

TESTIMONY
BEFORE THE UNITED STATES HOUSE OF
REPRESENTATIVES
COMMITTEE ON THE JUDICIARY
SUBCOMMITTEE ON THE CONSTITUTION AND
LIMITED GOVERNMENT
ON
REVISITING THE IMPLICATIONS OF THE FACE
ACT: PART II

BY

ERIN MORROW HAWLEY, SENIOR COUNSEL &
VICE PRESIDENT OF THE CENTER FOR LIFE AND REGULATORY PRACTICE

ALLIANCE DEFENDING FREEDOM

DECEMBER 18, 2024

The Text of the FACE Act Protects Pregnancy Centers and Houses of Worship, in Addition to Abortion Facilities like Planned Parenthood.

Congress passed and President Clinton signed the Freedom of Access to Clinic Entrances Act (“FACE Act” or “the Act”) in 1994. The FACE Act protects people from injury, intimidation, or interference when they provide or seek out “reproductive health services”—a broadly defined term—or exercise their freedom to worship. It does so by prohibiting use of or threats of force, obstruction, and property damage intended to disrupt religious worship or the administration of reproductive health care services. From its inception, the Act has carried with it the explicit promise that it would apply equally to all conduct that targets people or places that facilitate religious worship or reproductive health services. In the words of the FACE Act’s lead sponsor in the House of Representatives, then-Rep. Chuck Schumer:

It is evenhanded. It does not just protect the right to choose for those who wish to seek access to abortion services. It protects the rights of those who seek to counsel against abortion so that if pro-choice people were blockading a place that was trying to dissuade women from having abortions, the Federal Government could come in with equal force and say, “You cannot do that.”¹

A plain reading of the FACE Act’s text is conclusive that all facilities and people that provide reproductive health services are covered under the Act, regardless of their views on abortion. The definition of “reproductive health services” includes those services “provided in a hospital, clinic, physician’s office, or other facility” and is not limited to medical procedures but includes “counselling or referral services relating to the human reproductive system.” This broad protection extends to life-affirming pregnancy centers just as it does to abortion clinics. *See Rieley v. Reno*, 860 F. Supp. 693, 702 (D. Ariz. 1994) (“[T]he language of FACE . . . would apply to an individual who spray paints the words ‘KEEP ABORTION LEGAL’ on a facility providing counseling regarding abortion alternatives as well as to the individual who spray paints the words ‘DEATH CAMP’ on a facility providing abortion services.”).

Pregnancy centers provide important services to women and families who need support during and after pregnancy. These centers offer life-affirming options and emotional, mental, material, and spiritual support to pregnant women and new mothers who may otherwise feel alone. The services provided by pregnancy centers include medical care, such as ultrasounds, pregnancy

¹ 140 Cong. Rec. 30 (1994).

tests, STD testing and treatment, and abortion pill reversal; support for parents, including parenting and prenatal education classes, job training, and résumé building; counseling and mental health services, such as post-abortion support and recovery; and financial and material resources for new mothers, such as diapers, clothes, car seats, strollers, transportation, food, and housing. In 2022 alone, American pregnancy centers provided goods and services valued at \$358,725,517.²

Currently, the U.S. Department of Justice insists that “[t]he FACE Act is not about abortions” and that it “protects all patients, providers, and facilities that provide reproductive health services, including pro-life pregnancy counseling services and any other pregnancy support facility providing reproductive health care.”³ In short, the Act does not discriminate based on ideology.

The Biden Administration Has Weaponized the FACE Act to Target Pro-Life Advocates.

The text of the FACE Act is clear: Its protections apply not only to abortion clinics but also to pregnancy centers and places of worship.⁴ But the government has wielded the FACE Act in a one-sided manner, almost exclusively targeting pro-life advocates. Indeed, to friendly audiences, the Biden administration all but admits the FACE Act has been weaponized to target the pro-life community. A month after the *Dobbs* decision, the White House convened a meeting of lawyers in which Associate Attorney General Vanita Gupta called the decision “devastating.” She explained that the Department of Justice had established a “Reproductive Rights Task Force” of “senior officials from across the department, who meet daily on [their] response to *Dobbs*,” including “enforce[ment] of the FACE Act” against pro-life efforts.⁵ In a speech in December 2022, Gupta called *Dobbs* “a devastating blow ... increasing the urgency of our ... enforcement of the FACE Act.”⁶

² *Pregnancy Centers Offer Hope for a New Generation*, CHARLOTTE LOZIER INSTITUTE, https://lozierinstitute.org/wp-content/uploads/2023/12/Pregnancy-Center-Update_2022.pdf.

³ Civil Rights Division, U.S. Dep’t of Justice, *Protecting Patients and Health Care Providers* (May 22, 2023) JUSTICE.GOV, <https://www.justice.gov/crt/protecting-patients-and-health-care-providers>.

⁴ Although “place of religious worship” is not defined in the Act, neither is it limited to a specific faith tradition or practice. See *Jingrong v. Chinese Anti-Cult World All. Inc.*, 16 F.4th 47, 49 (2d Cir. 2021) (“We hold that ‘a place of religious worship’ is anywhere that religious adherents collectively recognize or religious leadership designates as a space primarily to gather for or hold religious worship activities.”).

⁵ Vanita Gupta, *Associate Attorney General Vanita Gupta Delivers Remarks at White House Convening of Lawyers in Defense of Reproductive Rights*, JUSTICE.GOV (Jul. 29, 2022), <https://www.justice.gov/opa/speech/associate-attorney-general-vanita-gupta-delivers-remarks-white-house-convening-lawyers>.

