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Congress Should Repeal the Freedom of Access to Clinic Entrances Act

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KEY TAKEAWAYS

The FACE Act is designed to be an ideological weapon and, therefore, remains a danger to the rule of law as well as to basic rights and freedoms.

Congress expanded the FACE Act's potential for ideological misuse and rejected attempts to reduce that potential with more concrete or limited language.

The FACE Act is irredeemable as policy and beyond Congress' constitutional authority and, therefore, Congress should repeal it.

Mark Houck volunteers as a counselor at the Community Women's Center of America, a crisis pregnancy center in Philadelphia located across the street from the Elizabeth Blackwell Health Center,[1] a Planned Parenthood abortion clinic. On October 13, 2021, Houck and his 12-year-old son were speaking to two women near the pro-life center when Bruce Love, a Planned Parenthood volunteer, aggressively confronted them.[2] He physically interfered with the interaction between Houck and these women, later testifying at Houck's trial that he wanted to prevent him from referring the women to the pro-life center.

Later that day, Houck and his son were standing on a corner well away from the abortion clinic entrance when, despite Planned Parenthood's policy against engaging with pro-life counselors, Love again accosted them. Ignoring Houck's request to leave his son alone,

Love approached them, and, this time, fearing for his son's safety, Houck pushed him away. Houck made a report to Philadelphia police officers who came to the scene, but no charges were filed, and Love's private criminal complaint was dismissed.

Almost a year later, the Justice Department indicted Houck on two counts of violating the Freedom of Access to Clinic Entrances (FACE) Act.[3] On September 23, 2022, nearly two dozen armed agents from the Federal Bureau of Investigation stormed the Houck home in the early morning, arresting Houck in front of his wife and children. Houck stood trial on January 24, 2023, and the jury took only three hours to acquit him on all charges.

Congress enacted the FACE Act in 1994, according to its backers, to counter an organized nationwide campaign of blockades, vandalism, arson, stalking, harassment, and violence against abortion clinics and staff. Some Members of Congress even called it "terrorism."[4] While those activities are already crimes under state law, they argued, federal help was needed because incidents involved so many protesters and such excessive and violent tactics that local law enforcement and courts were often overwhelmed.

Congress could have enacted a statute to address this problem in a way that minimized the likelihood it would be weaponized against individuals and used to suppress ordinary pro-life activity and expression. Congress could have done that, but it did not. Instead, abortion advocates used the controversy over some pro-life activities to create a weapon for attacking and suppressing a much broader range of pro-life activity and expression.

To this end, at each step of the legislative process, Congress broadened the FACE Act's reach; made key terms vaguer; increased the number of civil plaintiffs who could use it in litigation, the causes of action they could bring, and the damages they could seek; and detached it from the context to which it was supposedly a response. This *Legal Memorandum* examines the context in which this controversial law emerged, evaluates its constitutionality, looks at how federal authorities have enforced it, and concludes that Congress should repeal it altogether.

The FACE Act's Context

The FACE Act emerged during a volatile period of pro-life activism that included public activities ranging from prayer and sidewalk counseling at abortion clinic locations to more organized obstructive tactics and even acts of violence. Abortion advocates responded with both litigation and legislation.

In 1986, for example, the National Organization for Women (NOW) and two abortion clinics filed a lawsuit against a coalition of pro-life groups. The

case, *NOW v. Scheidler*, would travel up and down the federal judicial system for more than two decades. NOW accused the Pro-Life Action Network[5] of "conspir[ing] to drive women's health centers that perform abortions out of business through a pattern of concerted, unlawful activity" such as "threaten[ing] and intimidat[ing] clinic personnel and patients, block[ing] ingress and egress to clinics, [and] and destroy[ing] clinic advertising."[6] These actions allegedly violated several federal laws including the Sherman Antitrust Act,[7] the Racketeer Influenced and Corrupt Organizations (RICO) Act,[8] and the Travel Act.[9] This case went before the Supreme Court three times and, each time, the Court ruled in favor of the pro-life groups.[10]

In 1989, NOW sued Operation Rescue, a pro-life group, claiming that its activities violated the Civil Rights Act of 1871, commonly referred to as the Ku Klux Klan Act.[11] That statute allows a civil cause of action by anyone "deprived of having and exercising any right or privilege of a citizen of the United States" against "[t]wo or more persons [who] conspire…for the purpose of depriving, either directly or indirectly, any person or class of persons" of that right.[12] The lower courts found that Operation Rescue violated this provision by depriving women seeking abortions of their right to interstate travel.

The Supreme Court reversed,[13] holding that Operation Rescue did not meet either of two requirements for a suit under the Ku Klux Klan Act. First, the group was not motivated by "'some racial, or perhaps otherwise class-based, invidiously discriminatory animus.'"[14] The Court, in fact, rejected the notion that "opposition to abortion constitutes discrimination against the 'class' of 'women seeking abortion.'"[15] Second, the right to interstate travel is not "'protected against private, as well as official, encroachment.'"[16]

With litigation bearing little fruit, abortion advocates turned to a legislative strategy. The FACE Act's stated purpose is to provide "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."[17] President Bill Clinton signed the FACE Act into law on May 26, 1994, a few months after the Supreme Court's first decision in *NOW v. Scheidler*.

The FACE Act's Legislative History

The FACE Act went through multiple legislative iterations before Clinton signed it into law, including introduction, committee revision, passage in both the House and the Senate, and passage by both bodies of the final version produced by the conference committee. From the very beginning,

the FACE Act's legislative trajectory made its weaponization against ordinary pro-life activity and expression almost inevitable.[18]

Prohibited Activities. Each version of the FACE Act identified the activities that it prohibited, a category that applied to both its criminal penalties and civil remedies.

House Actions. Then-Representative Charles Schumer (D–NY) introduced H.R. 796 on February 3, 1993, when Democrats had a 258–176 House majority. As its title states, the Schumer bill's language focused concretely on access to abortion clinic entrances. It prohibited "intentionally and physically obstruct[ing], hinder[ing], or imped[ing] the ingress or egress of another to a medical facility" with the intent "to prevent or discourage any person from obtaining reproductive health services."

Subsequent changes in the bill's language, however, weakened this concrete connection and, therefore, any resemblance to its title. The House Judiciary Committee, despite not holding any hearing on the Schumer bill, changed its underlying legislative concept. While the Schumer bill prohibited obstructing "ingress or egress" to a medical facility, for example, the committee version prohibited "intimidat[ion or] interfere[nce] with any person…because that person or any other person or class of persons is obtaining or providing reproductive health services." This change detached the FACE Act from its original stated purpose and eliminated any apparent limitation on where, how, or when this undefined intimidation or interference might occur. The House passed H.R. 796 with this language on prohibited activities.

Senate Actions. Senator Edward Kennedy (D–MA) introduced S. 636 on March 23, 1993. Not only did his bill vaguely and broadly define the activities that could result in criminal penalties or civil judgments against pro-life activists, but it sought to exclude any application to abortion activists. By protecting individuals "obtaining abortion services" or "aiding another person to obtain abortion services," for example, the Kennedy bill left unprotected those seeking information or help from crisis pregnancy centers.

