IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. CITIZENS FOR A PRO-LIFE SOCIETY, INC., RED ROSE RESCUE, LAURA GIES, LAUREN HANDY, CLARA MCDONALD (AKA "STEPHANIE BERRY"), MONICA MILLER, CHRISTOPHER MOSCINSKI, JAY SMITH (AKA "JUANITO PICHARDO"), and AUDREY WHIPPLE, Defendants.	No. 1:24-cv-00893-CAB Hon. Christopher A. Boyko

DEFENDANT CHRISTOPHER MOSCINSKI'S
BRIEF IN SUPPORT OF MOTION TO DISMISS

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases **Page**

Constitution

Statutes / Rules

Other

INTRODUCTION

Through this civil action, Plaintiff United States of America (hereinafter "Government") seeks to convert a peaceful, local trespass case into a violation of federal law—the Freedom of Access to Clinic Entrances Act, 18 U.S.C. § 248 (hereinafter "FACE")—which carries harsh civil and criminal penalties.[1] As set forth in greater detail below, the Government's Complaint fails as a matter of law.

Unfortunately, this is yet another example of the Department of Justice weaponizing its law enforcement efforts to target, for draconian treatment and selective enforcement of federal law, individuals and organizations that oppose abortion. Fortunately, this Court stands as a bulwark against this abuse of federal authority.

It is axiomatic that the United States Constitution grants the federal government limited and enumerated powers. Accordingly, the federal government does not possess general police powers. Those powers were expressly reserved for local and state governments. Here, the Government seeks to expand its powers and encroach upon local state interests in its relentless pursuit of pro-lifers. This Court should not allow it. This case should be dismissed.

STANDARD OF REVIEW

A motion to dismiss for failure to state a claim under Rule 12(b)(6) tests whether a cognizable claim has been pled in the complaint. *Scheid v. Fanny Farmer Candy Shops, Inc.*, 859 F.2d 434, 436 (6th Cir. 1988). When considering a motion to dismiss, a court must accept as true all factual allegations, but need not accept any legal conclusions. *Ctr. for Bio- Ethical Reform, Inc. v. Napolitano*, 648 F.3d 365, 369 (6th Cir. 2011) (granting motion to dismiss).

[1] The elements of the offense are the same for both civil and criminal liability. *See* 18 U.S.C. § 248.

To survive a motion to dismiss, a plaintiff must allege facts sufficient to state a claim for relief that is "plausible on its face" and, when accepted as true, are sufficient to "raise a right to relief above the speculative level." *Mills v. Barnard*, 869 F.3d 473, 479 (6th Cir. 2017) (citation omitted). "A claim is plausible on its face if the 'plaintiff pleads *factual* content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.'" *Ctr. for Bio- Ethical Reform, Inc.*, 648 F.3d at 369 (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556 (2007)) (emphasis added). "The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2007) (citations omitted). And "a plaintiff's obligation to provide the grounds of his entitlement to relief requires *more than labels and conclusions*, *and a formulaic recitation of the elements of a cause of action will not do*." *Twombly*, 550 U.S. at 555 (quotations omitted) (emphasis added). "The complaint must 'contain either direct or inferential allegations respecting all material elements necessary for recovery under a viable legal theory.'" *Kreipke v. Wayne State Univ.*, 807 F.3d 768, 774 (6th Cir. 2015) (citation omitted).

As set forth below, the Government has failed to state a claim for relief under FACE against Defendant Christopher Moscinski (hereinafter "Fr. Fidelis").[2]

