

The Changing Legal Landscape of Pro-Life Protests

Cases reviewed:

- 1. United States of America vs. Calvin Zastrow, Joel Curry, Justin Phillips et al:** Case No. 23-cr-20100 (HON. MATHEW F. LEITMAN, 6th District Court for the Eastern District of Michigan)

On Aug. 27, 2020, 8 peaceful pro-lifers went to the Northland Family Planning Clinic in Sterling Heights, MI, an abortion facility.¹ Some of them had posted on social media the day before that they would be going to Northland the next day, and then livestreamed the rescue on Aug. 27. See Indictment, Doc. # 1, *USA v. Zastrow*.

Most of the group had been on an extended camping trip in the days leading up to the rescue, during which they preached, sang hymns, and shared the gospel.

When they arrived at Northland on the morning of Aug. 27, some positioned themselves in front of the entrance, peacefully interposing their bodies so as to prevent abortion-minded women from entering the facility. As the Indictment quoted one pro-lifer observing the rescue, they were there “to stand in between the hands of an abortionist who wants to murder these children and the life of these babies.” *Id.*

Others fanned out in the parking lot seeking opportunity to speak with women on their way in. All hoped and prayed that their actions would save the lives of innocent children in the womb and point the mothers and abortion facility employees and police to Christ.

When a woman approached the entrance and said she had an appointment and needed inside, one of the pro-lifers told her, “We’re not letting anybody in.” *Id.*

When the police arrived, some of the pro-lifers explained why they were there and urged the police not to arrest them in order to serve the higher calling of saving innocent lives. Several were eventually arrested and charged locally for criminal trespass.

The incident was largely forgotten until February 15, 2023 – some 2 and ½ years later – when the DOJ indicted them in federal court, charging them with violations of Conspiracy Against Rights, 18 U.S.C. § 241, and the Freedom of Access to Clinic Entrances Act, 18 U.S.C. § 248 (“FACE”). The conspiracy charge carried a maximum sentence of 10 years in prison and up

¹ Two of these pro-lifers also traveled to a separate abortion facility, the Women’s Health Clinic, located in Saginaw, MI. That separate count, which repeats the same charges, will not be discussed here.

to \$250,000 in fines. The FACE charge carried a maximum of 6 months in prison and up to \$10,000 in fines.²

2. United States of America vs. Chester Gallagher, Paul Vaughn, Coleman Boyd, et al: Case No. 3:22-cr-00327 (HON. ALETA TRAUGER, District Court for the Middle District of Tennessee)

In the second case, *United States v. Gallagher*, No. 3:22-cr-00327 (M.D. Tenn.), several pro-lifers, including some of the same defendants as in the Detroit case, including Calvin Zastrow and Chet Gallagher, engaged in a similar rescue at the carafem Health Center in Mt. Juliet, TN on March 5, 2021. See Indictment, Doc. No. 1.

The abortion facility was located on the second floor of a multi-use medical building in this case. The pro-lifers gathered in the stairwell outside the second floor, prayed, and then entered the hallway shortly before the facility was scheduled to open. As before, some of the pro-lifers sat down in front of the entrances while others stood in the hallway. As before, they sang hymns, prayed, read Scripture, and reached out to abortion-minded women.

At no time did any of them try to enter the abortion facility. They were peaceful, respectful, and well-behaved at all times. They simply refused to leave when asked.

When the police were called, they did not seem to know what was happening. Paul Vaughn (my client), wanting to avoid any violence or misunderstandings, approached the police, Bible in hand, and explained what a rescue was and how it worked. He then engaged in lengthy discussions with various police officers, primarily the lead negotiator, concerning the law of God and the law of man.

As in Sterling Heights, the event was mentioned on social media in the days before, and again was livestreamed. *Id.*

After well over two hours, the police arrested some of the pro-lifers. As in Michigan, they were charged with criminal trespass and released after a few hours in jail.