⁶ Vanita Gupta, *Associate Attorney General Vanita Gupta Delivers Remarks at the Civil Rights Division's 65th Anniversary*, JUSTICE.GOV (Dec. 6, 2022), <https://www.justice.gov/opa/speech/associate-attorney-general-vanita-gupta-delivers-remarks-civil-rights-divisions-65th>.

The Biden Department of Justice has followed those orders. Since 2021, it has brought criminal or civil cases under the FACE Act against at least 50 pro-life advocates.⁷ It has charged 24 FACE Act cases against 55 defendants but only two of the cases were brought in defense of pregnancy centers.⁸ None have been brought to protect churches or other houses of worship. Indeed, despite hundreds of attacks on churches and pregnancy centers since May 2022, only 8% of Biden DOJ FACE Act cases have been filed to protect pro-life Americans.⁹

Make no mistake: there has been no shortage of opportunities for the Biden DOJ to enforce the FACE Act to protect pregnancy centers and houses of worship. Since the *Dobbs* decision was leaked in May 2022, there have been close to 100 pro-life pregnancy centers that have been vandalized, spraypainted with threatening messages, firebombed, or received threats of violence.¹⁰

Examples:

On June 6, 2022, **Mountain Area Pregnancy Services in Asheville, North Carolina** was doused in red paint, had its windows and doors shattered, and was spray-painted with the message, “If abortions aren’t safe, neither are you!”¹¹



⁷ U.S. Department of Justice, *Recent Cases on Violence Against Reproductive Health Care Providers*, JUSTICE.GOV, <https://www.justice.gov/crt/recent-cases-violence-against-reproductive-health-care-providers>.

⁸ Chip Roy, *Here's Why The FACE Act Must Be Repealed*, DAILY WIRE (March 12, 2024) <https://www.dailywire.com/news/heres-why-the-face-act-must-be-repealed> 3/12

⁹ *Id.*

¹⁰ *Tracking Attacks on Pregnancy Centers & Pro-Life Groups*, CATHOLIC VOTE (last updated Nov. 12, 2024), <https://catholicvote.org/pregnancy-center-attack-tracker/>.

¹¹ Ingraham Angle, *Victim of anti-abortion terrorism joins Laura: We will not back down*, FOX NEWS (Jun. 7, 2022), <https://www.foxnews.com/video/6307433820112>.

On June 7, 2022,
CompassCare’s office in Buffalo, New York, was firebombed and tagged with spray paint reading, “Jane was here.”¹²



On June 25, 2022, **Blue Ridge Pregnancy Center in Lynchburg, Virginia,** was vandalized with a spraypainted message reading, “If abortion ain’t safe, you ain’t safe!”¹³



¹² *CompassCare’s Buffalo Office Firebombed by Abortion Terrorists*, COMPASSCARE (Jun. 7, 2022), <https://www.compasscarecommunity.com/2022/06/compasscares-buffalo-office-firebombed-by-abortion-activists/>.

¹³ Ivy Lyons, ‘No room for this in Virginia’ — Gov. Youngkin decries vandalism at crisis pregnancy center, WTOP NEWS (Jun. 25, 2022), <https://wtop.com/virginia/2022/06/no-room-for-this-in-virginia-gov-youngkin-decries-vandalism-at-crisis-pregnancy-center/>.

On December 17, 2022, **Pregnancy Aid Detroit in Eastpointe, Michigan**, was tagged with spray paint saying “liars,” “fake clinic,” and “Jane’s Revenge.” In addition, a board member’s home was spray-painted and had windows broken.¹⁴



On March 2, 2023, vandals used hammers to smash the windows of **First Care in Minneapolis, Minnesota** and spray-paint the messages, “If abortions arn’t safe, neither r u.”¹⁵



¹⁴ Francis X. Donnelly, *Pro-life pregnancy center in Eastpointe, board member’s house spray-painted with graffiti*, THE DETROIT NEWS (Dec. 17, 2022), <https://www.detroitnews.com/story/news/local/macomb-county/2022/12/17/pro-life-pregnancy-center-board-members-house-graffiti-spray-painted/69737422007/>.

¹⁵ Joe Bukuras, *Abortion activists smash windows at Minnesota pregnancy clinic that provides free diapers*, CATHOLIC NEWS AGENCY (Mar. 6, 2023), <https://www.catholicnewsagency.com/news/253802/abortion-activists-smash-windows-at-minnesota-pregnancy-clinic-that-provides-free-diapers>.

On June 25, 2022, **Life Choices Free Pregnancy Services in Longmont, Colorado**, was firebombed and spray-painted with the message, “if abortions aren’t safe, neither are you.”¹⁶



A post dated June 25, 2022, on AnarchistNews.org shows vandalism to **Avenues Pregnancy Clinic in Glendale, California**.¹⁷ The phrases written were “Jane was here,” “abort the court,” and “If abortions aren’t safe neither are you.” The post continues:

To all the conservatives, Fox News anchors, judges, cops, Christian extremists, or federal agents reading this:

This attack is nothing in compare [sic] to what is in store for you. Some spray paint will be the least of your worries. For decades you have bombed abortion clinics and murdered doctors. We fight not just for abortion rights, but for trans liberation, ecological harmony, decolonization, the destruction of white supremacy and capitalism, and the uprooting of the entire global civilization.



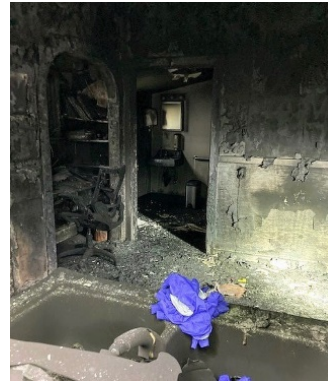
We will hunt you down and make your lives a living hell. You started this war but we will win it. So far its [sic] just been pregnancy crisis centers, but tomorrow it might be your cars, your homes, or even your lives. We support a diversity of tactics and we will not step down in this fight.