[2] Defendant Christopher Moscinski is a Catholic priest. He is a member of the Franciscan Friars of the Renewal (the "Gray Friars"), and Fr. Fidelis is the name he took during his ordination. The Government cannot reasonably dispute this fact as it can be drawn directly from a video that is incorporated as part of the Complaint. (*See* Compl. ¶ 24, n.4 [referencing video referring to Christopher Moscinski as "Father Fidelis"], Doc. No. 1); *see also* https://www.justice.gov/usao-edny/pr/defendant-charged-blocking-access-planned-parenthood-health-center-long-island (referring to Moscinski as "a Franciscan friar" and noting that he is "also known as 'Fr. Fidelis Moscinski'"). Additionally, the Court can take judicial notice of this fact. *See* Fed. R. Evid. 201(b) ("The court may judicially notice a fact that is not subject to reasonable dispute because it: (1) is generally known within the trial court's territorial jurisdiction; or (2) can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned."); *see also* Fed. R. Evid. 201(d) (stating that a court must take judicial notice "if requested by a party and supplied

STATEMENT OF FACTS RELATED TO FR. FIDELIS

On June 4, 2021, Fr. Fidelis engaged in an "unlawful trespass" at the Northeast Ohio Women's Center ("NOWC")—an abortion center. (Compl. ¶¶ 43, 44). At approximately 11:28 a.m., Fr. Fidelis, along with three other co-defendants, entered NOWC's waiting room through the front entrance. (*Id*. ¶ 47). There are no allegations that he used any type of force to enter the abortion center because he didn't—he simply walked in. Approximately two minutes later, Fr. Fidelis and his co-defendants "started handing out roses to the patients in the waiting room while encouraging them to not have abortions." (*Id*. ¶ 48). Apparently, because the abortion center staff did not want their "patients" to receive roses or to be persuaded not to have an abortion, the staff told Fr. Fidelis and his co-defendants "to leave and [then the staff] *evacuated* their patients into a *secured* portion of the facility." (*Id*. ¶ 49 [emphasis added]). "After the patients had left the waiting room" due to the evacuation *initiated by the staff*, Fr. Fidelis refused to leave, and he proceeded to lay or kneel (the Complaint does not specify the actions he took) on the floor of the waiting room. (*Id*. ¶ 52). There are no allegations that Fr. Fidelis physically and purposefully blocked or obstructed any doorway, entrance way, or hallway (because he didn't) or that he physically obstructed any patient (because he didn't nor could he have as the staff "evacuated" the patients to a "secured" area away from Fr. Fidelis and the other co-defendants).

Officers from the Cuyahoga Falls Police Department arrived and told Fr. Fidelis and his co-defendants to leave the abortion center. (Compl. ¶¶ 53-54). They refused and were arrested.

---

with the necessary information"). And it can do so when ruling on this Rule 12(b)(6) motion without converting it to one for summary judgment. *See, e.g., Prod. Sols. Int'l, Inc. v. Aldez Containers, LLC*, 46 F.4th 454, 457 (6th Cir. 2022) ("While the question of whether to grant a Rule 12(b)(6) motion to dismiss is typically confined to the pleadings, we may take judicial notice of other court proceedings without converting the motion into one for summary judgment.") (internal quotations and citation omitted).

(*Id*. ¶ 58). At approximately noon, the officers carried Fr. Fidelis and his co-defendants out of the waiting room and into police cars. (*Id*.). Consequently, Fr. Fidelis was in the abortion center waiting room for about *30 minutes total*. The Government further alleges that Fr. Fidelis stated to the abortion center staff, "*In the name of Jesus Christ, I forbid you from committing any abortions for today*." (*Id*. ¶ 56 [emphasis added]).

According to the Government, there were "23 *appointments*" that "were scheduled to occur" and that "at least five patients did not show up"—in other words, at least 18 patients did show up for their appointments. (Compl. ¶ 60 a.). The Government does not allege that the five no-shows were caused by any force or threat of force or physical obstruction engaged in by Fr. Fidelis, nor could they as Fr. Fidelis didn't engage in any such conduct. And the same is true for the allegation that "[s]ome patients rescheduled their surgical abortions to different days" and the allegation that "one patient had her procedure delayed until later in the day." (*Id*. ¶ 60 b. & d.). Finally, as the Government admits, some patients called the abortion center to say that they would not be coming to their appointments (apparently one or more of the five appointments that did not show) because "they saw police gathered outside of the facility." (*Id*. ¶ 60 c.). In other words, the no-shows were not the result of any force or threat of force or physical obstruction engaged in by any defendant, specifically including Fr. Fidelis. Rather, it was the *presence of the police* (which is not a basis for a FACE violation) that dissuaded them from going to the abortion center.

