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A POST-ROE AMERICA: THE LEGAL CONSEQUENCES OF THE DOBBS DECISION

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A POST-ROE AMERICA: THE LEGAL CONSEQUENCES OF THE DOBBS DECISION

TUESDAY, JULY 12, 2022

UNITED STATES SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Committee met, pursuant to notice at 9:59 a.m., in Room 106, Dirksen Senate Office Building, Hon. Richard J. Durbin, Chair of the Committee, presiding.

Present: Senators Durbin [presiding], Feinstein, Whitehouse, Klobuchar, Coons, Blumenthal, Hirono, Booker, Padilla, Ossoff, Grassley, Cornyn, Lee, Cruz, Hawley, Cotton, Tillis, and Blackburn.

OPENING STATEMENT OF HON. RICHARD J. DURBIN, A U.S. SENATOR FROM THE STATE OF ILLINOIS

Chair DURBIN. This meeting of the Senate Judiciary Committee will come to order. I usually defer to the presence of Senator Grassley, my colleague on the Committee, but he is running a few minutes late, and so he has given me permission to begin, and I will certainly recognize him when he arrives.

A little over 2 weeks ago, the Alito Supreme Court issued its decision in *Dobbs v. Jackson Women's Health Organization*. The majority overturned nearly five decades of precedent, holding that the United States Constitution does not protect a woman's right to an abortion, reversing both *Roe v. Wade* and *Planned Parenthood v. Casey*. This case represents the first time in America's history that the Supreme Court has revoked a constitutionally protected right. The first time. As a result, a woman's personal decision to make her own reproductive health care choices is no longer protected or guaranteed by the Constitution.

In the words of Justices Kagan, Sotomayor, and Breyer, the conservative majority has, quote, "consigned women to second class citizenship." In overturning *Roe*, the Supreme Court has unleashed a health care crisis across America. Make no mistake, women's health, and in some cases their lives, are at risk.

Today, the Committee will examine the very real consequences of the Court's unprecedented decision. We'll start with a video.

[Video presentation.]

Since the *Dobbs* decision, at least 10 States have banned abortion. More are expected to join them. The bans we've seen include insufficient and confusing exceptions for the life of the mother. Many do not even provide exceptions for rape or incest. When they do, they are unwieldy and inadequate.

What exactly do these efforts to ban abortion mean in the real world? They mean that a woman facing complications in pregnancy could die waiting in the hallway of a hospital because a doctor must weigh the risk of jailtime against making the best decision for the health of the patient. That means that individuals in organizations who help someone travel to a State like my State of Illinois, where abortion is legal, may face legal liability. Consider a letter sent to the Sidley Austin Law Firm last week, by a group of conservative Texas lawmakers, which threaten to, quote, “impose additional civil and criminal sanctions on law firms that pay for abortions or abortion travel.”

Some Republican State lawmakers have even sought to punish women seeking abortions. For example, in Louisiana, Republican legislators sought to advance a bill in May that would have subjected women who terminate pregnancy to charges of criminal homicide.

In his majority opinion, Justice Alito claims that by overturning *Roe* and *Casey*, the Court was simply returning power to decide how abortion may be regulated to the States. But *Dobbs* raises many questions with no answers, leaving health care providers and patients to navigate new restrictions that will likely and rightfully face further constitutional challenge. For example, in his concurring opinion, Justice Kavanaugh insists that the State cannot infringe on the, quote, “constitutional right to interstate travel,” close quote. It seems some State Republican lawmakers didn’t get the message. They are proposing bills that will turn their State borders into Checkpoint Charlies for patients seeking abortions out-of-state.

In a post-World War America, it is not only abortion rights that are in peril. Other constitutional rights are under threat, and that’s not my conclusion. It’s Justice Clarence Thomas’ conclusion. According to him, your constitutional right to privacy is a fiction. In his concurring opinion, Justice Thomas declares that a court should, quote, “eliminate the constitutional rights to birth control, marriage equality, and consensual relationships between LGBTQ people,” close quote. This radical, regressive vision for America is eroding the Court’s institutional integrity.