The Senate-passed bill went even further, providing that suits could be brought "only by a person involved in providing…or obtaining…services in a medical facility that provides pregnancy or abortion-related services." The bill defined "abortion-related services" as "medical, surgical, counselling or referral services, provided in a medical facility, related to pregnancy or the termination of pregnancy." Even though crisis pregnancy centers provide counselling and referral services, they do not do so in "medical facilities."[19]

Final FACE Act. The final FACE Act[20] that President Bill Clinton signed into law opted for the "reproductive health services" language from the House bill rather than the abortion-specific Senate language. By defining "reproductive health services" to include "medical, surgical, counselling or referral services relating to the human reproductive system," the FACE Act, at least on its face, protects crisis pregnancy centers as well as abortion clinics. In addition, the statute includes the Senate language related to places of religious worship. As detailed below, however, textual coverage of both crisis pregnancy centers and churches would prove cosmetic, as enforcement would focus almost exclusively on protecting abortion clinics.

Civil Plaintiffs. The FACE Act provides for both criminal penalties and civil remedies for the activities it prohibits. In addition to making that category of activities broader and vaguer, the House and Senate multiplied the potential plaintiffs who could sue pro-life activists for engaging in those activities.

House Actions. Consistent with its limited definition of prohibited activities, the original Schumer bill provided for a civil cause of action by four specific groups of private plaintiffs who might be concretely impacted by those activities. These included those whose ingress or egress had been actually hindered or whose obtaining reproductive health services was actually intended to be prevented or discouraged. Just as it had changed the Schumer bill's underlying concept of prohibited activities, the House Judiciary Committee changed its concept of who might sue. Rather than those concretely impacted by pro-life activities, for example, the committee bill would allow any person who is "aggrieved" by those activities to sue for damages.

The committee also added to this expanded category of private plaintiffs the Attorney General of the United States or of any state. They could bring a civil action based not only on "reasonable cause to believe that any person... is aggrieved by a violation" of the act, as private plaintiffs might do, but also when they believed a "group of persons" had been so aggrieved. Neither the committee, which did not hold a hearing on the Schumer bill, nor the bill it approved indicated how to identify this aggrieved "group" or what it means for a group of persons to be "aggrieved" by the actions of someone else.

The full House of Representatives rejected attempts to pare back the Judiciary Committee's expanded version. When the House took up H.R. 796 on November 18, 1993, for example, Rep. Chris Smith (R–NJ) offered an amendment to specify that prohibited actions must occur near an abortion clinic or the home of an individual. The House defeated the Smith amendment before passing the bill and sending it to the Senate.

Senate Actions. Like the House bill, the Kennedy bill allowed any person "aggrieved by reason of the conduct" prohibited by the FACE Act to file a civil lawsuit. While it added only the Attorney General of the United States as a public plaintiff, the Kennedy bill changed and expanded the causes of action available to the Attorney General. It would, for example, allow the Attorney General to sue upon reasonable cause to believe that any person or group of persons "is being, has been, or may be injured" by conduct constituting a violation. It did not, however, indicate whether "has been...injured" was limited in any way to a particular time frame or whether "may be injured" was anything more than pure speculation. Kennedy's committee added state attorneys general to the list of potential plaintiffs and, as the House had done, the full Senate rejected attempts to limit the FACE Act's expansive and vague language before voting 69–30 to send its version to the House.

Final FACE Act. As signed into law, the FACE Act combines features of the House and Senate bills, allowing lawsuits by "aggrieved" private plaintiffs and by the Attorney General of the United States or of any state with reasonable cause to believe that a person "or group of persons is being, has been, or may be injured by conduct constituting a violation."

Relief. It was quickly becoming clear that the FACE Act was being fashioned into a weapon to attack the pro-life movement. Many pro-life individuals often act at significant personal sacrifice and organizations, such as crisis pregnancy centers, are typically nonprofit entities, meaning that the threat of significant monetary damages—especially for vaguely defined conduct—could have a significant impact.

House Actions. The Schumer bill excluded punitive damages but included "treble the actual damages (and any such damages may include an award for pain and suffering and emotional distress)." The Judiciary Committee bill expanded this to cover "compensatory *and* punitive damages for each person aggrieved by the violation." The final House bill had similar language on damages.

Senate Actions. Like the final House bill, the Kennedy bill provided for both compensatory and punitive damages but added, in civil suits brought by an attorney general, authority for a court also to "assess a civil penalty against each respondent." The final Senate bill contained similar language.

Final FACE Act. As signed into law, the FACE Act provides the broadest range of relief for both private and public plaintiffs: temporary, preliminary, or permanent injunctive relief; compensatory and punitive damages; and civil penalties "to vindicate the public interest."

This history of the FACE Act's legislative development shows that, at every stage in both the House and Senate, it moved steadily away from

its original stated purpose and toward becoming a weapon that could be used, in multiple ways, to attack and suppress ordinary pro-life activity and expression.

The FACE Act's Constitutionality

Congressional Authority. Like any federal law, the FACE Act's constitutionality depends first on whether Congress had authority to enact it. America's Founders believed that government needs not only powers to accomplish its purpose of securing inalienable rights, but limits on those powers to prevent destroying those same rights. As James Madison explained, government is "the greatest of all reflections on human nature," and—human nature being what it is—safeguards are necessary "to control the abuses of government."[21] Those safeguards include the division of power between the federal and state governments.[22]

The Tenth Amendment provides: "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."[23] Madison explained that "[t]he powers delegated by the proposed Constitution to the federal government are few and defined. Those which remain in the State governments are numerous and indefinite."[24]

"Every law enacted by Congress must be based on one or more of its powers enumerated in the Constitution."[25] Congress, therefore, had authority to enact the FACE Act only pursuant to one or more of its delegated powers. As finally enacted, the FACE Act identifies two of them: the power to enforce, "by appropriate legislation," the provisions of the Fourteenth Amendment[26] and the power to "regulate Commerce among...the several States."[27]

Fourteenth Amendment. In *Roe v. Wade*,[28] the Supreme Court held that the "liberty" protected by the Fourteenth Amendment's Due Process Clause includes a "right of privacy...[that] is broad enough to encompass a woman's decision whether or not to terminate her pregnancy."[29] In *Planned Parenthood v. Casey*,[30] decided less than a year before the Senate's FACE Act hearing, the Court reaffirmed *Roe*'s "central holding" that "the Constitution protects a woman's right to terminate her pregnancy in its early stages."[31]

Roe and *Casey* were the prevailing Supreme Court precedents when Congress enacted the FACE Act. During the Senate's FACE Act hearing, Attorney General Janet Reno emphasized that the FACE Act was "crucial to ensuring that women have an unobstructed opportunity to choose whether or not to have an abortion."[32] This is, in fact, by far the most frequently cited basis for Congress' authority to enact the FACE Act.

The Supreme Court, however, held in 2022 that *Roe* had been "egregiously wrong and on a collision course with the Constitution from the day it was decided" and that *Casey* only "perpetuated its errors."[33] The Court overruled both of those precedents, holding that "the Constitution does not confer a right to abortion."[34] Needless to say, Congress has no authority to enforce a right that does not exist. The Fourteenth Amendment not only fails to provide Congress authority to maintain the FACE Act today, but it did not authorize Congress to enact it in the first place.