Fr. Fidelis was found guilty of trespassing by an Ohio state court in August 2021 (Compl. ¶ 61), as the conduct he engaged in was a simple trespass proscribed by local state law and not a federal offense.

The Government's final "factual" allegations related directly to Fr. Fidelis state as follows:

> 62. Through the actions described above, [Defendant Moscinski], by force or threat of force or by physical obstruction: (1) intentionally injured, intimidated, or

> interfered with, or attempted to injure, intimidate or interfere with, persons because those persons were, or had been, obtaining or providing reproductive health services; or (2) intimidated such persons or any other person or class of persons from obtaining or providing reproductive health services.
>
> 63. [Defendant Moscinski's] unlawful actions at NOWC, resulting in the closure of a portion of NOWC, made ingress to or egress from NOWC impassable and/or rendered passage unreasonably difficult or hazardous.

(Compl. ¶¶ 62, 63). These allegations are nothing "more than labels and conclusions, and a formulaic recitation of the elements of a cause of action"; therefore, they "will not do." *See Twombly*, 550 U.S. at 555.

FREEDOM OF ACCESS TO CLINIC ENTRANCES ACT

FACE provides, in relevant part, the following:

> **(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;
>
> * * *
>
> **(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***.

18 U.S.C. § 248 (emphasis added).

ARGUMENT

I. The Complaint Fails to State a Claim for Relief under FACE against Fr. Fidelis.

The Government impermissibly seeks to convert a simple trespass violation under local state law into a violation of federal law. While this is a civil action under FACE, the elements for a civil or criminal violation are precisely the same. *See* 18 U.S.C. § 248 (a). Consequently, if the Government can fit the "square peg" facts of this trespass case into the "round hole" of a civil violation under FACE, it could do the same for a criminal violation as well—thereby converting a simple misdemeanor trespass into a potential felony offense. Not only is this lawsuit an erroneous application of FACE, it is a direct affront to the principles of federalism and the principle that the federal government lacks general police powers.

FACE was passed to prevent threats, violence, and the blockading of abortion centers. More specifically, it's purpose was to prevent "rescues" that are often described as "lock and blocks" where the rescuers would physically and intentionally blockade the entrance to an abortion facility or use devices such as locks and chains to lock the entrances to prevent persons from entering the facility. That is ***not*** what a Red Rose Rescue is or does. And it does not remotely describe any of Fr. Fidelis's actions.

Pursuant to the statute, FACE was enacted "to protect and promote the public safety and health and activities . . . by establishing [f]ederal criminal penalties and civil remedies for certain *violent*, *threatening*, *obstructive* and *destructive* conduct that is *intended to injure, intimidate* (cause a "reasonable apprehension of bodily harm") *or interfere* ("restrict a person's freedom of movement") with persons seeking to obtain or provide reproductive health services." Freedom of Access to Clinic Entrances Act of 1994, Pub. L. No. 103-259, § 2, 108 Stat. 694 (1994) (emphases added). Congress enacted FACE in response to *violence* directed toward abortion centers and