Expect us, Jane’s Revenge

¹⁶ Nick Wills, *Longmont pregnancy center vandalized overnight*, KDVR NEWS (Jun. 26, 2022), <https://kdvr.com/news/local/longmont-pregnancy-center-vandalized-overnight/>.

¹⁷ Anonymous, *Jane’s Revenge – Night of Rage Communique*, ANARCHIST NEWS (Jun. 25, 2022), <https://anarchistnews.org/content/jane%E2%80%99s-revenge-%E2%80%93-night-rage-communique>.

On June 10, 2022, the **Gresham Pregnancy Resource Center in Gresham, Oregon** was burned.¹⁸



These attacks aren't limited to pregnancy centers. Last year, Arielle Del Turco with the Family Research Council, reported to this Committee over 400 incidents of hostile acts directed at churches between 2018 and 2022, including hundreds of acts of vandalism, dozens of arson attacks, and incidents involving guns or bomb threats.¹⁹ In 2023 alone, the FRC identified 436 incidents against churches—more than double the number in 2022, and eight times the number in 2018.²⁰ Shockingly, the Biden DOJ has failed to initiate a single prosecution to protect churches and other houses of worship under the FACE Act.

After the leak of the *Dobbs* opinion, the anarchist group “Jane’s Revenge” attacked various churches in Olympia, Washington, spray-painted pro-abortion messages onto the exteriors of Harbor Church, Church of Latter-Day Saints, St. Michael’s Catholic Church, and Calvary Church.²¹



¹⁸ Colin Miner, *Gresham Pregnancy Resource Center Fire ‘Suspicious,’ Police Say*, PATCH (June 10, 2022), <https://patch.com/oregon/portland/s/iadjc/gresham-pregnancy-resource-center-fire-suspicious-police-say>.

¹⁹ *Revisiting the Implications of the FACE Act: Hearing Before the H. Judiciary Subcomm. on Const. and Ltd. Gov’t*, 118th Cong. 1 (2023) (written testimony of Arielle Del Turco, Director of the Center for Religious Liberty, Family Research Council), <https://www.congress.gov/118/meeting/house/115924/witnesses/HHRG-118-JU10-Wstate-DelTurcoA-20230516.pdf>.

²⁰ Arielle Del Turco, *Hostility Against Churches Is on the Rise in the United States*, FAMILY RESEARCH COUNCIL (Feb. 2024), <https://www.frc.org/issueanalysis/hostility-against-churches-is-on-the-rise-in-the-united-states>.

²¹ Josh Christenson, *Anarchists Take Credit for Vandalizing Four Pro-Life Churches in Washington State*, WASH. FREE BEACON (May 25, 2022), <https://freebeacon.com/latest-news/anarchists-take-credit-for-vandalizing-four-pro-life-churches-in-washington-state/>.

In April 2023, less than a half hour after an Easter service, a massive fire was started at Faith Lutheran Church in Cambridge, Massachusetts.²² The fire spread quickly and caused a great deal of damage, requiring the steeple to be removed. Thankfully, no one was hurt. The FBI investigated the fire as an arson.



In July 2020, while parishioners were getting ready for mass at Queen of Peace Catholic Church in Ocala, Florida, someone crashed a minivan through the main doors, poured gasoline inside the church, and lit it on fire, causing substantial damage.²³



²² Staff, *Cambridge church fire on Easter Sunday investigated as arson*, WBZ BOS. CBS NEWS (April 19, 2023), <https://www.cbsnews.com/boston/news/cambridge-church-fire-easter-sunday-investigated-arson/>.

²³ *Florida Catholic church rebuilding after arson attack*, CATHOLIC NEWS AGENCY (July 27, 2020), <https://www.catholicnewsagency.com/news/45315/florida-catholic-church-rebuilding-after-arson-attack>.

In one case, Maeve Nota, an abortion activist, was arrested for vandalizing the St. Louise Catholic Church in Bellevue, Washington. Nota smashed two of the church’s glass doors, scrawled “F–k Catholics,” “women haters,” “kid groomers,” and “rot in hell” on the church’s walls, assaulted a church employee—throwing rocks at and spray painting the employee across the face—and defaced several religious statues.²⁴ The Biden DOJ *declined* to pursue a FACE Act claim and instead charged Nota with misdemeanor destruction of religious property subject to a maximum one-year prison sentence.²⁵ In the plea agreement, the Biden DOJ recommended zero jail time.²⁶



Unfortunately, these attacks on pro-life pregnancy centers and churches are typical of the dozens of incidents that have occurred across the country since the leak of the *Dobbs* decision. To date, however, we have only identified *two* cases in which the Biden Justice Department sought to protect pregnancy centers (and again the Biden DOJ scorecard for protecting churches remains at zero):

1. In *United States v. Freestone*, No. 8:23-cr-00025 (M.D. Fla.), four defendants were charged with FACE Act violations for painting threatening messages on three pregnancy centers in Florida. Three pled guilty to non-FACE Act charges and received sentences of 30 days (two defendants) and one year (one defendant). The fourth defendant is awaiting trial.
2. In *United States v. Durant*, Case No. 3:23-mj-08003 (N.D. Ohio), a single defendant pled guilty to violating the FACE Act by vandalizing a Bowling Green pregnancy center with “Jane’s

²⁴ Mark Moore, *Biden’s DOJ recommends no jail time for abortion activist who vandalized church, assaulted worker*, NEW YORK POST (March 13, 2023) <https://nypost.com/2023/04/13/bidens-doj-recommends-no-jail-time-for-church-vandal-report/>; Jeff Zymeri, *DOJ Recommends No Jail Time for Trans Catholic Church Vandal*, NATIONAL REVIEW, (April 12, 2023) <https://www.aol.com/news/doj-recommends-no-jail-time-153427242.html>

²⁵ Moore, *supra* note 24.