Commerce Clause. In the wake of the Great Depression, the Supreme Court "ushered in an era of Commerce Clause jurisprudence that greatly expanded the previously defined authority of Congress under that Clause."[35] The most significant expansion came when the Court began allowing federal regulation not only of interstate commerce itself, but of intrastate activities that have "a relation to interstate commerce."[36] In a statement that captured how the very concept of defined delegated powers was changing, the Court held in 1941 that the "power of Congress over interstate commerce is not confined to the regulation of commerce among the several states."[37]

The question became how to identify the necessary "relation to interstate commerce" that allowed Congress to regulate intrastate activities. The Court abandoned its previous focus on the kind of effect, such as "direct" or "indirect,"[38] in favor of the "degree"[39] of those effects. A consistent measure of that degree, however, remained elusive, and the Court ended up with the circular holding that Congress may regulate intrastate activities that affect interstate commerce to the degree that makes regulation "appropriate."[40]

During the FACE Act's legislative development, abortion advocates tried to take advantage of this Commerce Clause confusion in three different ways.

1. The original Schumer bill would prohibit obstructing ingress or egress to a medical facility that "affects interstate commerce."

2. The Senate dropped any such language in the FACE Act's substantive provisions in favor of a finding that the conduct it prohibited "burdens interstate commerce" by "interfering with business activities of medical clinics" and "forcing women to travel from States where their access to reproductive health services is obstructed to other states."

3. As signed into law, the FACE Act simply states, in a preliminary section describing the statute's purpose, that Congress had authority to enact it "under section 8 of article I of the Constitution."

None of these is adequate to support congressional authority for the FACE Act today. In addition, even if the Supreme Court's expansion of the Commerce Clause's meaning supported an argument for congressional authority to enact the FACE Act in 1994, the Supreme Court began the very next year to draw tighter boundaries that have substantially weakened that argument. Two post–FACE Act precedents are particularly important.

United States v. Lopez. The Gun-Free School Zones Act, enacted in 1990, prohibited possession of a firearm in a school zone. A 12th grade student moved to dismiss his indictment for bringing a handgun to school on the ground that the law "is unconstitutional as it is beyond the power of Congress to legislate control over our public schools."[41] The district court denied the motion, concluding that it was a "constitutional exercise of Congress' well-defined power to regulate activities in and affecting commerce."[42] The Fifth Circuit reversed.[43]

"We start," wrote Chief Justice William Rehnquist for the Supreme Court majority in affirming the Fifth Circuit, "with first principles."[44] The federal government may exercise only the powers enumerated in the Constitution and those "necessary and proper for carrying [those powers] into Execution."[45] These include the power to "regulate Commerce...among the several States." Despite the Court's previously expansive interpretation, Rehnquist explained, "this power is subject to outer limits."[46]

To clarify those limits, the Court focused on both the nature of the regulated activity and its relation to interstate commerce. "First, we have upheld a wide variety of congressional Acts regulating intrastate *economic* activity where we concluded that the activity substantially affected interstate commerce."[47] If the federal government could regulate entire areas of traditional state concern, Rehnquist wrote, "areas having nothing to do with the regulation of commercial activities, the boundaries between the spheres of federal and state authority would blur."[48]

Second, the Court warned against "pil[ing] inference upon inference in a manner that would bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States."[49] The first principle focuses on the nature of the regulated activity, and this principle focuses on the degree of connection to interstate commerce. Together, they help maintain the distinction between defined federal delegated powers and indefinite reserved state powers. *Lopez*, therefore, firmly established the principle that the Commerce Clause allows Congress to regulate activities that have a "substantial effect on interstate commerce" *and* that are commercial or economic in nature.[50]

United States v. Morrison. President Clinton signed the Violence Against Women Act (VAWA) into law on September 13, 1994, less than four months after signing the FACE Act. It provided a "federal civil remedy for the victims of gender-based violence."[51] Congress asserted its authority to enact VAWA using the identical language that appears in the FACE Act,[52] citing both the Fourteenth Amendment and the Commerce Clause.

A woman sued two men and Virginia Polytechnic University, alleging that the men had raped her when they were all students at the school. The defendants challenged VAWA's civil remedy provision, and both the district court and Fourth Circuit held that Congress lacked authority under the Commerce Clause to enact it. In *Morrison*, with Rehnquist again writing for the majority, the Supreme Court agreed.[53]

The Court considered whether VAWA's civil remedy provision constituted "a regulation of activity that substantially affects interstate commerce."[54] The answer, the Court said, was controlled by *Lopez*,[55] where "the noneconomic, criminal nature of the conduct at issue was central to our decision."[56] The Court again held that, for Congress to have Commerce Clause authority to enact a statute, the activity it regulates must not only have a "substantial effect on interstate commerce,"[57] but "the activity in question [must be] some sort of economic activity."[58]

The Supreme Court drew other parallels to *Lopez*. The link between the economic activity regulated by a statute and its effect on interstate commerce, for example, may not be too "attenuated."[59] Otherwise, Congress could claim authority to regulate virtually any activities "regardless of how tenuously they relate to interstate commerce."[60] The Court also emphasized the importance of a "federal jurisdictional element establishing that the federal cause of action is in pursuance of Congress' power to regulate interstate commerce."[61]

Finally, while VAWA did include findings that the Gun-Free School Zones Act did not, the Court cautioned that "the existence of congressional findings is not sufficient, by itself, to sustain the constitutionality of Commerce Clause legislation." In addition, the VAWA findings "rel[ied] heavily on a method of reasoning that we have already rejected as unworkable."[62] Those findings asserted that gender-based violence "deter[s] potential victims from traveling interstate…[or] transacting with business and in places involved in interstate commerce."[63] The Court flatly rejected "the argument that Congress may regulate noneconomic, violent criminal conduct based solely on that conduct's aggregate effect on interstate commerce."[64]

Application. The Supreme Court's decisions in *Lopez* and *Morrison* provide two principles that undermine the constitutionality of the FACE

Act. First, they established two criteria for whether the Commerce Clause authorizes Congress to enact a particular statute: whether the activity it regulates is economic or commercial in nature and whether that activity substantially affects interstate commerce. FACE Act supporters simply ignore the first criterion and focus exclusively on the second.

In her testimony during the Senate's FACE Act hearing, for example, Attorney General Reno asserted that "Congress has clear authority to enact [it]" under the Commerce Clause[65] because the activities it regulates may affect the provision of abortion services and the "provision of abortion services undoubtedly affects commerce."[66] This is because the "entities that provide these services...purchase or lease facilities, purchase and sell equipment, goods, and services, employ people and generate income," and "many serve significant numbers of patients from other States."[67]

The FACE Act, however, does not regulate the provision of abortion services, the purchase or lease of facilities, or any of the other commercial activities to which Reno referred. Instead, it regulates interactions between individuals and prohibits the destruction of property. Neither of these is economic or commercial in nature.

Courts upholding the FACE Act between *Lopez* and *Morrison* have made the same error.