abortionists and in response to abortion center *blockades*. *See* H.R. Rep. No. 103-306, at 6-7 (1993), *reprinted in* 1994 U.S.C.C.A.N. 699, 703-04; *see, e.g., id*. at 704 (noting that "[t]hroughout the country, . . . groups ha[d] organized blockades designed to bar access to reproductive facilities" and that "[t]h[o]se blockades disrupt[ed] a wide range of services, terrorize[d] patients and staff, and impose[d] upon clinics, individuals and responding jurisdictions millions of dollars of costs for law enforcement, prosecutions, staff time, medical expenses, and property damage," further noting that "[*d*]*ozens and often hundreds of persons trespass onto clinic property* ***and*** *physically barricade entrances and exits by sitting or lying down, by standing and locking arms or by chaining themselves to fences, doors or other clinic property*"). A conference committee report also explains that "Congress ha[d] found[] . . . an interstate campaign of violent, threatening, obstructive and destructive conduct aimed at providers of reproductive health services across the nation ha[d] injured providers of such services and their patients" and that such conduct "included blockades and invasions of medical facilities." H.R. Conf. Rep. No. 103-488, at 7 (1994), *reprinted in* 1994 U.S.C.C.A.N. 724, 724.[3] Indeed, the Sixth Circuit upheld FACE against a constitutional challenge based in large measure on the congressional findings that the statute was necessary to prevent abortion center *blockades* and *violent* abortion protests—actions which interfered with interstate commerce. *See Norton v. Ashcroft*, 298 F.3d 547, 557 (6th Cir. 2002) ("Both the Senate Judiciary Committee and the House Committee on Labor and Human Resources submitted extensive reports detailing that clinic blockades and violent anti-abortion protests

[3] This legislative history is provided by way of background only. This Court is bound to follow the express and unambiguous language of the statute. *See Okla. v. Castro-Huerta*, 142 S. Ct. 2486, 2496-97 (2022) ("[T]he text of a law controls over purported legislative intentions unmoored from any statutory text. The Court may not 'replace the actual text with speculation as to Congress' intent'. . . because we 'begin (and find that we can end) our search. . . with text and structure.'"). As discussed in the text above, the facts related to Fr. Fidelis do not fall within the proscriptions of FACE. In other words, the Government has failed to state a claim under FACE as to Fr. Fidelis.

burdened interstate commerce. . . . Thus, in evaluating the constitutionality of the Act we are mindful of the informed judgment of our congressional counterparts."). FACE was *never* intended to apply to a peaceful, simple trespass at an abortion center, such as this case. If it was (and if the Court were to say it is so in this case), then FACE is unconstitutional as it is seeking to convert a truly local matter into a national one. *United States v. Morrison*, 529 U.S. 598, 617-18 (2000) ("The Constitution requires a distinction between what is truly national and what is truly local.").

Regardless of the constitutional implications posed by this case (as discussed in § II below), as set forth above, there are no factual allegations that establish a FACE violation in the case of Fr. Fidelis. There are no factual allegations that Fr. Fidelis used force or a threat of force in any way or that any of his actions were violent because no such facts exist. There are no factual allegations that Fr. Fidelis "intimidated" anyone as that term is expressly defined by the statute ("to place a person in ***reasonable apprehension of bodily harm to him- or herself or to another***") because no such facts exist. The Government's efforts to seek civil liability for the statement allegedly made by Fr. Fidelis (a Catholic priest) in an abortion center that "In the name of Jesus Christ, I forbid you from committing any abortions for today" fail as a matter of law. First, this statement does not fit the statute's definition of "intimidate," as noted above. And second, this statement is not proscribable as a matter of law and is thus not an independent basis for criminal or civil liability.[4] *See NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 910 (1982) ("Speech

[4] *See United States v. Alvarez*, 567 U.S. 709, 717 (2012) (describing "the few historic and traditional categories of expression long familiar to the bar" that may be restricted, stating, "[a]mong these categories are advocacy intended, and likely, to incite imminent lawless action, obscenity, defamation, speech integral to criminal conduct, so-called 'fighting words,' child pornography, fraud, true threats, and speech presenting some grave and imminent threat the government has the power to prevent") (internal punctuation, quotations, and citations omitted).

does not lose its protected character, however, simply because it may embarrass others or coerce them into action.").