Once again, all was forgotten until October 3, 2022, when the DOJ filed the Indictment charging 11 defendants with violating the Conspiracy Against Rights statute, 18 U.S.C. § 241, and the Freedom of Access to Clinic Entrances Act, 18 U.S.C. § 248. *Id.*

Background: The Law

-DAVE to provide 10-minute introduction, history, and analysis of Conspiracy Against Rights

1. 18th Century Law and the KKK (meaning of “Oppression”)

² For a second offense the penalties increase to 18 months in prison and up to \$25,000 in fines. 18 U.S.C. § 248(b)(2).

2. Conspiracy Against Rights a short history
3. History of Prolife Protests and Roe
 - a. Pre-1973 – Growing movement, with successful state legislation (see Daniel K. Williams, *Defenders of the Unborn: The Pro-Life Movement Before Roe v. Wade*, Oxford University Press, 2016).
 - b. 1973 -- Faithful individuals outside discrete abortion facilities
 - c. Rise of organized groups (RTL, ALL, PLAL, etc.)
 - d. 1987 -- Operation Rescue – Estimated 77,000 Christians willing to sacrifice and face minor sentences for trespass or disorderly conduct
4. 18 USC 241 (Conspiracy Against Rights)
 - a. Never used against peaceful protestors before
 - b. Only pressed into service by DOJ after Dobbs
 - c. Expressly chosen in part because it imposes harsh penalties
5. Protests and response to the 2020 Summer of love
6. FACE Act

History of the FACE Act

FACE was enacted in response to an alleged nationwide campaign of attacks on abortion facilities. In particular, the hugely successful campaign by Operation Rescue to encourage otherwise law-abiding Christians to come and peacefully and prayerfully engage in what amounted to a sit-in resulted in some 77,000 misdemeanor arrests. While the pro-abortion supporters of FACE talked long and loudly about arson, bombings, and violence, in reality it was the peaceful sit-in type of “rescues” that they couldn’t abide. After all, arson and violence were already punishable by felonies and harsh penalties. It was the sit-ins they couldn’t handle. See Thomas Jipping and Seth Lucas, “Congress Should Repeal the Freedom of Access to Clinic Entrances Act,” Heritage Foundation March 3, 2025, <https://www.heritage.org/life/report/congress-should-repeal-the-freedom-access-clinic-entrances-act> (hereafter, “Repeal FACE”).

In addition, there had been major lawsuits seeking to enjoin pro-life activism broadly. See, e.g., *National Org. for Women v. Scheidler*, 765 F.Supp. 937 (N.D. Ill. 1991) accusing Joe Scheidler, Pro-Life Action Network, and Operation Rescue of antitrust violations, racketeering, and more. The case went to the Supreme Court three times, and the pro-life side ultimately prevailed.³

³ In the first case to reach the Supreme Court, *NOW v. Scheidler*, 510 U.S. 249 (1994), the Court reversed an order dismissing the case, holding that the RICO Act does not require an economic motive for the alleged activity. In the second, *NOW v. Scheidler*, 537 U.S. 393 (2003), the Court reversed defendants’ RICO Act conviction, holding that they had not committed extortion—a predicate offense for establishing a racketeering conspiracy—because they had not obtained property from the abortion facilities. And in the third case to reach the Supreme Court, *NOW v. Scheidler*, 547 U.S. 9 (2006), the Court unanimously reversed the defendants’ conviction, holding that physical violence unrelated to robbery or extortion falls outside the Hobbs Act.