- In *United States v. Bird*,[68] the Fifth Circuit upheld the FACE Act because the activity it regulates "could have a deleterious impact on the availability of abortion-related services in the national market."[69]

- In *Hoffman v. Hunt*,[70] the Fourth Circuit acknowledged that "the activity regulated by FACE...is not itself commercial or economic in nature"[71] but still upheld the FACE Act because that activity is "directly" or "closely" connected with economic activity.[72]

- In *United States v. Dinwiddie*,[73] the Eighth Circuit upheld the FACE Act, describing it as "prohibit[ing] interference with a commercial activity."[74]

- In *United States v. Weslin*,[75] the Second Circuit held that Congress can regulate "activity [that] is not itself commercial."[76]

Courts perpetuated this error even after *Morrison* explicitly reaffirmed what it said in *Lopez*. In *United States v. Gregg*,[77] for example, the Third Circuit correctly cited *Morrison* for the proposition that "'the regulated

activity [must be] of a commercial character'"[78] but proceeded to focus solely on that activity's effect. The court conceded that the "misconduct regulated by FACE...[is] not motivated by commercial concerns [but] has an effect which is, at its essence, economic."[79]

An activity does not become economic or commercial in nature, however, simply because its effects can be described that way. If the Supreme Court's pre–FACE Act Commerce Clause decisions suggested otherwise, its subsequent decisions have been clear on this point. Were it otherwise, it would take little more than an inference or two or a bit of imagination for Congress to have virtually unlimited authority to regulate everything.

The second principle from *Lopez* and *Morrison* is that a statute should include some kind of "jurisdictional element which would ensure, through case-by-case inquiry," that the activity "in question affects interstate commerce."[80] A jurisdictional element "refers to a provision in a federal statute that requires the government to establish specific facts justifying the exercise of federal jurisdiction in connection with any individual application of the statute."[81] Like the Gun-Free School Zones Act at issue in *Lopez*, the FACE Act contains no such element.

Courts have upheld the FACE Act under the Commerce Clause even while acknowledging that this important element is missing. In *Gregg*, for example, the Third Circuit conceded that "FACE does not contain an explicit jurisdictional element establishing that the federal cause of action is in pursuance of Congress' power to regulate interstate commerce."[82] Especially since the activity regulated by the FACE Act is not, as the Supreme Court requires, itself economic or commercial in nature, this concession should be fatal to its constitutionality.

The FACE Act's legislative history is also relevant to this point. As noted above, the original Schumer bill arguably included a jurisdictional element by prohibiting the obstruction of ingress or egress to a medical facility "that affects interstate commerce." That was the first and last time that any iteration of the FACE Act contained any such jurisdictional language. As signed into law, the FACE Act regulates interactions between individuals without any necessary connection, including time or physical proximity, to any place in which commercial activity might occur. That connection is merely illusory, the result of piling inference upon inference, and exceeds Congress' authority under the Commerce Clause.

The FACE Act's Enforcement

Investigation and Enforcement of the FACE Act. In recent years, the Federal Bureau of Investigation (FBI) and U.S. Department of Justice (DOJ) have been accused of under-enforcing, unequally enforcing, and outright weaponizing the FACE Act based on political considerations to target pro-life activists. Available data indicates that these allegations have merit: A significant disparity exists between the number of acts that ostensibly violate the FACE Act and actual civil and criminal prosecutions. A disparity also exists between the number of prosecutions of individuals who hold pro-life views and prosecutions of those who do not. The dearth of information, however, on the number and nature of investigations into potential FACE Act violations and how decisions to prosecute are made leave lingering questions regarding the true basis for these disparities.

Prosecutions After Dobbs. From 1994 to January 2021, an estimated 142 cases were prosecuted under the FACE Act.[83] Only one known case, in 1995, was in defense of pro-life facilities. Three cases involved threats or violence against mosques. None appear to have been brought in defense of churches. In sum, while 80 cases were brought during the Clinton Administration, only 16 were brought during the Bush Administration, 27 during the Obama Administration, 19 during the first Trump Administration, and two during the first year of the Biden Administration.

But in 2022, that changed.

Following the May 2022 leak of the draft opinion in *Dobbs v. Jackson Women's Health Organization*, violence and threats of violence erupted against pregnancy resource centers and churches.[84] The day after the leak, for instance, a Colorado church was vandalized with graffiti reading "my body, my choice" and "You don't speak 4 God," while a Maryland Care Net Pregnancy Center was graffitied with messages including "end forced motherhood."[85] In the subsequent weeks and months, other pro-life clinics were similarly vandalized.[86] Some were firebombed, including CompassCare Pregnancy Services in Buffalo, New York, which had to pay nearly $400,000 in repairs and to obtain additional security.[87] Catholic churches were also frequent targets, as vandals broke or stole statues, desecrated the Eucharist, and in one instance, even attempted to remove the tabernacle which contained the Eucharist.[88]

By the end of 2022, nearly 77 attacks on pregnancy resource centers and 98 on Catholic churches had occurred.[89] But not one person was charged regarding any of these acts. Instead, that year, the DOJ charged 26 individuals—all but one of whom engaged in nonviolent pro-life activism—with

FACE Act violations. For instance, in early 2022, nine activists were indicted and arrested for blocking access to a Washington, DC, clinic, but none were accused of engaging in violent conduct.[90] Notably, this occurred after oral arguments in *Dobbs* indicated that the Court might overturn *Roe* and *Casey*.[91] In September 2022, FBI agents arrested Mark Houck at his home despite his offer to turn himself in.[92] In October, the DOJ charged 11 pro-life individuals for blocking an abortion facility's entrance the prior year.[93] One was Paul Vaughn, who, like Houck, was arrested in front of his family by heavily armed FBI agents.[94] Vaughn was later convicted for violating the FACE Act even though he never personally blocked access to the clinic.[95] Another was Eva Edl, an 87-year-old survivor of a communist concentration camp.[96]

Nonetheless, the FBI claimed to be evenhandedly investigating potential FACE Act violations. In June, it broadly stated that it was investigating "a series of attacks and threats targeting pregnancy resource centers, faith-based organizations, and reproductive health clinics across the country."[97] The FBI also would not comment on the number of attacks and threats it was investigating or who those attacks and threats had targeted.[98]

Lawmakers Investigate Disparities. In October 2022, Representative Chip Roy (R–TX) and other lawmakers demanded that the FBI brief them on how it was enforcing the FACE Act.[99] The FBI did not respond. Instead, in his November 2022 testimony before the Senate Homeland Security Committee, FBI Director Christopher Wray stated that the FBI "h[as] quite a number of investigations…into attacks or threats against pregnancy resource centers, faith-based organizations, and other pro-life organizations."[100] He added:

> And…since the Dobbs Act decision, probably in the neighborhood of 70% of our abortion-related violence cases or threats cases are cases of violence or threats against…pro-life organizations. And we're going after that through our joint terrorism task forces, through our criminal authorities, FACE Act and things like that.[101]

Wray subsequently reiterated that "more of [the FBI's] abortion-related violent extremism investigations have focused on violence against pro-life facilities."[102]

Meanwhile, Roy began pressing the DOJ to explain how it was enforcing the FACE Act. In May 2022, in response to a Freedom of Information Act (FOIA) request, the DOJ gave reporters with Reveal News "a 'never-before released' list" of every FACE Act case the DOJ had filed since 1994.[103]

Despite releasing the information to Reveal, the DOJ refused to release the same information to Congress.[104] The DOJ even refused to disclose whether the FBI had referred a single case to the DOJ for prosecution.[105]

By March 2023, the number of attacks on pregnancy resource centers had risen to 81, while the attacks on Catholic churches reached around 130. Meanwhile, the DOJ had charged 34 individuals—none of whom were associated with those attacks.[106] When challenged to explain this disparity, Attorney General Merrick Garland told Congress that the attacks had occurred "at night, in the dark" by "people who are...clever and are doing it in secret."[107] He added that he was "convinced that the FBI [was] trying to find them with urgency."[108] That did not assuage rising concerns, however, that the FBI and DOJ were weaponizing the FACE Act to target pro-life activists.

