



February 6, 2023

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Dear Counsel:

In 2022, the U.S. Supreme Court held that the tort of malicious prosecution involved a suit instituted without probable cause, where the motive in instituting the suit was malicious and where the prosecution terminated in the acquittal of the accused.¹

In the prosecution of Mark Houck under the Freedom of Access to Clinic Entrances (FACE) Act, 18 U.S.C. § 248(a)(1), counsel to the government pursued prosecution despite the lack of probable cause and acted with a malicious motive. First, the government knew or should have known that it would not be able to prove the allegations made in the indictment.²

Second, the government intentionally misstated the evidentiary requirements necessary to prove a violation of 18 U.S.C. § 248(a)(1). The government stated that it need only “introduce evidence that proves the following elements: (1) the defendant used force; (2) the intentionally injured, intimidated, and interfered with B.L., or attempted to do so; and (3) the defendant acted because B.L. was a provider of reproductive health services.”³ 18 U.S.C. § 248(a)(1) requires a showing that the relevant person (“B.L.”) was “obtaining or providing reproductive health services.”⁴ Whether B.L. was a provider of reproductive health services is irrelevant. At the time of the alleged threat or violence against B.L., the relevant reproductive health services had already been *provided*.⁵ The statute does not replicate common law assault; it is clearly not a statutory FACE Act offense (although it may violate other laws) for a defendant to use force to injure someone who had *completed* providing reproductive health services. And the government is not even acting consistently with those courts

¹ *Thompson v. Clark*, 142 S. Ct. 1332, 1338 (2022) (internal citation omitted) (cleaned up).

² *U.S.A. v. Houck*, Criminal No. 22-cr-323 (E.D. Pa. 2022), ECF No. 1; Government’s Response in Opposition to Defendant’s Motion to Dismiss, *U.S.A. v. Houck*, Criminal No. 22-cr-323 (E.D. Pa. Dec. 16, 2022) ECF No. 27.

³ Government’s Response to Defendant’s Motion in Limine No. 2 at 3, *U.S.A. v. Houck*, Criminal No. 22-cr-323 (E.D. Pa. Dec. 16, 2022), ECF No. 31.

⁴ 18 U.S.C. § 248(a)(1).

⁵ *Terry v. Reno*, 101 F.3d 1412, 1421 (D.C. Cir. 1996) (noting the statutory text is in the active, not past tense, *viz.*, “the provision of reproductive health services”).

which have relied on legislative history to add in to the statutory text the element that the person “is or *has been* obtaining or providing reproductive health services.”⁶ Even the most liberal interpretation of the statute does not convert its text to the past tense as the government has done here (“Defendant Houck acted as he did because B.L. **was, or had been**, providing reproductive health services, or Houck acted as he did to keep B.L. from providing reproductive health services”).⁷ And the forceful retaliation against a volunteer patient escort disconnected from the actual provision of healthcare services is not a reasonable factual basis for a FACE Act prosecution.⁸

Third, the government’s lawyers moved to preclude evidence of the fact that the Philadelphia Police Department did not charge Houck and the fact that the Philadelphia District Attorney’s Office dismissed the alleged victim’s private criminal complaint against Houck.⁹ In their brief, the government specifically sought suppression of “statements” which would “reference his purported motivation for assaulting the victim, which was because Defendant Houck was protecting his minor son who was present during the incidents.”¹⁰

For these reasons, the subject-listed attorneys should be investigated for misconduct.

/s/ Reed D. Rubinstein
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⁶ *United States v. Operation Rescue Nat’l*, 111 F. Supp. 2d 948, 954 (S.D. Ohio 1999).

⁷ Government’s Trial Memorandum, at 4, *U.S.A. v. Houck*, Criminal No. 22-cr-323 (E.D. Pa. 2023), ECF No. 45 (emphasis added); *cf.* Indictment, *U.S.A. v. Houck*, Criminal No. 22-cr-323 (E.D. Pa. Sept. 20, 2022), ECF No. 1.

⁸ Government’s Response to Defendant’s Motion in Limine No. 2 at 5, *U.S.A. v. Houck*, Criminal No. 22-cr-323 (E.D. Pa. Dec. 16, 2022), ECF No. 31.

⁹ Government’s Consolidated Motion in Limine, *U.S.A. v. Houck*, Criminal No. 22-cr-323 (E.D. Pa. Dec. 5, 2022), ECF No. 21.

¹⁰ *Id.*