In *NAACP v. Clairborne Hardware Company*, for example, the Court addressed the issue of whether a person may be civilly liable for speech occurring in conjunction with violent or destructive activity (a boycott in that case). Per the Court:

> No federal rule of law restricts a State from imposing tort liability for business losses that are caused by violence and by threats of violence. When such conduct occurs in the context of constitutionally protected activity, however, 'precision of regulation' is demanded. *NAACP v. Button*, 371 U.S. 415, 438 [(1963)]. Specifically, the presence of activity protected by the First Amendment imposes restraints on the grounds that may give rise to damages liability and on the persons who may be held accountable for those damages.
>
> * * *
>
> While the State legitimately may impose damages for the consequences of violent conduct, it may not award compensation for the consequences of nonviolent, protected activity. Only those losses proximately caused by unlawful conduct may be recovered.

Claiborne Hardware Co., 458 U.S. at 916-18. In other words, FACE cannot be used to impose civil liability on speech unless that speech may be independently proscribed consistent with the First Amendment. *Va. v. Black*, 538 U.S. 343, 359 (2003) (narrowly defining "true threats" to "encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals"); *Watts v. United States*, 394 U.S. 705, 708 (1969) (instructing that only a contextually *credible* threat to kill, injure, or kidnap the President constitutes a "true threat" that is punishable under the law and noting that "[t]he language of the political arena . . . is often vituperative, abusive, and inexact," but nonetheless protected by the First Amendment); *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) ("[T]he constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is

directed to inciting or producing imminent lawless action and is likely to incite or produce such action."); *Claiborne Hardware Co.*, 458 U.S. 886 (holding that the threatening rhetoric employed to ensure compliance with a boycott against racial discrimination was speech protected by the First Amendment).

In fact, Fr. Fidelis's religious speech is protected from government punishment by the First Amendment (Free Speech and Free Exercise Clauses). In *Bible Believers v. Wayne County*, 805 F.3d 228 (6th Cir. 2015), the Sixth Circuit, sitting *en banc*, stated:

> The right to free exercise of religion includes the right to engage in conduct that is motivated by the religious beliefs held by the individual asserting the claim. . . . The government cannot prohibit an individual from engaging in religious conduct that is protected by the First Amendment. . . .

Id. at 255-56. Moreover, "[f]ree exercise claims are often considered in tandem with free speech claims and may rely entirely on the same set of facts." *Id.* at 256.

There can be no serious dispute that Fr. Fidelis's speech was motivated by his religious beliefs and is thus protected by the Free Speech and Free Exercise Clauses from punishment by the Government. Here, Fr. Fidelis was punished for the simple trespass, which was peaceful and non-violent, by local authorities, but now the Government is seeking to impose civil (and potentially criminal) liability under federal law for this very same conduct by expressly including his speech, which it cannot do consistent with the Constitution.

The Government's effort to punish the religious speech of Fr. Fidelis, a Catholic priest, also implicates the Religious Freedom Restoration Act, 42 U.S.C. 42 U.S.C. § 2000bb, as the entity seeking to impose liability is the federal government. Congress, through RFRA, intended to bring Free Exercise Clause jurisprudence back to the test established prior to *Employment Division v. Smith*, 494 U.S. 872 (1990). *See, e.g.,* 42 U.S.C. § 2000bb (enacting RFRA "to restore the compelling interest test as set forth in *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Wisconsin v.*

Yoder, 406 U.S. 205 (1972) and to guarantee its application in all cases where free exercise of religion is substantially burdened").

Under RFRA, the government "shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability." 42 U.S.C. § 2000bb-1(a). RFRA protects "any exercise of religion." *Id*. at §§ 2000bb-2(4), 2000cc-5(7)(A). To justify a substantial burden on the free exercise of religion under RFRA, the government must satisfy strict scrutiny, the "most demanding test known to constitutional law." *City of Boerne v. Flores*, 521 U.S. 507, 534 (1997). That is, the government must demonstrate that the challenged action is "(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000bb-1(b). The government's burden is a heavy one.