In 1989, NOW sued Operation Rescue in another case, this time asserting violation of the Civil Rights Act, also known as the Ku Klux Klan Act, 18 U.S.C. § 1985(3). *NOW v. Operation Rescue*, 726 F.Supp. 1483 (E.D. Va. 1989). That case also reached the Supreme Court, and in *Bray v. Alexandria Women's Clinic*, 506 U.S. 263 (1993) (Scalia, J.) the Court held that the defendants could not be enjoined under the Act because their motive to prevent abortion did not qualify as invidious discrimination against a class and their actions were not directed against interference with the right to travel interstate. The Court also held that deprivation of the right to abortion could not serve as the object of a purely private conspiracy. *Id.*

The pro-abortion lobby immediately pivoted to a legislative solution to their problem. As introduced by Senator Kennedy on March 23, 1993, the FACE Act explicitly stated that it was introduced in response to the *Bray* decision only two months earlier:

- (8) in the *Bray* decision, the Court denied a remedy under such section **to persons injured by the obstruction of access to abortion services**;
- (9) legislation is necessary **to prohibit the obstruction of access by women to abortion services** and to ensure that persons injured by such conduct, as well as the Attorney General, can seek redress in the Federal courts;

Senate Bill 636 -- Freedom of Access to Clinic Entrances Act of 1994, 103rd Congress (1993-1994), <https://www.congress.gov/bill/103rd-congress/senate-bill/636/text/is?r=29> (emphasis added).⁴ Note, too, that Senator Kennedy was concerned only with access to **abortion services**, not “reproductive health services” generally. It specifically protected only those seeking or assisting in obtaining abortions; it omitted any protection for pregnancy resource centers or pro-life counseling. *Id.*; see also “Repealing FACE” at 3-4.

After numerous revisions and additions, the final FACE Act was signed into law by President Bill Clinton on May 26, 1994. PUB. L. 103-259, 108 Stat. 694 (May 26, 1994). The final version included protections for both pregnancy resource centers and churches, at least on its face. In practice, however, “textual coverage of both crisis pregnancy centers and churches would prove cosmetic, as enforcement would focus almost exclusively on protecting abortion clinics.” “Repeal FACE” at 3.

By voice vote, the Senate adopted an amendment proposed by Senator Orrin Hatch to add a parallel provision protecting houses of worship in the same way it protected “reproductive

It was this case that gave birth to the Thomas More Society. See <https://www.thomasmoresociety.org/history>.

⁴ Then Representative Chuck Schumer introduced the House version, HB 796, on February 3, 1993. See H.R. 796, 103rd Cong. (1993), <https://www.congress.gov/bill/103rd-congress/house-bill/796?s=2&r=1>. The Act went through numerous revisions before final passage. See “Repeal FACE” at 3-4.

health services.” 139 Cong. Rec. S15791 (1993). There was virtually no discussion of the proposal.

The FACE Act Statute

The FACE Act provides:

(a) **PROHIBITED ACTIVITIES.** -- Whoever-

- (1) **by force or threat of force or by physical obstruction**, intentionally injures, intimidates or interferes with or attempts to injure, intimidate or interfere with any person **because** that person is or has been, or in order to intimidate such person or any other person or any class of persons from, obtaining or providing reproductive health services;
- (2) by force or threat of force or by physical obstruction, intentionally injures, intimidates or interferes with or attempts to injure, intimidate or interfere with any person lawfully exercising or seeking to exercise the First Amendment right of religious freedom at a place of religious worship; or
- (3) intentionally damages or destroys the property of a facility, or attempts to do so, because such facility provides reproductive health services, or intentionally damages or destroys the property of a place of religious worship, shall be subject to the penalties provided in subsection (b) and the civil remedies provided in subsection (c), except that a parent or legal guardian of a minor shall not be subject to any penalties or civil remedies under this section for such activities insofar as they are directed exclusively at that minor.

18 U.S.C. § 248(a) (emphasis added).

The Act also contains several important definitions:

(e) **DEFINITIONS** – As used in this section:

- (1) **FACILITY** – The term “facility” includes a hospital, clinic, physician’s office, or other facility that provides reproductive health services, and includes the building or structure in which the facility is located.
- (2) **INTERFERE WITH** – The term “interfere with” means **to restrict a person’s freedom of movement**.