²⁶ *Id.*

Revenge”-style spray painted message threatening the center’s safety and espousing hostility toward religion.²⁷ She received a sentence of probation.

Not only has the Biden Justice Department demonstrated bias in its failure to prosecute violence against pro-life and religious organizations, but it frequently presses for and secures multi-year FACE Act sentences for pro-life individuals—even when they engaged in non-violent civil disobedience. Further, for the first time in the FACE Act’s history, the Biden DOJ started to tack on a “conspiracy against rights” felony charge *in addition to* FACE Act charges. The use of this Reconstruction-era law to add significant jail time for protest activity is another example of how the Biden DOJ has weaponized the FACE Act against pro-life Americans.

For example, in 2022 and 2023, the Biden administration charged 11 individuals with FACE Act violations for singing hymns and praying in a hallway leading to an abortion clinic in Tennessee in 2021,²⁸ and 10 defendants for a non-violent protest in Washington, DC,²⁹ and eight more for a non-violent protest in Michigan in 2020. Among those receiving convictions for these protests are:

- **Eva Edl** (right), an 89-year-old survivor of a Soviet concentration camp,³⁰ who passively sat in front of the entrance to an abortion clinic. Ms. Edl received a longer term of probation (3 years) for singing and praying from her wheelchair than the woman in Ohio who painted threats against the safety of a pregnancy center. Moreover, because the Biden DOJ tacked on a conspiracy charge, Edl could face a sentence of up to 11 years in federal prison along with hundreds of thousands of dollars in fines.
- **Heather Idoni**, a 60-year-old woman who received an 8-month sentence of incarceration in the Tennessee case, and a 2-year sentence for the nonviolent protest at an abortion clinic in Washington, DC.³¹ For Idoni, prosecutors in Washington had requested a



²⁷ BREAKING: Bowling Green Pregnancy Center Vandalized By Abortion Group, OHIO RIGHT TO LIFE (Apr. 15, 2023), <https://ohiolife.org/breaking-bowling-green-pregnancy-center-vandalized-by-abortion-group/>.

²⁸ *United States v. Gallagher, et al.*, Case No. 3:22-cr-00327 (M.D. Tenn.).

²⁹ *United States v. Handy, et al.*, Case No. 1:22-cr-00096 (D.D.C.).

³⁰ Daniel Payne, *89-Year-Old Death Camp Survivor Convicted for Pro-Life Protest Faces Jail Time*, NAT’L CATH. REG. (Aug. 21, 2024), <https://www.ncregister.com/cna/89-year-old-death-camp-survivor-convicted-for-pro-life-protest-faces-jail-time>.

³¹ *United States v. Handy, et al.*, Case No. 1:22-cr-00096 (D.D.C.).

sentence of 41 months in prison;³² they asked for a sentence of six and a half years for the organizer of the DC protest.³³

- **Paul Vaughn**, father of 11, whose conduct was so benign he wasn't arrested *or even cited* on the day of the Tennessee protest, but was later arrested at gunpoint in an FBI raid at his home in front of his wife and children.³⁴ Prosecutors wanted him to spend a year in prison,³⁵ but the court sentenced him to time served.³⁶
- **Jonathan Darnel**, who live-streamed a non-violent abortion clinic protest on Facebook, received a sentence of almost 3 years (34 months) under conspiracy charges.³⁷ The government had asked the court for a sentence of over 4 years.³⁸
- **Jean Marshall, 74, and Paulette Harlow, 75**, both received prison sentences of 2 years for their nonviolent protest in Washington, DC.³⁹ Prosecutors had asked for sentences of 41 months for Marshall,⁴⁰ and 33 months for Harlow.⁴¹



³² Government's Sentencing Memorandum, Dkt. No. 549, *United States v. Handy, et al.*, Case No. 22-cr-00096 (D.D.C.) (Apr. 17, 2024).

³³ Government's Sentencing Memorandum, Dkt. No. 543, *United States v. Handy, et al.*, Case No. 22-cr-00096 (D.D.C.) (Apr. 12, 2024).

³⁴ EWTN, *FBI Raids Home of Another Pro-Life Father, Paul Vaughn, in Front of His Family*, EWTN NEWS NIGHTLY (Oct. 13, 2022), <https://www.youtube.com/watch?v=Q2IC8odAcJ8>.

³⁵ Government's Sentencing Memorandum, Dkt. No. 633, *United States v. Gallagher, et al.*, Case No. 22-cr-00327 (M.D.Tenn.) (Apr. 17, 2024).

³⁶ Judgment, Dkt. No. 667, *United States v. Gallagher, et al.*, Case No. 22-cr-00327 (M.D.Tenn.) (Jul. 8, 2024).

³⁷ *United States v. Handy, et al.*, Case No. 1:22-cr-00096 (D.D.C.).

³⁸ Government's Sentencing Memorandum, Dkt. No. 541, *United States v. Handy, et al.*, Case No. 22-cr-00096 (D.D.C.) (Apr. 12, 2024).

³⁹ *United States v. Handy, et al.*, Case No. 1:22-cr-00096 (D.D.C.).

⁴⁰ Government's Sentencing Memorandum, Dkt. No. 542, *United States v. Handy, et al.*, Case No. 22-cr-00096 (D.D.C.) (Apr. 12, 2024).

⁴¹ Government's Sentencing Memorandum, Dkt. No. 540, *United States v. Handy, et al.*, Case No. 22-cr-00096 (D.D.C.) (Apr. 12, 2024).