The day after Garland testified, Representative Roy and Senator Ted Cruz (R–TX) demanded information from Attorney General Garland about allegations that the FBI had used an informant to spy on a pro-life meeting in Washington, DC, that past January.[109] And in May 2023, the House Judiciary Committee's Subcommittee on the Constitution and Limited Government held a hearing titled, "Revisiting the Implications of the FACE Act."[110]

But while Republican Members of the Subcommittee alleged that the FACE Act was allowing "radical left-wing groups [to] go unpunished,"[111] Democrat Members pushed back. Representative Jerry Nadler (D–NY), for instance, argued that the real problem lay in underenforcement. In support of this claim, he cited data from the National Abortion Federation (NAF) that since 1977, pro-life "extremists" had committed "thousands of incidents of criminal activities."[112] In a second hearing held in December 2024, Representative Mary Scanlon (D–PA) again invoked this data, claiming that a 2022 report from the NAF showed increases in arson and stalking since *Dobbs*.[113]

Those claims were misleading at best. From early May to late September 2022, for instance, only six known attacks on pro-choice groups occurred.[114] In comparison, around 135 attacks on pro-life organizations were identified during the same period.[115] Moreover, according to the NAF report, only four instances of arson occurred in 2022, compared to two in 2021—which, mathematically, is a 100 percent increase, but not the massive increase in raw numbers as implied.[116] "Clinic invasions" similarly rose from 16 reported instances to 20.[117] The NAF also defined "stalking" so broadly that it could encompass merely attempting to engage someone in a conversation as they entered or left a clinic, rendering the data it collected on that issue meaningless.[118] Moreover, of the 15 categories of violence listed, only five showed any increase between 2021 to 2022.[119] The total number of listed

violent acts *fell* over 37 percent in 2022.[120] Blockades and the number of abortion-facility disruptions overall also fell in 2022 when compared to 2021.[121] And instances of murder and attempted murder remained at zero.[122]

In September 2023, Roy, joined by Representative Chris Smith and Senator Mike Lee (R–UT), began efforts to repeal the FACE Act.[123] By that point, since 1994, the DOJ had prosecuted 126 alleged crimes by pro-life individuals—but only *four* alleged crimes by pro-abortion groups.[124] And in May 2024, the DOJ confirmed that its Civil Rights Division had "charged 24 FACE Act cases against 55 defendants and obtained 34 convictions" since January 2021.[125]

Weaponizing FACE. While it delayed delivery of requested data to Congress, the DOJ was celebrating its record of enforcing the FACE Act. In December 2022, Associate Attorney General Vanita Gupta declared that the *Dobbs* decision was a "devastating blow to women" and "increas[ed] the urgency" of "enforcement of the FACE Act, to ensure continued lawful access to reproductive services."[126] A year later, again bemoaning the "devastation" caused by *Dobbs*, Gupta applauded the dedication of the 18-month-old DOJ Reproductive Rights Task Force "to work creatively and relentlessly to use all our available tools to protect reproductive rights, health, and justice."[127] One of those tools was "the Department's ongoing... FACE Act enforcement."[128]

Another, it turned out, was 18 U.S.C. § 241, Conspiracy Against Rights, which imposes up to 10 years of imprisonment and fines for conspiracy to injure or intimidate any person who seeks to exercise a right protected by the Constitution or federal law.[129]

This pairing of FACE Act and § 241 charges was odd. First, it was novel. Historically, the FACE Act was enforced through either civil lawsuits or criminal prosecutions, with criminal prosecutions typically focused on "extreme" acts like threats of violence, arson, and bombings. It was not until 2022—the same year as *Dobbs*—that the DOJ began to pair FACE Act charges with charges of conspiracy against rights under § 241.[130]

Second, it dramatically increased the penalties defendants faced. Instead of facing only a year of imprisonment plus fines, defendants now faced up to 10 additional years in prison and higher fines.[131] Moreover, even if the underlying conduct was not a felony, a violation of § 241 is a felony.[132]

Third, FACE is not a civil rights statute: It confers no rights in itself. And now, after *Dobbs*, no constitutional right to abortion exists. If anything, Gupta's remarks—as well as the existence of the Reproductive Rights Task Force itself—suggest that the pairing of FACE Act and § 241 charges is designed to salvage an abortion right by assuming its existence in criminal prosecutions.

Increasing Disparities in Prosecutions and Penalties. The stark difference between the rigor with which the DOJ enforced FACE against pro-life individuals and its seeming dismissal of allegations of violence by pro-abortion individuals continued to increase. By December 2024, an estimated 311 attacks on Catholic churches and 95 attacks on pregnancy resource centers and other pro-life groups had occurred.[133] Congressman Roy's office was forced to compile its own list of cases dating back to 1994 to supplement the data obtained from the DOJ.

The resulting data showed that from 1994 to 2024, 205 of the total 211 cases brought under the FACE Act were brought against pro-life activists.[134] It also showed that by May 2024, just two of the 24 FACE Act cases concerned violence against pregnancy resource centers. None involved attacks on churches. At bottom, *92 percent* of the Biden Administration's prosecutions were against pro-life demonstrators.[135] Most cases involved a handful of individuals attempting to limit or block access to clinics—not violence or threats of violence against the clinics, clinical staff, or patients.

Sentencing disparities also appeared. In 1994, for instance, a man named Frank Bird threw a bottle at the windshield of a vehicle driven by an abortion provider while yelling, "I'm going to kill you."[136] He pled not guilty, but was convicted and sentenced to one year of imprisonment and a year of conditioned supervised release. When he rammed the doors of an abortion clinic with a van in 2003 and again pleaded not guilty, he was convicted and sentenced to 10 months incarceration and ordered to pay restitution.[137] And when a Florida man spray painted threatening messages including "WE'RE COMING for U" on a Florida pro-life clinic, he was sentenced to a year and a day imprisonment.[138] In contrast, several individuals who linked arms to block access to an abortion clinic in 2020 were sentenced in 2024 to 21, 24, 27, 34, and 57 months in prison, respectively.[139]

By December 2024, the Biden Administration had brought an estimated 60 FACE Act prosecutions—about one-quarter of all prosecutions since FACE was enacted in 1994 and nearly as many prosecutions as brought during the Bush, Obama, and first Trump Administrations *combined*. The vast majority were against individuals who engaged in peaceful pro-life actions. Only five prosecutions—four arising from the same incident—resulted from the violence against pregnancy resource centers following the *Dobbs* decision. The DOJ never prosecuted a single person for the violence against churches.

Unanswered Questions. At the end of the day, assessing the validity of claims that the FBI and DOJ are weaponizing the FACE Act is difficult in

part because only part of the picture is available. As noted previously, the DOJ refused to give Congress information it had already disclosed in a FOIA request. Two years after Congress began demanding that data, the DOJ finally handed over a portion of that data. The FBI, for its part, has repeatedly assured Congress that the vast majority of its investigations are focused on violence against pro-life organizations, but it has not provided any numbers to back up that claim.

