outside its narrow facts "were dissipated by the expansive holding in" *Morrison*. *Gregg,* 226 F.3d at 268 (Weis, J., dissenting). Judge Weis further noted the Supreme Court's statement in *Morrison* to the effect that "'[w]e accordingly reject the argument that Congress may regulate non-economic, violent criminal conduct based solely on that conduct's aggregate effect on interstate commerce. The Constitution requires a distinction between what is truly national and what is truly local.'" *Id.* (quoting *Morrison*, 529 U.S. at 617-18). If Congress cannot regulate non-economic *violent* criminal conduct based solely on its aggregate effect on interstate commerce, then *a fortiori* it may not regulate noneconomic *nonviolent* pro-life conduct on such a basis. The restoration of the right of states to regulate abortion by *Dobbs* breathes new life into the position taken in *Gregg* by Judge Weis, who wrote in dissent that "FACE, like the Gun–Free School Zones Act and the Violence Against Women Act, is an example of congressional intrusion into criminal law traditionally within the province of the States." *Gregg*, 226 F.3d at 268-69 (Weis, J., dissenting). "'[N]either the actors nor their conduct has a commercial character, and neither the purposes nor the design of the statute[s] has an evident commercial nexus.'" *Id.* At 269 (quoting *Lopez*, 514 U.S. at 580 (Kennedy, J., concurring)). The FACE Act was unconstitutional when it was enacted, and the fig leaf of a substantial relation to interstate commerce has now been completely removed by *Dobbs*.

E. Post-*Norton* decisions of the Supreme Court make it clear that Congress does not possess unfettered power to regulate simply by invoking a "market" for services.

"[T]he Commerce Clause does not authorize Congress to 'regulate noneconomic, violent criminal conduct based solely on that conduct's aggregate effect on interstate commerce.'" *United States v. Whited*, 311 F.3d 259, 266 (3d Cir. 2022) (quoting *Morrison*, 529 U.S. at 617). Ten years after the Sixth Circuit decided *Norton*, the Supreme Court made plain the insufficiency of an interstate "market" alone to support plenary federal regulation under the Commerce Clause of *any form* of intrastate conduct. In *NFIB v. Sebelius*, 567 U.S. 519 (2012), the Court held that an individual's decision to not purchase health insurance was

beyond Congress' power to regulate under the Commerce Clause. The Court reasoned that an individual's decision against purchasing health insurance is not economic activity, and moreover it could not be swept into the jurisdictional power of the federal government simply because there is, indisputably, a national market for healthcare. *See NFIB*, 567 U.S. at 551-57.

F. Principles of federalism militate against the constitutionality of the FACE Act.

Furthermore, when confronted with "an improbably broad reach" of a federal criminal statute, it is appropriate to seek recourse to principles of federalism, including a presumption against "interpreting the statute's expansive language in a way that intrudes on the police power of the States" to reach "purely local crimes," to properly interpret the law. *Bond v. United States*, 572 U.S. 844, 859-60 (2014) (internal citations omitted). While the federal government possesses only those powers expressly enumerated in the Constitution, "the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people," U.S. Const. amend. X. "As James Madison wrote, 'the powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite.'" U.*S. v. Lopez*, 514 U.S. 549, 552 (1995) (quoting The Federalist No. 45, pp. 292-93 (C. Rossiter ed. 1961)). This division between the powers of the federal and State governments is not a trifling technicality, but rather "was adopted by the Framers to ensure the protection of 'our fundamental liberties.'" *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 242 (1985) (quoting *Garcia v. San Antonio Metro. Transit Auth.,* 469 U.S. 528, 572 (1985) (Powell, J., dissenting)); *see Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991) (describing "dual sovereignty").

One of the powers the federal government lacks but which the states retain is a general police power. "For nearly two centuries it has been 'clear' that, lacking a police power, 'Congress cannot punish felonies generally' . . . A criminal act committed wholly within a State 'cannot be made an offence against the United States, unless it have some relation to the execution of a power of

Congress, or to some matter within the jurisdiction of the United States.'" *Bond*, 572 U.S. at 854 (internal citations omitted). Thus, it must be clear that Congress intended to reach crime of a local nature before a federal statute will be construed to criminalize such conduct. *Id.* at 860.