- **Mark Houck** was charged with a FACE Act violation in Philadelphia after a minor altercation with a clinic escort who had got into Mark’s 12-year-old son’s personal space and yelled obscenities at him. He offered to appear voluntarily, but the FBI sent “twenty heavily armed federal agents to the Houck residence at dawn” to arrest him.⁴² The local and state prosecutors both declined to prosecute but the Biden DOJ proceeded with its federal case anyway. Ultimately, Mr. Houck was acquitted by a jury at his trial, at which the federal judge—an Obama appointee—asked the prosecution whether the FACE Act wasn’t being “stretched a little thin here.”⁴³



Pregnancy Centers are Targeted by State Attorneys General

The FACE Act was intended to ensure that pregnancy centers remain free to serve women, men, and children without intimidation, harassment, or violence. It explicitly allows state Attorneys General to use its provisions to protect pro-life pregnancy centers and churches. Ironically, instead of using their authority under the FACE Act to protect pregnancy centers and houses of worship, many state Attorneys General harass and intimidate these centers in a blatant attempt to silence their pro-life speech.

Shortly after the *Dobbs* decision, 16 state Attorneys General signed an open letter threatening pregnancy centers with various state enforcement actions.⁴⁴ The Attorneys General expressed “concern” that pregnancy centers existed in their states at all, and especially that these pro-life centers outnumber abortion clinics 3-to-1. They alleged that—because the centers don’t perform abortions—they mislead consumers. The Attorneys General even applauded the efforts of Yelp to place a “consumer notice” on the speech of pregnancy care centers. And they pledged to continue

⁴² Brittany Bernstein, *Pro-Life Activist Arrested by FBI Acquitted on Federal Charges*, NATIONAL REVIEW (Jan. 30, 2023), <https://www.nationalreview.com/news/pro-life-activist-arrested-by-fbi-acquitted-on-federal-charges/> (quoting Thomas More attorney Peter Breen).

⁴³ Joe Bukuras, *Prosecution rests case in Mark Houck trial, defense motions to dismiss the case*, CATHOLIC NEWS AGENCY (Jan. 26, 2023), <https://www.catholicnewsagency.com/news/253474/prosecution-rests-case-in-mark-houck-trial-defense-motions-to-dismiss-the-case>.

⁴⁴ Attorney General Rob Bonta, et al., *Open Letter from Attorneys General Regarding CPC Misinformation and Harm* (Oct. 23, 2023), available at <https://oag.ca.gov/system/files/attachments/press-docs/Open%20Letter%20re%20Crisis%20Pregnancy%20Centers%20FINAL.pdf>.

to take “numerous actions” to impede pro-life pregnancy centers from speaking about the harms of abortion.

These were not idle threats. A number of Attorneys General have made good on their promise to do what they can to shut pregnancy centers’ doors and silence their speech.

Washington State: In May of 2022, Washington State Attorney General Bob Ferguson issued civil investigative demands (CIDs) to the Obria Group and Obria Pacific Northwest.⁴⁵ The Obria Group is a network of pro-life medical clinics that provide comprehensive and compassionate care, such as ultrasounds, well-woman care, prenatal care, STD/STI testing and treatment, and abortion pill reversal.⁴⁶ Obria Pacific Northwest is a group of three clinics in the Obria network. Despite failing to identify a single patient complaint, or any purported violation of state law, Attorney General Ferguson investigated what he called “possible” deceptive marketing and “possible” unfair collection and use of consumer data.

He demanded that Obria produce an absurd amount of information, including over a decade’s worth of information relating to donors, volunteers, and employees. The Attorney General’s aggressive investigation caused Obria’s insurance costs to skyrocket and its vendors to question their relationship with Obria. Obria was compelled to spend precious resources on compliance with the frivolous investigation, resources it would otherwise have used to support women facing unplanned pregnancies. Even after Obria provided over 1,500 pages of responsive documents, the Attorney General’s office continued to demand further documentation.

⁴⁵ *Washington AG Folds, Ends Illegal Investigation of Pro-Life Pregnancy Centers*, ALLIANCE DEFENDING FREEDOM (Nov. 30, 2023), <https://adfflegal.org/article/washington-ag-folds-ends-illegal-investigation-pro-life-pregnancy-centers/>.

⁴⁶ Abortion pill reversal (APR) is the use of progesterone supplements to counter the effects of a chemically induced abortion. There is a time period after women take the first abortion drug (mifepristone) and before they take the second drug (misoprostol) that they can try to reverse the effects of the abortion process, potentially saving their baby’s life. Statistics show that APR has likely saved over 5,000 unborn lives and has a 64-68% success rate. APR has given countless women who regretted taking the first drug a chance to save their baby. For example, Atoria Foley of California remembered seeing a sign for abortion pill reversal after she began to experience deep regret over taking the first abortion drug. She went on the internet, found an abortion-pill-reversal hotline, and was connected with National Institute of Family and Life Advocates (NIFLA) member Alternatives Pregnancy Center in Sacramento, California. Atoria soon gave birth to a healthy baby girl. You can watch Atoria’s full story here: <https://youtu.be/UGjYBXL2uwo?si=Lx-AxgyuzfHmYjGl>.

It was only after Alliance Defending Freedom filed a lawsuit against Attorney General Ferguson—alleging that his CIDs were overbroad and a retaliatory effort to silence pro-life speech—that the Attorney General backed down, formally closing the investigation.⁴⁷

California: In September 2023, California Attorney General Rob Bonta sued Heartbeat International (a national network of pregnancy centers) and RealOptions Obria (which has five pregnancy centers in California) for publishing information about abortion pill reversal.⁴⁸ The suit threatens punishment—including fines of up to \$2,500—for promoting and offering services that can save lives through APR. The Attorney General’s lawsuit is an unconstitutional attempt to censor potentially life-saving information. California is trying to keep women from finding out about a medical option that gives their unborn children a second chance at life.