And while the FBI provides a plethora of crime statistics, it does not provide any clear way to drill down on FACE Act violations, either alleged or resulting in convictions. For instance, the FBI publishes crime statistics that can be filtered by categories such as "Homicide," "All Property Crime," or "Explosives Violation."[140] But while a category exists for reported violations of the National Firearm Act of 1934, no similar category exists for reported FACE Act violations.[141]

Available data is nonetheless revealing. Most cases were brought against peaceful pro-life advocates, who are characterized as having engaged in violence against civil rights. The vast majority of cases brought since January 2021 involve mere obstruction, and sometimes no obstruction (as in Mark Houck's case). And in contrast to the first two-and-a-half decades of FACE Act enforcement, FACE Act charges were paired with § 241 charges, meaning that nonviolent FACE Act violations were being punished with far harsher penalties than pre-*Dobbs* violent violations. On top of that, nearly one-quarter of all FACE Act prosecutions were brought in a span of three years—most after the *Dobbs* leak.

Could this disparity be because of the nature of the crimes investigated and prosecuted, as former Attorney General Garland argued? Likely not. The FBI and DOJ have their priorities. The DOJ, after all, made abortion such a high priority that it launched a special task force to advance so-called reproductive rights after *Dobbs*. And even if a crime is done in a stealthy manner, that does not mean the FBI and DOJ cannot investigate or prosecute: The FBI and local law enforcement, to give a recent example, spent "tens of thousands" of hours to gather evidence sufficient to arrest an individual for arson and vandalism of several Jehovah's Witness halls in Washington state.[142] Difficulty, it seems, is no barrier to the FBI doing its job when agents put in the effort.

But again, that is only part of the picture. No data exists on how the FBI categorizes or assigns investigations. None exists on how many hours agents are working each case—or whether they are working them at all. No information is available on how the FBI and DOJ decide which cases are worth pursuing and which need further investigation.

Congress, in its oversight role, should seek answers to the following questions:

- What is the process by which the FBI receives, reviews, categorizes, and assigns cases for investigation?
- How many cases has the FBI received which allege vandalism, arson, or any similar act against pregnancy resource centers, places of worship, or abortion providers?
- How many of those cases has the FBI closed, and how many remain open?
- For each case, how many hours has the agent assigned to the case worked that case?
- Has any person associated with the DOJ given the FBI any guidance—written, oral, or otherwise—regarding what cases it will or will not prosecute?

That information is essential to truly discerning whether the agencies have been forthright or have been hiding an unwillingness to investigate and prosecute behind grandiose talk. But for now, available information strongly indicates the latter.

The FACE Act's Future

Since its enactment, the FACE Act has proven its opponents correct in three important respects.

1. Even before Clinton signed it into law, the bill was steadily changed in ways that detached it from its stated purpose and made its use to suppress ordinary pro-life activity and expression much more likely.
2. Supreme Court decisions show that any argument in 1994 that Congress had authority to enact the FACE Act is no longer valid.
3. Available information consistently shows that, in practice, the FACE Act has been enforced to favor the pro-abortion agenda and viewpoint, ignore the law's plain application to pro-life centers and churches, and to attack ordinary pro-life activity and expression.

This crisis calls for a decisive legislative response to either substantially revise the FACE Act or to repeal it altogether. Revision will prove impossible. The House and Senate not only expanded the FACE Act's potential for ideological misuse, but each rejected attempts to reduce that potential with more concrete or limited language. Now that the Supreme Court has clarified that the Constitution does not protect any right to abortion, advocates will certainly resist even more strongly any attempt to rein in legislative weapons like the FACE Act.

The realities of the legislative process are such that any legislative revision of the FACE Act is highly unlikely, if not impossible. Senate rules require that ending debate on a bill, a procedural step necessary for final passage, requires "three-fifths of Senators duly chosen and sworn," or 60 votes. This means that 41 Senators, although too few to defeat a bill outright, can prevent its passage by blocking any final vote.

On January 22, 2025, the Senate voted 52–47 on a motion to end debate on S. 6, the Born-Alive Abortion Survivors Protection Act. This bill would require that physicians "exercise the same degree of professional skill, care, and diligence to preserve the life and health" of a child who survives an attempted abortion "as a reasonably diligent and conscientious health care practitioner would render to any other child born alive at the same gestational age." A majority of Americans say that abortion should be illegal in the second trimester, and more than three-fourths say so for third-trimester abortions.[143] Allowing a baby born alive to suffer and die after an attempt to kill him or her by abortion is certainly an extreme position. If 47 Senators will not even allow a vote on legislation to prevent such a practice, there will be at least 41 to prevent consideration of any legislation to revise the FACE Act.

While the same fate may await legislation to repeal the FACE Act, there is nonetheless a compelling reason to pursue repeal. In *Marbury v. Madison*,[144] the Supreme Court held that "an act of the legislature, repugnant to the Constitution, is void."[145] The FACE Act is repugnant to the Constitution and, for that reason alone, should be repealed.

Conclusion

In his opening statement at the Senate hearing on his bill, Senator Kennedy described the FACE Act as necessary to address "antiabortion violence and intimidation" such as "blockades and invasions" of abortion clinics, which are "bombed, vandalized, sometimes burned to the ground. The doctors and staff who work there and their families

are assaulted and threatened."[146] As noted above, the FACE Act states as its purpose to address "violent, threatening, obstructive and destructive conduct."

That is the rhetoric. Mark Houck and many others have experienced the reality. Nothing he did bears even the remotest resemblance to the "physical blockades, sabotage of facilities, stalking and harassing abortion providers, arson, bombings, and, finally, culminating in...murder" that Attorney General Reno testified would be the focus of the FACE Act.[147]

On January 23, 2025, President Donald Trump granted pardons to 23 individuals who had been prosecuted for pro-life activities under the FACE Act.[148] One was Paul Vaughn who, like Mark Houck, had been arrested by armed FBI agents for nonviolent pro-life activism. Eighteen months after he and several others participated in a peaceful demonstration outside an abortion clinic in Mount Juliet, Tennessee, men in tactical gear armed with pistols and automatic weapons placed Vaughn in handcuffs at his home. His crime? "Aiding" pro-life demonstrators by acting as a liaison between them and the police and educating the police about their pro-life actions.[149]

Eva Edl also received a pardon. Edl was six years old when she and her grandmother were placed by Communist Dictator Josef Tito in a concentration camp. Her only crime was being Danube-Swabian.[150] When she was rescued and came to the United States, she became an advocate for life based on her experience and faith. Now nearly 90 years old, Edl was convicted in August 2024 of a felony conspiracy against rights and two FACE Act violations. Already sentenced to three years' probation for praying, singing hymns, and urging women to not get abortions during a sit-in at a Tennessee clinic,[151] Edl faced potential imprisonment. At her age, that could be a death sentence.

Despite expending resources going after Edl and others who engage in peaceful demonstrations based on sincerely held religious beliefs, by the end of the Biden Administration, the FBI and DOJ had not yet prosecuted a single person for vandalizing or disrupting houses of worship in the three years since *Dobbs*. And despite sending armed FBI agents to arrest people like Mark Houck or Paul Vaughn as if they were dangerous criminals, the vast majority of individuals who targeted pro-life clinics and churches during that time remain free.

Thankfully, in addition to Trump's pardons, the Justice Department has restricted FACE Act prosecutions to "extraordinary circumstances" and cases involving "death, serious bodily harm, or serious property damage."[152] But the FACE Act is designed to be an ideological weapon and, therefore,

remains a danger to the rule of law as well as to basic rights and freedoms. It is irredeemable as policy and defies the very concept of defined delegated federal powers. It must be repealed.