Fundamentally, the "exercise of religion" embraces two concepts: the freedom to believe and the freedom to act. *Cantwell v. Conn.*, 310 U.S. 296, 303 (1940). Accordingly, "[t]he Free Exercise Clause categorically prohibits government from regulating, prohibiting, or rewarding religious beliefs as such." *McDaniel v. Paty*, 435 U.S. 618, 626 (1978). Here, the Government seeks to punish Fr. Fidelis for exercising his religion by expressing his religious beliefs in an abortion center. RFRA and the First Amendment prohibit it from doing so.

Finally, the Government has not alleged facts establishing that Fr. Fidelis engaged in any "physical obstruction" proscribed by FACE. "Physical obstruction" is defined as "*rendering impassable* ingress to or egress from" an abortion center "or *rendering passage to or from such a facility . . . unreasonably difficult or hazardous*." 18 U.S.C. § 248(e)(4) (emphasis added). Lying or kneeling in an *empty* waiting room (the abortion center staff "evacuated" the patients) is not "physical obstruction" under FACE by any man's measure. There are no facts alleged (because

none exist) that Fr. Fidelis *physically* prevented anyone from entering or leaving the abortion center. "Ingress" (entering) refers to the *entrance* of the abortion facility and "egress" (leaving) refers to its exit. The inclusion of the words "ingress" and "egress" in the definition of "physical obstruction" therefore shows that the obstruction must occur in proximity to a facility's entrance/exit such that it "restrict[s] a person's freedom of movement" from entering or exiting the facility. Consequently, there must be evidence showing that Fr. Fidelis physically obstructed the entrance/exit of the abortion facility. No such facts were alleged as none exist. The other aspect of "physical obstruction"—the "or" in the statute—requires facts showing that the "physical obstruction" "render[ed] passage *to or from such a facility* . . . unreasonably difficult or hazardous." Kneeling or lying in an empty waiting room does not "*physically* obstruct" and thus prevent anyone from walking *into the facility* nor does it prevent anyone from walking *out of the facility*. There are no facts alleged (as none exist) that Fr. Fidelis *physically* restrained anyone or *physically* restricted anyone's freedom of movement

Moreover, "physical obstruction" under FACE doesn't stand alone. The Government must present facts that, *by* his "physical obstruction," Fr. Fidelis intentionally "***injure[d]***, ***intimidate[d]*** [*i.e.*, *placed in reasonable apprehension of bodily harm*] or ***interfere[d] with*** [*i.e.*, *restricted freedom of movement*] a person seeking or providing an abortion. There are no facts to support this.

In the final analysis, the Government failed to state a claim for relief that is plausible on its face. Indeed, in light of the express language and requirements to establish a FACE violation, the Government's claim against Fr. Fidelis is frivolous as it has no basis in fact or law. *See* Fed. R. Civ. P. 11(c).

II. The Application of FACE in this Case Violates the Tenth Amendment and Principles of Federalism.

"The Constitution requires a distinction between what is truly national and what is truly local." *Morrison*, 529 U.S. at 617-18. In *Dobbs*, the Court held that "*Roe* was egregiously wrong from the start." *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 231 (2022). In other words, there was *never* a legal or factual basis for concluding that abortion was a right protected by the U.S. Constitution. *Roe* is void *ab initio*. *Dobbs* also expressly overruled *Planned Parenthood v. Casey*, 505 U.S. 833 (1992). *Dobbs*, 597 U.S. at 231 ("We hold that *Roe* and *Casey* must be overruled.").

As a result of *Dobbs*, abortion is truly a local matter. As stated by the Court, "The Constitution does not prohibit the citizens of each State from regulating or prohibiting abortion. *Roe* and *Casey* arrogated that authority. We now overrule those decisions and return that authority to the people and their elected representatives." *Dobbs*, 597 U.S. at 302. Consequently, *Dobbs* undermines the very foundation for federal involvement in abortion and thus the foundation for enacting FACE in the first instance, as the legislative history reveals. *See supra*.