Because pregnancy centers in California that have made similar statements are also at risk of being targeted for litigation, Alliance Defending Freedom filed a lawsuit against Attorney General Bonta on behalf of the National Institute of Family and Life Advocates (NIFLA) and SCV Pregnancy Center.⁴⁹

New Jersey: In November 2023, New Jersey Attorney General Matthew Platkin targeted First Choice Women’s Resource Center because of its religious and pro-life views by issuing a baseless subpoena.⁵⁰ First Choice is a faith-based pregnancy center network providing medical services in New Jersey, serving women and families facing unplanned pregnancies. They provide ultrasounds to confirm pregnancy, STD/STI testing, educational resources, and material resources, like baby clothes, maternity clothes, and food.

The Attorney General has made no secret of his animus against religious pregnancy centers like First Choice. He has referred to pro-life groups as “extremists” and promised to “use all legal tools” to further his pro-abortion agenda. He issued a consumer alert warning New Jerseyans about pregnancy centers and steering them to places like Planned Parenthood instead. The Attorney General even asked Planned Parenthood to edit his draft of the consumer alert.

⁴⁷ *Id.*

⁴⁸ *California pro-life pregnancy centers sue AG for censoring their speech*, (Oct. 2, 2024), <https://adfmedia.org/case/national-institute-family-and-life-advocates-v-bonta>.

⁴⁹ *Id.*

⁵⁰ *ADF to 3rd Circuit: Stop New Jersey AG’s Harassment of Pro-Life Ministry*, ALLIANCE DEFENDING FREEDOM (Dec. 9, 2024), <https://adfmedia.org/case/first-choice-womens-resource-centers-v-platkin>.

Without identifying a single complaint from the public, the Attorney General demanded First Choice disclose constitutionally protected information—such as the names of its donors, staff, and volunteers—as well as provide communications with other pro-life organizations. This overbroad demand to dig up ten years of documentation drains resources that would otherwise be used to serve women, men, and children. And it flies in the face of clear holdings from the U.S. Supreme Court that donor information is constitutionally protected and may only be obtained upon an extraordinary showing.

That’s why Alliance Defending Freedom is defending First Choice, so it can continue to provide resources to women in their community without unjust government harassment.

New York: In May of 2024, New York Attorney General Letitia James sued eleven faith-based, pro-life pregnancy centers in the state and a network of affiliated pregnancy centers for claiming that abortion pill reversal was safe and effective.⁵¹ Attorney General James is seeking an injunction, damages, civil penalties, and attorney’s fees—all of which would have a chilling effect on the speech and life-saving work of these organizations. The lawsuit denies women potentially life-saving information and essentially forces them to follow through with an abortion—even if they don’t want to. But the First Amendment forbids government officials from picking sides in a political debate; they can’t censor or shut down pregnancy centers for speaking about life-saving care.

Alliance Defending Freedom sued Attorney General James on behalf of several other pregnancy centers arguing that New York’s actions censor pro-life pregnancy centers because they tell women about the option of abortion pill reversal. A federal district court agreed and issued a preliminary injunction against Attorney General James. The court compared her efforts to silence pro-life pregnancy centers to the dystopian “Ministry of Truth” in George Orwell’s *1984*, and added, “freedom of speech and thought ‘flows not from the beneficence of the state but from the inalienable rights of the person.’”⁵²

⁵¹ *Court halts NY attorney general from violating pregnancy centers' freedom of speech*, ALLIANCE DEFENDING FREEDOM (Aug. 22, 2024), <https://adfmedia.org/case/national-institute-family-and-life-advocates-v-james>.

⁵² *NIFLA v. James*, Case No. 24-cv-514, Preliminary Injunction Order at 2 (W.D.N.Y. Aug. 22, 2024), available at <https://adfmedialegalfiles.blob.core.windows.net/files/NIFLA-James-Ruling.pdf>.

The FACE Act is Constitutionally Suspect Because of its Biased Application and Lack of Firm Constitutional Basis.

I. The Biden DOJ's Application of the FACE Act Raises Concerns of Viewpoint-Based Enforcement.

The First Amendment prohibits government discrimination on the basis of viewpoint. While the Executive Branch has discretion to decide whether to prosecute a case, it “cannot selectively enforce the law in a way that violates the Constitution.” *Frederick Douglass Found., Inc. v. D.C.*, 82 F.4th 1122, 1137 (D.C. Cir. 2023). Prosecutorial discretion, in other words, “is not unfettered.” *Wayte v. United States*, 470 U.S. 598, 608 (1985) (cleaned up). The government may not decide whether or not to prosecute someone based on “unlawful favoritism.” *Thomas v. Chi. Park Dist.*, 534 U.S. 316, 325 (2002).

“[S]elective enforcement of a neutral and facially constitutional law may run afoul of the First Amendment if the government’s prosecutorial choices turn on the content or viewpoint of speech.” *Frederick Douglass Found.*, 82 F.4th at 1141. Such viewpoint-based prosecution “is antithetical to a free society.” *Id.* The government cannot give “one side of a debatable public question an advantage in expressing its views to the people.” *First Nat’l Bank of Bos. v. Bellotti*, 435 U.S. 765, 785 (1978).

The Biden administration’s unequal enforcement of the FACE Act targeting pro-life advocates raises the specter of selective enforcement. Despite the alarming number of attacks on pregnancy centers and houses of worship, the Biden administration has largely looked the other way. Instead, it has almost exclusively targeted pro-life individuals. This is no happenstance, but appears to be a direct order from the highest levels at the Department of Justice.

