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September 27, 2016

The Honorable Loretta E. Lynch
Attorney General
U.S. Department of Justice
Washington, D.C. 20530

Dear Attorney General Lynch,

On March 29, 2016, we wrote you concerning the Justice Department's seemingly biased enforcement of the Freedom of Access to Clinic Entrances Act of 1994 (FACE). On June 29, 2016, your agency responded, conceding that the provisions of FACE protecting houses of religious worship have indeed gone unenforced. The response claims that this is because of the availability of other statutes that are "broader in scope" than FACE.

FACE prohibits any use or threat of force or physical obstruction that intentionally injures, intimidates, or interferes with any person seeking to: (1) obtain or provide reproductive health services (*i.e.* abortion), or (2) exercise the First Amendment right of religious freedom at a place of religious worship. The DOJ has used FACE to protect abortion providers on numerous occasions. But by the DOJ's own admission, "the Department has not filed any criminal or civil actions under the FACE Act" to protect religious freedom. The justifications provided for this non-enforcement do not add up.

Your agency's primary claim is that other statutes are "broader in scope" than FACE—especially 18 U.S.C. § 247. In reality, FACE clearly offers broader and more effective protections for religious liberty than § 247. Most significantly:

1. **FACE creates a civil cause of action, while § 247 does not.** Under FACE, citizens who are harassed, threatened, or have their houses of worship vandalized may bring their own civil action, and they may seek injunctive relief, damages, and attorneys' fees. Crucially, FACE also allows the government to bring a civil suit on behalf of the aggrieved party, in which case it may seek a civil penalty in the form of a fine. The opportunity for the government to file a civil suit is a vital element of FACE and greatly enhances the protection for those exercising their right to worship. This is in no small part because civil liability can be proven by a mere preponderance of the evidence while criminal guilt under § 247 must be proven beyond a reasonable doubt.

The DOJ clearly believes civil actions help vindicate people's rights, as it often files civil actions to enforce the Voting Rights Act, the Fair Housing Act, and other civil rights laws. Indeed, since 2009 the DOJ has "filed nine civil cases under FACE on behalf of abortion providers, securing relief in seven of them." Those exercising their right to worship freely deserve at least the same protection, and they aren't receiving it.

2. **FACE's criminal provisions are broader than § 247.** Section 247 criminalizes acts of violence and intimidation that are motivated by a specific animus—*i.e.* when the act is undertaken “because of the religious character of that property” or “because of the race ... of any individual associated with that religious property.” This is substantially narrower than the protection offered by FACE, which criminalizes all intentional acts and attempts of violence against houses of worship, regardless of a specific racial or religious animus.
3. **Section 247 contains a higher prosecutorial bar than FACE.** Under § 247(e), “no prosecution of any offense ... shall be undertaken” unless “a prosecution by the United States is in the public interest and necessary to secure substantial justice.” FACE contains no such provision, meaning criminal and civil cases can proceed regardless of the DOJ's conception of what is “necessary” for “substantial justice.”

Again, FACE clearly offers broader protections than § 247, which greatly undermines the DOJ's rationale for not using FACE. But even this somewhat misses the point: FACE is the law. It is not the DOJ's prerogative to decide which laws merit enforcement and which ones merit no enforcement at all. There are multiple statutes proscribing violence and intimidation that the DOJ could use to shield abortion providers, but the DOJ uses FACE because of the broad protections and expansive remedies it offers. If protection is extended to abortion clinics under FACE, then it ought to be extended to houses of worship suffering FACE violations as well.

We would also note that, without explanation, the response did not address a number of our specific requests for information regarding the enforcement of FACE in our original letter. We are keenly interested in the way the DOJ gathers, catalogues, and pursues cases involving religious liberty. Based on the facts presented in our initial letter, and the troubling facts disclosed (and not disclosed) in the response, it appears that abortion is being given much higher priority than religious freedom by the DOJ without any justification.

This perception is buttressed by the admission that the recorded incident referenced in our initial letter went completely unnoticed by the Civil Rights Division.¹ The clip in question shows “more than a thousand” angry protestors chanting hateful slogans and blocking the entrance of the Los Angeles Temple of the Church of Jesus Christ of Latter-day Saints.² Demonstrations like this were part of a larger campaign of intimidation and harassment carried out against the Mormon Church for its support of California's Proposition 8.³ This campaign of hate was covered extensively by the press; for example, stories ran in major newspapers like the *Los Angeles Times*, and on national news networks like CNN and CBS.⁴ The DOJ's explanation for its inaction on this issue, that the “matter had not previously been brought to our attention,” simply lacks

¹ See <http://www.youtube.com/watch?v=GxagcNFyHyc>.