- (3) INTIMIDATE – The term “intimidate” means **to place a person in reasonable apprehension of bodily harm** to him- or herself or to another.
- (4) PHYSICAL OBSTRUCTION – The term “physical obstruction” means rendering impassable ingress to or egress from a facility that provides reproductive health services or to or from a place of religious worship, **or rendering passage** to or from such a facility or place of religious worship **unreasonably difficult or hazardous**.
- (5) REPRODUCTIVE HEALTH SERVICES – The term “reproductive health services” means reproductive health services **provided in a hospital, clinic, physician’s office, or other facility**, and includes medical, surgical, counselling or referral services relating to the human reproductive system, including services relating to pregnancy or the termination of a pregnancy.

18 U.S.C. § 248(e) (emphasis added).⁵

Furthermore, the FACE Act provides broad criminal and civil remedies. In subsection (b) it assesses criminal penalties of up to one year’s imprisonment for a first offense and up to three years’ imprisonment for a second offense, unless the offense consists only in a “nonviolent physical obstruction” (i.e. a sit-in), in which case a first offense may be punished up to six months in prison and a second offense up to 18 months.

Subsection (c) sets forth the civil remedies.

(C) CIVIL REMEDIES.—

(1) Right of action.—

(A) In general.—

Any person aggrieved by reason of the conduct prohibited by subsection (a) may commence a civil action for the relief set forth in subparagraph (B), except that such an action may be brought under subsection (a)(1) only by a person involved in providing or seeking to provide, or obtaining or seeking to obtain, services **in a facility** that provides reproductive health services, and such an action may be brought under subsection (a)(2) only by a person lawfully exercising or seeking to exercise the First Amendment right of religious freedom at a place of religious worship or by the entity that owns or operates such place of religious worship.

(B) Relief.—

⁵ The Act also defines “STATE” to include the District of Columbia and any territory or possession of the United States. *Id.* at (e)(6).

In any action under subparagraph (A), the court may award appropriate relief, including temporary, preliminary or permanent injunctive relief and **compensatory and punitive damages, as well as the costs of suit and reasonable fees for attorneys and expert witnesses**. With respect to compensatory damages, **the plaintiff may elect, at any time** prior to the rendering of final judgment, **to recover, in lieu of actual damages, an award of statutory damages in the amount of \$5,000 per violation**.

(2) ACTION BY ATTORNEY GENERAL OF THE UNITED STATES.—

(A) In general.—

If the Attorney General of the United States has reasonable cause to believe that any person or group of persons is being, has been, or may be injured by conduct constituting a violation of this section, the Attorney General may commence a civil action in any appropriate United States District Court.

(B) Relief.—

In any action under subparagraph (A), the court may award appropriate relief, including temporary, preliminary or permanent injunctive relief, and compensatory damages to persons aggrieved as described in paragraph (1)(B). The court, to vindicate the public interest, may also assess a civil penalty against each respondent—

- (i) **in an amount not exceeding \$10,000** for a nonviolent physical obstruction and \$15,000 for other first violations; and
- (ii) **in an amount not exceeding \$15,000** for a nonviolent physical obstruction and \$25,000 for any other subsequent violation.

(3) ACTIONS BY STATE ATTORNEYS GENERAL.—

(A) In general.—

If **the Attorney General of a State** has reasonable cause to believe that any person or group of persons is being, has been, or may be injured by conduct constituting a violation of this section, such Attorney General may commence a civil action in the name of such State, as parens patriae on behalf of natural persons residing in such State, in any appropriate United States District Court.

(B) Relief.—

In any action under subparagraph (A), the court may award appropriate relief, including temporary, preliminary or permanent injunctive relief, compensatory damages, and civil penalties as described in paragraph (2)(B).