In short, the Biden DOJ has “consistently declined” to enforce the FACE Act against individuals attacking pregnancy centers and churches “while vigorously enforcing” the Act against pro-life advocates. *Frederick Douglass Found.*, 82 F.4th at 1140. This selective enforcement likely violates the First Amendment.

II. The FACE Act is a Questionable Exercise of Congress's Commerce Clause Authority.

In addition to the history of viewpoint-based enforcement, the FACE Act gives rise to other serious constitutional concerns. Every statute enacted by Congress “must be based on one or more of its powers enumerated in the Constitution.” *United States v. Morrison*, 529 U.S. 598, 607 (2000). As Chief Justice Marshall explained long ago: “The powers of the legislature are defined and limited; and that those limits may not be mistaken, or forgotten, the constitution is written.” *Marbury v. Madison*, 1 Cranch 137, 176, 2 L.Ed. 60 (1803) (Marshall, C. J.). Nothing in the text or history of the constitutional authorization to Congress to regulate “interstate commerce” establishes that Congress may regulate purely local intrastate activity like trespassing on a church or clinic’s property. Quite the opposite. As a matter of text and history, the FACE Act is an unconstitutional exercise of Congressional power.

Modern-day Commerce Clause jurisprudence has expanded far beyond the traditional interstate activities subject to regulation at the Founding. But even under the more recent, more expanded interpretations of the Commerce Clause, the FACE Act is a stretch. The Supreme Court has held that there are three categories under which Congress may regulate intrastate activities. “First, Congress may regulate the use of the channels of interstate commerce.” *United States v. Lopez*, 514 U.S. 549, 558 (1995). “Second, Congress is empowered to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities.” *Id.* Third, Congress may regulate activities “that substantially affect interstate commerce.” *Id.* at 558–559. Only the third category is at issue for the FACE Act.

While broad, Congress’s power under the Commerce Clause is not unlimited. In *United States v. Lopez*, for instance, the Supreme Court held that a statute making it a federal crime to knowingly possess a firearm in a school zone exceeded Congress’s Commerce Clause authority. The Court paid special attention to the fact that the federal statute was “a criminal statute that by its terms has nothing to do with ‘commerce’ or any sort of economic enterprise, however broadly one might define those terms.” *Id.* at 561. The Court explained that its Commerce Clause cases had upheld the regulation of “intrastate economic activity” where it “substantially affected interstate commerce.” *Id.* at 559.

The Court rejected the United States' claim that the possession of guns could lead to violent crime which would affect the national economy. The "costs of crime" argument was too attenuated and would permit Congress to regulate any "activity that it found was related to the economic productivity of individual citizens: family law (including marriage, divorce, and child custody), for example." *Id.* at 564. Such a theory would provide for limitless federal authority, "even in areas such as criminal law enforcement or education where States historically have been sovereign." *Id.* If the Court were to accept the government's argument, it would be "hard pressed to posit any activity by an individual that Congress is without power to regulate." *Id.* In sum, a "fair reading of *Lopez* shows that the noneconomic, criminal nature of the conduct at issue was central" to the Court's decision in that case." *Morrison*, 529 U.S. at 610.

The *Lopez* Court also found it important that Section 922(q) contained "no express jurisdictional element which might limit its reach to a discrete set of firearm possessions that additionally have an explicit connection with or effect on interstate commerce." 514 U.S. at 562.

Similarly, in *United States v. Morrison*, the Supreme Court invalidated the Violence Against Women Act as exceeding Congress's Commerce Clause authority. The *Morrison* Court reiterated that when the Court had "sustained federal regulation of intrastate activity based upon the activity's substantial effects on interstate commerce, the activity in question has been some sort of economic endeavor." 529 U.S. at 611. The Court rejected the government's argument that violence against women could deter interstate travel and reduce national productivity. By the Court's lights, that argument would "completely obliterate the Constitution's distinction between national and local authority." As a result, the Court "reject[ed] the argument that Congress may regulate noneconomic, violent criminal conduct based solely on that conduct's aggregate effect on interstate commerce." *Id.* at 608. To the contrary, the "Constitution requires a distinction between what is truly national and what is truly local." *Id.* at 617-18.

The FACE Act is a federal criminal statute that regulates noneconomic activity. The intentional vandalizing or destruction of a facility that provides reproductive health services is not a commercial activity. See *United States v. Bird*, 124 F.3d 667, 675 (5th Cir. 1997). While Congress could have ensured that the FACE Act reach only activities affecting interstate commerce by including a jurisdictional element, it did not do so.

Lopez and *Morrison* rejected the but-for causation argument that Congress may regulate any crime so long as it has a nationwide aggregate effect on some sort of economic activity. As the *Morrison* Court explained: that reasoning “seeks to follow the but-for causal chain from the initial occurrence of violent crime (the suppression of which has always been the prime object of the States’ police power) to every attenuated effect upon interstate commerce.” 529 U.S. at 615. And if accepted, Congress could “regulate any crime as long as the nationwide, aggregated impact of that crime has substantial effects on employment, production, transit, or consumption.” *Id.* Needless to say, the federal government does not possess a general police power. “Under our federal system, the States possess primary authority for defining and enforcing the criminal law.” *Lopez*, 514 U.S. at 561 n. 3 (cleaned up).

Under these cases, it is doubtful that Congress has the authority to regulate the noneconomic criminal activity prescribed by the FACE Act “based solely on that conduct’s aggregate effect on interstate commerce.” *Morrison*, 529 U.S. at 617.

This does not mean that trespass or other criminal conduct directed at houses of worship, abortion facilities, or pregnancy resource centers may occur with impunity and without legal consequences, but these actions are quintessentially within the authority of the state and local governments to regulate—not Congress.

The FACE Act Should be Repealed

I. The FACE Act should be repealed because it has been weaponized to target pro-life activity while leaving pregnancy centers and churches largely unprotected.