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Endnotes

1. Elizabeth Blackwell was the first woman to obtain a degree from an American medical school and, ironically, strongly opposed abortion. She wrote in her diary that the "gross perversion and destruction of motherhood by the abortionist filled me with indignation," such that "I finally determined to do what I could do" to stop this "form of hell." See Cat Clark, *Dr. Elizabeth Blackwell*, Feminist Foremothers, https://www.feministsforlife.org/herstory/elizabethblackwell/.
2. These facts are drawn from Houck's Notice of Claim to the Department of Justice under the Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 267–80, https://www.scribd.com/document/683081859/Houck-Mark-Claim-FINAL.
3. Pub. L. 103–259, 108 Stat. 694 (May 26, 1994), codified at 18 U.S.C. § 248.
4. *The Freedom of Access to Clinic Entrances Act of 1993, Hearing Before the H. Comm. on Labor and Human Resources*, 103rd Cong. 6 (1993) (hereinafter *Senate Hearing*) (statement of Sen. Barbara Mikulski, D–MD). See also *id*. at 7 ("terrorism") (statement of Sen. Claiborne Pell, D–RI).
5. The plaintiffs added Operation Rescue as a defendant in 1988.
6. NOW v. Scheidler, 765 F. Supp. 937, 938 (N.D. Ill. 1991).
7. 15 U.S.C. §§ 1–7.
8. 18 U.S.C. §§ 1961–68. The RICO Act provided for prosecuting an individual who has committed at least two of 35 specific crimes (27 federal, eight state) within a 10-year period as part of a "racketeering enterprise."
9. 18 U.S.C. § 1952. The Travel Act prohibits traveling in interstate commerce, or using the mail, to engage in or promote unlawful activity.
10. In *NOW v. Scheidler*, 510 U.S. 249 (1994), the Supreme Court reversed dismissal of the lawsuit, unanimously holding that the RICO Act does not require an economic motive for the alleged activity. In *Now v. Scheidler*, 537 U.S. 393 (2003), the Court reversed defendants' RICO Act conviction, holding that they had not committed extortion in violation of the Hobbs Act—a predicate offense for establishing a racketeering conspiracy—because they had not obtained property from them. And in *NOW v. Scheidler*, 547 U.S. 9 (2006), the Court unanimously reversed defendants' conviction, holding that physical violence unrelated to robbery or extortion falls outside the Hobbs Act.
11. Pub. L. 42–22, 17 Stat. 13. President Ulysses S. Grant signed this legislation into law on April 20, 1871.
12. 42 U.S.C. § 1985(3).
13. Bray v. Alexandria Women's Health Clinic, 506 U.S. 263 (1993).
14. *Id*. at 268–69, quoting Griffin v. Breckenridge, 403 U.S. 88, 102 (1971).
15. 506 U.S. at 269.
16. *Id*. at 268, quoting Carpenters v. Scott, 463 U.S. 825, 883 (1983).
17. Pub. L. 103–259, 108 Stat. 694 (May 26, 1994).
18. *See* H.R. 796, 103rd Cong. (1993), https://www.congress.gov/bill/103rd-congress/house-bill/796?s=2&r=1; S. 636, 103rd Cong. (1993), https://www.congress.gov/bill/103rd-congress/senate-bill/636. Each online location includes a drop-down menu with links to the different versions of the FACE Act as it passed through the respective chamber. The discussion below identifies the version of the House, Senate, or conferenced bills where relevant legislative language may be found.
19. By voice vote, the Senate adopted an amendment proposed by Senator Orrin Hatch (R–UT) to add a parallel prohibition on interfering with any person exercising the First Amendment right to religious worship or destroying the property of a place of worship. 139 Cong. Rec. S15791 (1993).
20. When the Senate version reached the House, the House passed a motion by Representative Patricia Schroeder (D–CO) to strike the Senate language altogether and replace it with what the House originally approved, voted 237–169 to pass the FACE Act in its original form, and voted 228–166 to request a conference with the Senate.
21. The Federalist No. 51 (James Madison).
22. *See* Gregory v. Ashcroft, 501 U.S. 452, 458 (1991) ("a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front.").
23. U.S. Const., amend. X. See Charles Cooper, *Reserved Powers of the States*, Heritage Guide to the Constitution, https://www.heritage.org/constitution/#!/amendments/10/essays/163/reserved-powers-of-the-states.
24. The Federalist No. 45 (James Madison).
25. United States v. Morrison, 529 U.S. 598, 607 (2000).
26. U.S. Const., amend. XIV, § 5.
27. U.S. Const., art. I, § 8, cl. 3. See David F. Forte, *Commerce Among the States*, Heritage Guide to the Constitution, https://www.heritage.org/constitution/#!/articles/1/essays/38/commerce-among-the-states.

28. 410 U.S. 113 (1973).
29. *Id*. at 153.
30. 505 U.S. 833 (1992).
31. *Id*. at 844.
32. *Senate Hearing* at 8. See also *id*. at 9 ("A woman's right to choose whether to terminate a pregnancy is fundamental"); *id*. at 17 (prepared statement of Attorney General Janet Reno).
33. Dobbs v. Jackson Women's Health Organization, 597 U.S. 215, 218–19 (2022).
34. *Id*. at 292.
35. United States v. Lopez, 514 U.S. 549, 556 (1995).
36. NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 37 (1937).
37. United States v. Darby, 312 U.S. 100, 118 (1941).
38. *See Jones & Laughlin*, 301 U.S. at 36–38; Wickard v. Filburn, 317 U.S. 111, 125 (1942).
39. *Wickard*, 317 U.S. at 124.
40. *Jones & Laughlin*, 301 U.S. at 37. See also *Darby*, 312 U.S. at 118.
41. United States v. Lopez, 514 U.S. 549, 551 (1995).
42. *Id*.
43. United States v. Lopez, 2 F.3d 1342 (5th Cir. 1993).
44. *Lopez*, 514 U.S. at 552.
45. U.S. Const., art. I, § 8, cl. 18. See Gary Lawson, *Necessary and Proper Clause*, Heritage Guide to the Constitution, https://www.heritage.org/constitution/#!/articles/1/essays/59/necessary-and-proper-clause.
46. *Lopez*, 514 U.S. at 557.
47. *Id*. at 559 (emphasis added).
48. *Lopez*, 514 U.S. at 577. *See also* United States v. Wilson, 73 F.3d 675,689 (7th Cir. 1995) (Coffey, J., dissenting) (FACE Act "contains no jurisdictional element linking clinic protests to interstate commerce" and "criminalizes the purely non-economic activity…of anti-abortion protesters.").
49. *Lopez*, 514 U.S. at 567.
50. *Id*. at 560 ("Where economic activity substantially affects interstate commerce, legislation regulating that activity will be sustained."); *id*. at 574 (Kennedy, J., concurring ("the congressional power to regulate transactions of a commercial nature")). *See also* Victoria L. Killion, Cong. Rsch. Serv. R46484, Understanding Federal Legislation: A Section-by-Section Guide to Key Legal Considerations 33 (2021) ("[T]he Supreme Court has interpreted the [Commerce] Clause to empower Congress to regulate, among other things, *intra*state economic activity that has a 'substantial effect' on *inter*state commerce.").
51. *Id*. at 601–02.
52. 42 U.S.C. § 13981(a).
53. United States v. Morrison, 529 U.S. 598 (2000).
54. *Id*. at 609.
55. *Id*. at 601.
56. *Id*. at 610.
57. *Id*. at 612.
58. *Id*. at 611. *See also id*. at 613 ("[O]ur cases have upheld Commerce Clause regulation of intrastate activity only where that activity is economic in nature.").
59. *Id*. at 612.
60. *Id*. at 613.
61. *Id*.
62. *Id*. at 615.
63. *Id*.
64. *Id*. at 617.
65. *Senate Hearing* at 10. See also *id*. (The FACE Act "falls easily within the commerce power.").