Finally, FACE includes “Rules of Construction” designed to cabin its reach into expressive activity:

(d) RULES OF CONSTRUCTION.—Nothing in this section shall be construed—

(1) to prohibit any expressive conduct (including peaceful picketing or other peaceful demonstration) protected from legal prohibition by the [First Amendment](#) to the Constitution;

(2) to create new remedies for interference with activities protected by the free speech or free exercise clauses of the [First Amendment](#) to the Constitution, occurring outside a [facility](#), regardless of the point of view expressed, or to limit any existing legal remedies for such interference;

(3) to provide exclusive criminal penalties or civil remedies with respect to the conduct prohibited by this section, or to preempt [State](#) or local laws that may provide such penalties or remedies; or

(4) to [interfere with](#) the enforcement of [State](#) or local laws regulating the performance of abortions or other [reproductive health services](#).

18 U.S.C. § 248(d) (emphasis added).

The Trial in USA v. Zastrow

DAVE to provide 5-10 minute description of the courtroom, judge, trial procedure and the Jury

1. Trial Procedure
2. The judge
3. Jury Selection

INTERACTIVE: ISSUE and RULE SPOTTING- GET AUDIENCE PARTICIPATION AND LIST THE ISSUES!!!!

Issues:

1. Right to protest
2. Right to peaceably assemble
3. Free Speech
4. Right to practice religion (Establishment Clause)
5. Procedural Rules (Statute of Limitations)
6. Targeting of religious adherents on account of their beliefs
7. Weaponization of the DOJ and FBI

Rules:

- 1-FACE Act
- 2-Conspiracy Against Rights
- 3-Trespassing

- 4-First Amendment
- 5-Religious liberty
- 6-Right to protest
- 7-Equal Protection under Law
- 8-Invidious Prosecutions
- 9-Selective Prosecutions

Analysis of the FACE Act

The prohibitions in the FACE Act were carefully crafted to appear at first blush to be content-neutral. By using the phrase “reproductive health services” rather than “abortion services,” for example, and defining it to include counseling or referral services related to the human reproductive system the drafters overcame facial attacks on the basis of content- or viewpoint-discrimination. See, e.g., *Norton v. Ashcroft*, 298 F.3d 547 (6th Cir. 2002) (upholding constitutionality of FACE as content-neutral and within the powers of Congress to enact); *United States v. Weslin*, 156 F.3d 292 (2d Cir. 1998) (same); *United States v. Soderna*, 82 F.3d 1370 (7th Cir. 1996) (Posner, J.) (same). And by identifying the predicate acts as the use of force, threats of force, or physical obstruction, they successfully overcame challenges based on the First Amendment.⁶

The drafters also successfully overcame jurisdictional attacks by couching the purpose as protecting the right to interstate travel as well as the right to “terminate a pregnancy.” [CITATION] That it was always intended to be used primarily against pro-lifers was nonetheless obvious from the start. As the Heritage Foundation observed:

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.

“Repeal FACE” at 4. Reviewing the legislative history, Heritage concluded that “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.” *Id.*

FACE Act Prosecutions

⁶ But see *Norton v. Ashcroft*, 298 F.3d 547, 552 (6th Cir. 2002) (FACE “does not directly apply to speech, but rather prohibits three types of conduct—use of force, threat of force, and physical obstruction—which are not protected by the First Amendment”) (footnote and citations omitted); *New York ex rel. Spitzer v. Operation Rescue Nat’l*, 273 F.3d 184, 195 (2d Cir. 2001) (“an erroneous application of F.A.C.E. threatens to impinge First Amendment activity”).

Yet the bias in enforcement of the FACE Act is transparent. From 1994 until 2021, of some 142 prosecutions under FACE **only one** was against pro-abortion activists and in defense of pro-life facilities. “Repeal FACE” at 8 (citing data from Congressman Chip Roy’s office). All the rest were against pro-lifers. “Repeal FACE” at 8. Worse, after the Supreme Court reversed *Roe v. Wade*⁷ in the case of *Dobbs v. Jackson Women’s Health Organization*⁸ FACE was fully weaponized against pro-life actors and facilities.