"[U]nless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance" regarding criminal law since "Congress has traditionally been reluctant to define as a federal crime conduct readily denounced as criminal by the States." *United States v. Bass*, 404 U.S. 336, 349 (1971). *See Brzonkala v. Va. Polytechnic Inst. & State Univ.*, 169 F.3d 820, 841-42 (4th Cir. 1999) (describing most crimes as matters of traditional state concern) ("Congress not only has encroached upon the States' ability to determine when and how violent crime will be punished . . . but in so doing has blurred the boundary between federal and state responsibility for the deterrence and punishment of such crime."). The FACE Act was an affront to principles of federalism when enacted. Now, after *Dobbs*, it is flatly at odds with them.

G. *NIFLA v. Kwame Raoul* held (so far) that abortion counseling isn't "commerce."

On August 4, 2023, Judge Iain Johnston of the U.S. District Court for the Northern District of Illinois issued a 15-page single-spaced "Rule 65 Preliminary Injunction Order," by which he temporarily (pending further proceedings) banned enforcement of Illinois' new law (called "SB1909"), targeting pro-life pregnancy resource centers for allegedly "deceptive trade practices." National Institute of Family Life Advocates v. Raoul, 3:23-cv-50279, (N.D. Ill.) The Judge's opinion – not only sharply worded but caustic – deprecated the new law as not only "stupid" but "very likely unconstitutional," drawing favorable attention from the *Wall Street Journal* editorial writers. *See,* A Free-Speech Lesson for J.B. Pritzker https://www.wsj.com/articles/a-free-speech-lesson-for-j-b-pritzker-pregnancy-center-viewpoint-discrimination-supreme-court-judge-abortion-politics-law-45afb010?mod=hp_opin_pos_6.

Judge Johnston's opinion set forth an entire litany of legal defects in the new measure, which was signed by Governor Pritzker and enacted into Illinois

law just weeks earlier. But one part of his opinion supports our legal analysis that undercuts any defense of the FACE Act as falling within the scope of Congress' power to regulate abortion protest under the Commerce Clause of the U.S. Constitution.

At page 14 of his opinion, Judge Johnston rebuffed the contention of defendant Raoul, Illinois' Attorney General, that SB1909's constitutionality could be defended as a regulation of "commercial speech," as follows:

> The speech – and omission of speech – involved in this case is not an advertisement. To some extent the speech refers to a service, but the service is general. But, most importantly, there is no economic motivation for the speech. Centers are not compensated by the individuals they speak to, provide pregnancy tests for, or give baby supplies to. The same is true for sidewalk counselors. There is no remuneration of any kind and there is no economic motivation of any kind. *** In short, ***there is no commercial transaction in these interactions***. SB1909 is not a constitutional regulation of commercial speech.

This affords powerful support for any pregnancy resource center, or any other pro-life entity, counselor or activist sued or prosecuted under the FACE Act to defend by asserting that the FACE is unconstitutional as applied to them, or even generally, as lacking any constitutional justification under the Commerce Clause of the U.S. Constitution.

Indeed, there are very strong arguments to be mounted against the abortionists' and their allies' resort to laws governing commercial or mercenary interactions in attacking the selfless and often voluntary efforts of pro-lifers to save the lives of human beings from abortion. Abortion is far from being the only human activity that people generally believe to be outside the scope of economics, that is, subject to analysis and evaluation in terms of monetary costs and benefits, or by a count of dollars and cents. For example, the abortionists sued Joseph Scheidler, Randall Terry, and other activist leaders under the federal antitrust (i.e., shutting down an entire industry as "anti-competitive") and extortion ("obtain … property" by means of force, threat, or violence) laws. Then the FACE Act was passed as a means of regulating "commerce." Now NIFLA and other pregnancy

resource centers have been targeted under laws aimed at "deceptive trade practices," as if they were somehow commercial "competitors" of abortion providers. Indeed, are supposedly "unwanted" infants (including preborn infants) to be deemed, analyzed, and regulated as mere "commodities" whose disposal may be bought and sold?

These questions might be considered in a broader context, about which (if any) human interactions or transactions deserve to be treated in our law and culture as priceless, and wholly removed from the sphere of economic and commercial regulation. *See, generally, Contested Commodities: The Trouble With Trade in Sex, Children, Body Parts, and Other Things,* (Harv. Univ. Press, 2d ed., 2004), by Prof. Margaret Jane Radin – whose insights have proved helpful, perhaps crucial, in the defeat of the antitrust, extortion, and racketeering legal theories of the abortionists. This "anti-commodification" analysis may also prove decisive in bringing about the demise of the FACE Act and restoring state and local control over state and local moral and political issues.