But even more to the point for purposes of this case is the fact that the federal government does not possess a general police power. It has no authority to criminalize under federal law what amounts to a local, misdemeanor trespass. As stated by the Supreme Court in *United States v. Lopez*:

> Under our federal system, the States possess primary authority for defining and enforcing the criminal law. . . . When Congress criminalizes conduct already denounced as criminal by the States, it effects a change in the sensitive relation between federal and state criminal jurisdiction.

United States v. Lopez, 514 U.S. 549, 561 n.3 (1995) (internal citations and quotations omitted).

Our federal government is a government of limited and enumerated powers. This limitation protects the interests of the States and the liberty interests of the people (such as Fr. Fidelis). Aside from this limitation on the expressed powers of the federal government established by Article I of the Constitution, the Tenth Amendment guarantees that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. Const. amend. X. In sum, the Tenth Amendment protects individuals, such as Fr. Fidelis, from the overreach of the federal government.

In *Bond v. United States*, the Court held that an individual could make a Tenth Amendment challenge to a federal criminal law that the challenger believed violated the protections afforded by federalism. As stated by the Court:

> The individual, in a proper case, can assert injury from governmental action taken in excess of the authority that federalism defines. Her rights in this regard do not belong to a State.
>
> * * * *
>
> Federalism also protects the liberty of all persons within a State by ensuring that laws enacted in excess of delegated governmental power cannot direct or control their actions. . . . By denying any one government complete jurisdiction over all the concerns of public life, federalism protects the liberty of the individual from arbitrary power. When government acts in excess of its lawful powers, that liberty is at stake.

Bond v. United States, 564 U.S. 211, 220, 222 (2011) (internal citations omitted). While FACE has been upheld (pre-*Dobbs*) as falling within Congress's Commerce Clause powers, *see Norton*, 298 F.3d 547, its *application* in this case violates the Tenth Amendment and the principles of federalism.

For example, in *Jones v. United States*, 529 U.S. 848, 850 (2000), the Court considered whether the federal arson statute, which prohibited burning "'any . . . property used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce,'" applied to an owner-occupied private residence. The Court rejected the Government's "expansive

interpretation," under which "hardly a building in the land would fall outside the federal statute's domain." *Id*. at 857. Instead, the Court held that the reaches of the statute were far narrower, applying only to buildings used in "active employment for commercial purposes." *Id*. at 855. As the Court noted, "arson is a paradigmatic common-law state crime," *id*. at 858, and that the Government's proposed broad reading would "'significantly change[ ] the federal-state balance,'" *id*. (quoting *United States v. Bass*, 404 U.S. 336, 349 (1971)), "mak[ing] virtually every arson in the country a federal offense," *Jones*, 529 U.S. at 859.

Here, trespass is "a paradigmatic common-law state crime." The Government's application of FACE against Fr. Fidelis in this case would convert virtually every trespass at an abortion facility into a federal offense. Our Constitution does not permit such overreach by the Government. The case against Fr. Fidelis must be dismissed.

CONCLUSION

The Court should promptly dismiss this frivolous action against Defendant Christopher Moscinski (Fr. Fidelis) and award him costs and fees for having to defend against this unlawful overreach of the Government.

Respectfully submitted,

AMERICAN FREEDOM LAW CENTER

/s/ *Robert J. Muise*
Robert J. Muise, Esq. (MIP62849)
P.O. Box 131098
Ann Arbor, Michigan 48113
Tel: (734) 635-3756
rmuise@americanfreedomlawcenter.org

Counsel for Defendant Christopher Moscinski

CERTIFICATE OF SERVICE

I hereby certify that on July 29, 2024, a copy of the foregoing was filed electronically. Notice of this filing will be sent to all parties for whom counsel has entered an appearance by operation of the court's electronic filing system. Parties may access this filing through the court's system. I further certify that a copy of the foregoing has been served by ordinary U.S. mail upon all parties for whom counsel has not yet entered an appearance electronically: None.

AMERICAN FREEDOM LAW CENTER

/s/*Robert J. Muise*
Robert J. Muise, Esq.