Even before the decision was issued, an unprecedented leak of the draft majority opinion was leaked in May 2022, and immediately pro-abortion activists began a campaign of violence, vandalism, and threats against pro-life churches and pregnancy resource centers. See, e.g., 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). Among other attacks, CompassCare Pregnancy Services in Buffalo, New York was firebombed, resulting in some \$400,000 in damages. See 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>.

By the end of 2022, there had been nearly 77 attacks on pregnancy resource centers and 98 on Catholic churches – but not a single person had been charged for these FACE violations. See 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/](https://www.dailysignal.com/2022/12/12/doj-official-admits-targeting-pro-lifers-is-response-to-overturn-of-ro/). In a DOJ Report entitled, “Recent Cases on Violence Against Reproductive Health Care Providers,” the DOJ stated that it had initiated eleven criminal prosecutions against 50 pro-life defendants since 2020, but only one against a pro-abortion defendant. See <https://www.justice.gov/crt/recent-cases-violence-against-reproductive-health-care-providers>.

Then-Director of the FBI Christopher Wray testified in Congress on November 17, 2022, and stated that **70%** of the abortion-related violence in the wake of the *Dobbs* decision were against pro-life organizations. Timothy H.J. Nerozzi, Pro-life centers targeted by 70% of abortion-related violent threats since Dobbs decision: FBI, Fox News November 17, 2022, <https://www.foxnews.com/politics/pro-life-centers-targeted-70-abortion-related-violent-threats-dobbs-decision-fbi>. Yet the lack of arrests of pro-abortion activists continued.

To date, there have been at least 96 attacks on pregnancy resource centers and pro-life groups, and 338 attacks on churches since the leak of the *Dobbs* decision. See Tracking Attacks on Pregnancy Centers & Pro-Life Groups, Catholic Vote, January 21, 2025, <https://catholicvote.org/pregnancy-center-attack-tracker/>, and Tracker: 500 Attacks on U.S. Catholic Churches Since May 2020, Catholic Vote, May 27, 2025,

⁷ 410 U.S. 113 (1973).

⁸ 597 U.S. 215 (2022).

<https://catholicvote.org/tracker-church-attacks/>. Yet the Biden Administration did little to nothing to prosecute the perpetrators of these often violent FACE violations, while simultaneously leaving no stone unturned to seek out and prosecute peaceful pro-lifers for simple sit-ins at abortion facilities.

This gross discrepancy between the zealous prosecution of pro-life activists and the lack of prosecution of pro-abortion activists strongly suggests either selective enforcement for viewpoint discrimination, equal protection issues, or abuse of process. Congressman Chip Roy's investigation revealed that 92% of the Biden Administration's FACE prosecutions were against pro-lifers. Chip Roy, Here's Why the FACE Act Must Be Repealed, Daily Wire (Oct. 4, 2024), <https://www.dailywire.com/news/heres-why-the-face-act-must-be-repealed>.

FACE is not content-neutral

In addition, the FACE Act is a content-based regulation of speech under *Reed v. Town of Gilbert, Ariz.*, 576 U.S. 155 (2015) and *McCullen v. Coakley*, 573 U.S. 464 (2014), despite the drafters' efforts to make it facially constitutional. The FACE Act does not prohibit all interference with individuals near reproductive health care facilities, but only those who do so because that person is "obtaining or providing reproductive health services." 18 U.S.C. § 248(a)(1) (emphasis added). Accordingly, the Government must examine the content of Defendants' messages to determine their motivation before applying FACE. Such a determination renders the law content-based on its face under *McCullen* and *Reed*.