² See Jessica Garrison & Joanna Lin, *Prop. 8 protesters target Mormon temple in Westwood*, *Los Angeles Times*, Nov. 7, 2008, <http://www.latimes.com/local/la-me-protest7-2008nov07-story.html>; John Cadiz Klemack, Patrick Healy, & Jon Lloyd, *Prop 8 Protesters March Into Night*, NBC 4 Los Angeles, Nov. 7, 2008, http://www.nbclosangeles.com/news/politics/Protestors_Signal_Battle_over_Same_Sex_Marriage_Not_Over.html.

³ See Artie Ojeda, *Proposition 8 Protest Targets Mormon Church*, NBC 7 San Diego, Nov. 10, 2008, <http://www.nbcsandiego.com/news/local/Proposition-8-Protest-Targets-Mormon-Church.html>.

⁴ See Garrison & Lin, *supra* note 2; *Prop 8 Protest Continue*, CBS, Nov. 7, 2008,

https://www.youtube.com/watch?v=cj_jsrbFti8; *CNN: The Mormon Church vs. Proposition 8*, CNN, June 18, 2010, <https://www.youtube.com/watch?v=CGg3yXNyivA>.

credibility. Given the massive law enforcement presence protecting the house of worship from being overrun by an angry mob, it seems highly unlikely that the local U.S. Attorney's office, which has its own Civil Rights Unit, was unaware of the incident.

In short, it would appear the DOJ's process for tracking violations of religious liberty is either woefully inadequate or purposefully biased.

In light of the response, we request answers to the below follow-up questions. We also ask again that you respond to several inquiries made in our March letter that have gone unanswered, which are replicated below. The information we ask for is necessary to carry out our duty to conduct oversight of the DOJ, and to determine whether the DOJ is doing everything it can to protect the rights of all American citizens.

FACE and § 247

1. The response letter claims that § 247 is a statute "broader in scope" than FACE. Do you still stand by that claim? If so, please explain.
2. Why has the DOJ brought numerous civil actions on behalf of abortion providers under FACE but not for a single house of worship?
3. Was the U.S. Attorney's Office entirely unaware of the high profile blocking of a house of worship in Los Angeles, an event covered extensively in the press? If so, how do you explain the DOJ's lack of awareness?

Again, we ask that you please respond to the following requests, with the applicable time period for each being January 2009 to present:

FACE enforcement with regard to abortion facilities

1. Identify by date, location, and name of organization, every discussion, conference, or meeting (whether by e-mail, text message, phone, video, or in person) between the DOJ and any pro-abortion, "reproductive choice," or "pro-choice" advocacy group or similar organization, concerning FACE enforcement with regard to access to abortion facilities.
2. Identify by date, location, and name of organization every discussion, conference, or meeting (whether by e-mail, text message, phone, video, or in person) between the DOJ and any abortion clinic or facility, abortion provider, parent organization, or affiliate, concerning FACE enforcement with regard to access to abortion facilities.
3. Identify by date, location, and name of organization every discussion, conference, or meeting (whether by e-mail, text message, phone, video, or in person) between the DOJ and any anti-abortion, or "pro-life" advocacy group or similar organization, concerning FACE enforcement with regard to access to abortion facilities.
4. Identify the number of matters the DOJ has investigated, looked into, or reviewed concerning potential FACE enforcement with regard to access to abortion facilities.
5. Identify the number of matters the DOJ has assigned "DJ Numbers" to concerning potential FACE enforcement with regard to access to abortion facilities.

FACE enforcement with regard to houses of worship:

1. Identify by date, location, and name of organization every discussion, conference, or meeting (whether by e-mail, text message, phone, video, or in person) between the DOJ

and any religious freedom or religious liberty advocacy group or similar organization, concerning FACE enforcement with regard to access to houses of worship.

2. Identify by date, location, and name of organization every discussion, conference, or meeting (whether by e-mail, text message, phone, video, or in person) between the DOJ and any religious group, house of worship, or similar organization, concerning FACE enforcement with regard to access to houses of worship.

Very truly yours,



Ted Cruz
U.S. Senator



Mike Lee
U.S. Senator

Cc: The Honorable Charles E. Grassley
Chairman
Senate Committee on the Judiciary

The Honorable Patrick J. Leahy
Ranking Member
Senate Committee on the Judiciary

The Honorable Christopher A. Coons
Ranking Member
Subcommittee on Oversight, Agency Action,
Federal Rights and Federal Courts