66. *Id*. at 11.
67. *Id*. Similarly, Harvard Law School professor Laurence Tribe noted that at least some women "are themselves engaged in interstate commerce by traveling from one State to obtain abortion services in another."
68. 124 F.3d 667 (5th Cir. 1997).
69. *Id*. at 681–82.
70. 126 F.3d 575 (4th Cir. 1997).
71. *Id*. at 587. See also *id*. ("[T]he activity regulated by FACE [is] not itself economic or commercial.").
72. *Id*.
73. 76 F.3d 913 (8th Cir. 1996).
74. *Id*. at 921.
75. 156 F.3d 292 (2d Cir. 1998).
76. *Id*. at 296.
77. 226 F.3d 253 (3d Cir. 2000).
78. *Id*. at 262, quoting *Morrison*, 529 U.S. at 610 n. 4.
79. *Gregg*, 226 F.3d at 262. See also Hoffman v. Hunt, 126 F.3d 575, 587 (4th Cir. 1997) ("[T]he activity regulated by FACE [is] not itself economic or commercial.").
80. United States v. Lopez, 514 U.S. 529, 561 (1995).
81. United States v. Rodia, 194 F.3d 465,471 (3d Cir. 1999), cert. denied, 529 U.S. 1311 (2000).
82. *Gregg*, 226 F.3d at 263.
83. The authors express their appreciation to U.S. Representative Chip Roy's office for sharing data that it compiled on FACE Act prosecutions. Unless a citation is otherwise provided, the data regarding those prosecutions is from that dataset.
84. *See* Carole Novielli, *Has Your State Experienced Recent Pro-Abortion Violence? Find Out Here*, LiveAction (June 14, 2022, 6:37 AM), https://www.liveaction.org/news/state-experienced-pro-abortion-violence/ (listing vandalizations, arsons, and disruptions of religious services); Mary Margaret Olohan, *FBI Won't Provide Updates, Say Whether It Has Arrested Anyone Over Attacks on Pro-Life Organizations, Centers, Churches*, Daily Signal (Oct. 6, 2022), https://www.dailysignal.com/2022/10/06/fbi-wont-provide-updates-say-whether-it-has-arrested-anyone-over-attacks-on-pro-life-organizations-centers-churches/ (listing 83 attacks on Catholic churches and 73 on pregnancy resource centers and pro-life organizations between the *Dobbs* opinion leak and early October 2022).
85. *Revisiting the Implications of the FACE Act: Hearing Before the Subcomm. on the Constitution and Limited Government of the H. Comm. on the Judiciary* [hereinafter *May 2023 Hearing*], 118th Cong., app. A (2023), https://docs.house.gov/meetings/JU/JU10/20230516/115924/HHRG-118-JU10-20230516-SD001.pdf.
86. Novielli, *supra* note 89.
87. *Id.*; Cassy Fiano-Chesser, *FBI Releases Video of Man Who Firebombed NY Pregnancy Center in June*, LiveAction (Nov. 15, 2022, 12:39 PM), https://www.liveaction.org/news/fbi-video-firebombed-ny-pregnancy-center/.
88. *May 2023 Hearing*, app. A; Novielli, *supra* note 89.
89. Mary Margaret Olohan, *DOJ Official Admits Targeting Pro-Lifers Is Response to Overturn of Roe*, Daily Signal (Dec. 12, 2022), https://www.dailysignal.com/2022/12/12/doj-official-admits-targeting-pro-lifers-is-response-to-overturn-of-roe/.
90. Bettina di Fiore, *Nine Pro-Life Activists Arrested by FBI For Entering DC Abortion Facility*, LiveAction (Mar. 30, 2022, 6:15 PM), https://www.liveaction.org/news/nine-pro-life-activists-arrested-fbi-dc/.
91. Amy Howe, *Majority of Court Appears Poised to Roll Back Abortion Rights*, SCOTUSBlog (Dec. 1, 2021, 1:04 PM), https://www.scotusblog.com/2021/12/majority-of-court-appears-poised-to-uphold-mississippis-ban-on-most-abortions-after-15-weeks/ (discussing oral arguments in *Dobbs*).
92. Kelli Keane, *FBI Raids Home of Pro-Life Sidewalk Counselor, Traumatizing Family's Children*, LiveAction (Sept. 24, 2022, 9:28 PM), https://www.liveaction.org/news/fbi-raids-pro-life-traumatize-children/; Brittany Bernstein, *Pro-Life Activists Arrested by FBI Acquitted on Federal Charges*, Nat'l Rev. (Jan. 30, 2023, 3:16 PM), https://www.nationalreview.com/news/pro-life-activist-arrested-by-fbi-acquitted-on-federal-charges/.
93. Press Release, U.S. Dep't of Just., Eleven Charged With FACE Act Violations Stemming From 2021 Blockade of Mount Juliet Reprod. Health Clinic (Oct. 5, 2022), https://www.justice.gov/usao-mdtn/pr/eleven-charged-face-act-violations-stemming-2021-blockade-mount-juliet-reproductive.
94. Cassy Fiano-Chesser, *FBI Arrests Another Pro-Life Activist at Home in Front of Family With Guns Drawn*, LiveAction (Oct. 11, 2022, 6:31 AM), https://www.liveaction.org/news/pro-life-activist-home-family-guns-fbi/.
95. Tyler Arnold, *Pro-Life Activist Paul Vaughn Avoids Jail Time After FACE Act Conviction*, Catholic News Agency (July 3, 2024, 7:19 PM), https://www.catholicnewsagency.com/news/258194/pro-life-activist-paul-vaughn-avoids-jail-time-after-face-act-conviction.

96. Nancy Flanders, *87-Year-Old Concentration Camp Survivor Is One of 11 Pro-Lifers Recently Arrested by FBI*, LiveAction (Oct. 10, 2022), https://www.liveaction.org/news/87-concentration-camp-survivor-pro-lifers-fbi/.
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98. *Id.*
99. Letter from Chip Roy, U.S. Representative, to Christopher Wray, Federal Bureau of Investigation Director (Oct. 12, 2022), https://roy.house.gov/sites/evo-subsites/roy.house.gov/files/evo-media-document/final-roy-lee-letter-to-fbi-on-face-act.pdf; Off. of Chip Roy, Rep. Roy, Sen. Lee Lead Colleagues in Demanded Answers on FBI's "Abuse" of the FACE Act (Oct. 12, 2022), https://roy.house.gov/media/press-releases/rep-roy-sen-lee-lead-colleagues-demanding-answers-fbis-abuse-face-act.
100. Timothy H.J. Nerozzi, *Pro-Life Centers Targeted by 70% of Abortion-Related Violent Threats Since* Dobbs *Decision: FBI*, Fox News (Nov. 17, 2022), https://www.foxnews.com/politics/pro-life-centers-targeted-70-abortion-related-violent-threats-dobbs-decision-fbi.
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