Congress did not have authority to enact FACE

Although several appellate courts have upheld the constitutionality of FACE, the Supreme Court has yet to weigh in on the matter. In our view, Congress did not have authority to enact FACE under the Commerce Clause because it does not regulate interstate commerce or intrastate commerce that have a substantial effect upon interstate commerce. Rather, FACE regulates intrastate activity such as sit-ins that are entirely noneconomic. And the Supreme Court has held that such conduct is not "part of an economic 'class of activities' that have a substantial effect on interstate commerce" and therefore cannot be regulated by Congress under the Commerce Clause. *Gonzales v. Raich*, 545 U.S. 1, 17 (2005); see also "Repeal FACE" at 4-8. These arguments are strengthened considerably by the Supreme Court's holding in *Dobbs* – without the pretense of a constitutional right to abortion, the so-called right to access "reproductive health services" loses whatever fig leaf of constitutional authority Congress had before *Dobbs*.

Because the reason for FACE has ceased to exist, FACE is no longer valid

Finally, the FACE Act is no longer valid because the *Dobbs* case eviscerated the very purpose of the Act. FACE was originally enacted for the purpose of protecting abortion and access to abortion. The findings supporting the need for the Act and the entire legislative history were thus focused on abortion. When the Supreme Court handed down its decision in *Dobbs* the

federal constitutional “right” to abortion ceased to exist, and the very reason for FACE, its essence, its foundation, was destroyed. As a result, FACE is unconstitutional under the ancient doctrine of *cessante ratione cessat lex* -- “when the reason for a law ceases, the law itself ceases.” See, e.g., *United States v. Manton*, 107 F.2d 834, 845 (1938); *Pipefitters Loc. Union No. 562 v. United States*, 407 U.S. 385, 432 (1972).

DAVE: To provide analysis on Conspiracy against rights

1. Conspiracy Statute

- a. Case law suggests application of the statute is only appropriate when it does not interfere with core fundamental constitutional rights (like the right to protest).
- b. Under *Fischer v. United States*, 603 U.S. 480 (2024), application of the Conspiracy Against Rights statute to the newly created “right” of access under the FACE Act infringes the power of Congress to assess the proper punishment and is thus unconstitutional.
- c. The statute’s broad and undefined terms, enacted well before development of modern First Amendment jurisprudence, render it substantially overbroad and impermissibly vague in the context of peaceful protests.

2. Disparate Treatment (I have an extensive unfiled Motion alleging invidious prosecution with citations to dozens of concrete examples from the media of disparate treatment).

Conclusion

In both *Zastrow* and *Gallagher* the defendants filed motions to dismiss on various grounds, including lack of jurisdiction due to Congress’ lack of Commerce Clause authority, lack of content-neutrality, selective enforcement (in *Gallagher* only), and so forth. See Defendant Curry’s Motion to Dismiss in *United States v. Zastrow*, Doc. 77 (joined by several defendants); Defendant Zastrow’s Motion to Quash Count One, Doc. 69 (also joined by several defendants); Defendant Zastrow Motion to Quash Count Two, Doc. 70 (joined by several defendants); Defendants’ Joint Motion to Dismiss in *United States v. Gallagher*, Doc. 242. The district courts denied the motions in both cases, once again upholding the constitutionality of FACE and rejecting outright the assertion that there was anything untoward in the DOJ’s enforcing FACE almost exclusively against pro-life activists. See *Zastrow*, Doc.128; *Gallagher*, Doc. 282.

Of course, the trial courts were in large part bound by the Sixth Circuit’s prior opinion in *Norton v. Ashcroft*, but they each rejected the argument that the Supreme Court’s rulings in *Reed v. Town of Gilbert, Ariz.* and *McCullen v. Coakley* had changed to analysis. They also rejected the argument that the *Dobbs* decision rendered FACE void.

The defendants also moved to dismiss the Conspiracy Against Rights charge, arguing that its punishment was disproportionate to the crime and contrary to the intent of Congress in enacting FACE and carefully circumscribing both the prohibited acts and the punishment.