As explained above, the Biden administration’s implementation of the FACE Act has been one-sided, raising legitimate concerns about selective enforcement. The Administration has used the FACE Act almost exclusively to go after pro-life advocacy. In fact, 92% of all Biden-Harris FACE Act cases were brought against pro-life advocates. This, despite the fact that hundreds of churches and pregnancy centers have been attacked and vandalized since the leak of the *Dobbs* opinion. This is not the even-handed application of the law the American people deserve.

To make matters worse, the FACE Act’s superpower—and why it is such a potent weapon in the wrong hands—is the way it turns traditional state crimes, like trespass and disorderly conduct,

into federal felonies.⁵³ Were this not enough, the Biden DOJ has resorted to another federal statute—the conspiracy to violate rights statute—to up the ante and place pro-life advocates in as much jeopardy as possible. And indeed, the Biden administration has sought and obtained multi-year sentences for non-violent pro-life protests. Once again, the law has been unequally applied to pro-abortion advocacy. In the two cases in which the FACE Act was used to prosecute attacks on pregnancy centers, the maximum sentence obtained was one year in prison. Other defendants walked away with either probation or a 30-day sentence.

Every state, moreover, has laws that regulate trespass, assault, disorderly conduct, unlawful assembly, and the like. The Supreme Court has explained that Congress has historically “been reluctant to define as a federal crime conduct readily denounced as criminal by the States.” *United States v. Enmons*, 410 U.S. 396, 411 (1973). This is because for Congress to criminalize activity that’s already the subject of state regulation “significantly change[s] the federal-state balance.” *Id.*

The authority to enact criminal law is fundamental to the States’ “residuary and inviolable sovereignty.” The Federalist No. 39, p. 245 (C. Rossiter ed. 1961) (J. Madison). In fact, “[f]rom the beginning of our country, criminal law enforcement has been primarily a responsibility of the States.” *Kansas v. Garcia*, 589 U.S. 191, 212 (2020). As the Supreme Court recently put it, “the States possess primary authority for defining and enforcing the criminal law.” *Shinn v. Ramirez*, 596 U.S. 366, 376 (2022) (quoting *Engle v. Isaac*, 456 U.S. 107, 128 (1982)). This primary authority extends from the gravest of crimes down to the typical protest activity covered by the FACE Act, because, unlike Congress, a state “does not need . . . a jurisdictional hook” to regulate criminal activity. *Torres v. Lynch*, 578 U.S. 452, 458 (2016)

To be clear, there’s never any excuse for violence in expressing one’s viewpoint. But that doesn’t mean every protest is a federal crime. With respect to the FACE Act, members of Congress have “noted that state statutes, including criminal trespass, criminal contempt, disorderly conduct, resisting arrest, and unlawful assembly are more than adequate to address the activities sought to be

⁵³ There are a few different thresholds for FACE Act violations. For a first offense, a person may be sentenced to up to one year in prison and a \$250,000 fine, for a second or subsequent offense, a person may be sentenced to up to three years and a \$250,000 fine. Except if the offense involves exclusively nonviolent physical obstruction, the jail term is limited to six months plus a \$10,000 fine for the first offense, and eighteen months in jail plus a \$25,000 fine for a second or subsequent offense. If any injury results, the potential sentence increases to ten years in prison, plus the \$250,000 fine. If death results, a defendant may receive any term of years or life in prison.

regulated by FACE.” *U.S. v. Bird*, 401 F.3d 633, 636 (5th Cir. 2005) (DeMoss, J., dissenting) (citing H.R.REP. NO. 103-306, at 22 (1993), *reprinted in* 1994 U.S.C.C.A.N. 699, 717).

In short, the FACE Act has been weaponized against one side of a public debate about abortion. It is on shaky constitutional ground and has been unevenly applied. It imposes massive federal penalties for traditional state law crimes and thus displaces states from their primary role in enforcing criminal law. For all of these reasons, the FACE Act should be repealed.



Erin Morrow Hawley

SENIOR COUNSEL, VICE PRESIDENT OF THE CENTER FOR LIFE & REGULATORY PRACTICE

Erin Morrow Hawley serves as senior counsel and vice president of the Center for Life and regulatory practice at Alliance Defending Freedom. Before joining ADF, Hawley practiced appellate law at Kirkland and Ellis LLP, Bancroft LLP, and King & Spalding LLP, all in Washington, D.C. Hawley has litigated extensively before the U.S. Supreme Court as well as numerous federal courts of appeals and state courts of last resort. She also worked at the Department of Justice, serving as counsel to Attorney General Michael Mukasey.

As an academic, Hawley served as an associate professor of law at the University of Missouri where she taught constitutional litigation, federal income tax, tax policy, and agricultural law. She also taught constitutional law as a senior fellow at the Kinder Institute for Constitutional Democracy. Her scholarship focuses primarily on federal courts and has been published in numerous top journals.

Hawley is a frequent commentator on legal issues. Her work has been quoted or featured in the Washington Post, US News, USA Today, Fox News, the Washington Examiner, the Legal Times, and the Hill, among others. Hawley has also written a book on motherhood, entitled “Living Beloved: Lessons From My Little Ones About the Heart of God.”

Hawley is a former law clerk to U.S. Supreme Court Chief Justice John G. Roberts and Judge J. Harvie Wilkinson of the U.S. Court of Appeals for the Fourth Circuit. Hawley received her bachelor’s degree in Animal Science from Texas A&M University and her law degree from Yale Law School where she served as a Coker Fellow in Constitutional Law and on the Yale Law Journal. Hawley is an active member of the Missouri and District of Columbia bars and is admitted to practice before the U.S. Supreme Court and various federal courts of appeals.