On the eve of trial, Defendant Gallagher filed a motion to dismiss the Conspiracy Against Rights charge (Count One) out of time, which the Court entertained despite its late filing, because it was predicated on the recent Supreme Court decision in *Fischer v. United States*, 603 U.S. 480 (2024). See Gallagher Motion to Dismiss, Doc. 314, *Zastrow*.⁹ In brief, the argument was that application of the Conspiracy Against Rights statute against peaceful, non-violent conduct which Congress determined under FACE should be prosecuted only as a misdemeanor is incompatible with the enforcement scheme that Congress enacted and therefore impermissibly transfers the power of punishment from the legislative to the executive and judicial branches, contrary to our constitutional design.

In *Fischer*, an appeal from a January 6 defendant, the High Court held that the Sarbanes Oxley Act's prohibition on obstructing official proceedings, 18 U.S.C. § 1512(c)(2), must be narrowly interpreted to apply only to the impairment of *the availability or integrity of documents, etc., for use in official proceedings* – rather than to *any* obstruction of an official proceeding in *any* manner. *Id.* In so holding, the Court relied in essential part on “[t]he **broader context** of Section 1512 in the criminal code,” including “**the context from which the statute arose.**” *Id.* at 492 (emphasis added).

The Supreme Court also emphasized that a broad reading would be “novel” and effectively “**criminalize a broad swath of prosaic conduct, exposing activists and lobbyists alike to decades in prison**” – e.g., “a peaceful protestor could conceivably be charged under § 1512(c)(2) and face a 20-year sentence.” *Id.* at 496 (emphasis added). Such “peculiar results underscore the implausibility of the Government’s interpretation.” *Id.* (cleaned up). The Court ruled that application of the obstruction of official proceedings charge was improper given the text, context, and statutory history.

Applying that analysis to use of the Conspiracy Against Rights statute against nonviolent FACE defendants yields the same result, the defendants argued. The district court heard argument on several different occasions, eventually deferring a ruling until after the trial and the filing of Rule 29 motions.

The Verdicts

In both *Zastrow* and *Gallagher*, all defendants (in the felony cases) were found guilty on all charges. Appeals were filed in *Gallagher*, and the district court in *Zastrow* postponed briefing and consideration of post-trial motions until after the newly-elected Trump Administration had weighed in.

⁹ Recall that Mr. Gallagher was also a defendant in *United States v. Zastrow*.

The Pardons

On January 23, 2025, in response to formal petitions filed on behalf of all these defendants by Thomas More Society, President Trump pardoned all the defendants on all charges. See Mary Margaret Olohan and Lief Mahieu, 'They Should Not Have Been Prosecuted': Trump Pardons 23 Pro-Lifers Targeted By Biden DOJ, Daily Wire, January 23, 2025, <https://www.dailywire.com/news/they-should-not-have-been-prosecuted-trump-pardons-23-pro-lifers-targeted-by-biden-doj>. In signing the pardons on live television, President Trump commented that it was "a great honor" to sign and that "they should not have been prosecuted." *Id.*

Outcome – Appeals Mooted

As a result of the DOJ's unopposed motions to vacate the convictions and dismiss all charges with prejudice, the appeals became moot and the *Fischer* motion to dismiss was never decided. All defendants were restored all rights as if the cases had never been brought.

INTERACTIVE:

Discussion: What type of Protest IS allowed under current interpretations of the law? What do you advise the church group planning to protest at an abortion clinic?

1. Picketing- public and private and designated protest areas
2. Red Rose Rescues (inside the building)
3. Sit In/Blockade/Life Chain (outside the building)
4. Rescue Operations
5. Sidewalk/Parking Lot ministry
6. Private Property and free speech
7. Other ideas? Checkerboard or Gauntlet Protests?
8. Unanswered questions and issues remaining
9. What do you advise clients who wish to protest?
 - a. Red Rose Protests
 - b. The future of blockades?
 - c. Checkerboard Protest (there is a great pic of democrat protesters on the Supreme Court steps arranged in a checkerboard pattern to block access).
 - d. What will attract federal charges and what will not?