This comes in the aftermath of Republican Leader McConnell’s blocking President Obama’s right to fill the Supreme Court vacancy. President Donald Trump pledged to appoint nominees who would’ve overturned *Roe v. Wade*. That was the box each one of them had to check with the Federalist Society before they could appear before this Committee.

Today, three in four Americans say they have lost faith in the Supreme Court, a record low. It’s easy to see why. Families are living in fear that some of their most cherished rights are now on the conservative chopping block. So, what are we going to do to protect these rights? What are we going to do to defend women who have already had their rights revoked?

We know the Republican plan, win control of Congress and impose a Federal ban on abortion. The Republican leader said as much. Democrats have a different plan. Protect your rights by entering a —entering a Federal statutory right to abortion. In fact, that’s exactly what the vast majority of Americans support, keep-

ing access to abortion legal. A woman's choice to get an abortion is her choice alone. Politicians have no business sitting in the waiting room with the doctor. With that, I'll turn to Ranking Member Grassley for his opening statement.

**STATEMENT OF HON. CHARLES E. GRASSLEY,
A U.S. SENATOR FROM THE STATE OF IOWA**

Senator GRASSLEY. Thank you, Mr. Chairman. This is a very important hearing. I cast my first pro-life vote February 1972 as a Member of the Iowa House of Representatives. There was a motion before the House to repeal Iowa's ban on abortion. I was 1 of 44 people in a 44 to 44 vote, that voted not to repeal that bill, and obviously on a 44 to 44 vote, it didn't happen. The next year, we had *Roe v. Wade*, and it was never an issue with Iowa legislature until potentially it could be now as a result of *Roe*'s overturn.

We're here today because the Supreme Court has corrected a wrong that has impacted millions of lives since 1973. We're here because the Supreme Court, in a meticulous and well-reasoned opinion, returned the decision of abortion back to the States. For many Americans this decision is about far more than correcting a flawed legal analysis in *Roe*. It means protecting the rights of the unborn. This ruling doesn't ban the practice of abortion, but instead empowers the people, through their accounted elected Representatives to make common sense policy decisions. It takes policy out of the hands of unelected judges.

I understand with a decision of this magnitude comes differences of opinion and robust debate on the next steps. That's okay, and I welcome that. We live in a democracy, and with differences of opinion and passion for policies, all of that followed by thoughtful debate, can lead us to the best outcomes for the American people.

However, the treatment of Supreme Court Justices, pregnancy centers, and conservative women has been outrageous since *Dobbs* decision was leaked. Remember this: 8 out of 10 Americans do not support abortion on demand, right up to the time of birth.

First, regardless of views on this issue, we should all respect the role of our impartial Judiciary and the decisions that it renders. Seeking to intimidate or attack the Court or undermine its credibility because of an outcome that you don't agree with is dangerous—dangerous, and that's not an answer.

Justices have had their addresses published online, have been subjected to illegal pressure campaigns at their family homes, and one Justice was even the victim of an attempted assassination. I've called on the Justice Department to enforce the law and protect the Justices and their families from these very real threats. The lack of a response from both the Justice Department and the White House is extremely, extremely disappointing.

Along with the threats against the Justices, threats against pro-life, and crisis pregnancy centers have dramatically increased since the leak of the *Dobbs* decision, by pro-abortion extremists such as Jane's Revenge and Ruth Sent Us. They've been—there's been at least 40 violent attacks on crisis pregnancy centers, religious institutions, and other pro-life entities since the *Dobbs* leak, and before the Court even issued its final opinion.

[Poster is displayed.]

The first pictures I have with me is a crisis pregnancy center in North Carolina that was vandalized with pro-abortion and pro-Antifa graffiti. That is in the corner—in the corner is the Antifa sign. Another one in Oregon was set on fire, causing significant damage, as you can see behind me. I pray for these centers and the thousands of patients they serve every day.

I encourage all of my Colleagues, as well as myself, to condemn the violence and vandalism. I want to ensure that these violent attacks are recognized by the FBI, and are being properly investigated for what they are, cases of abortion related violent extremism. Let me be clear, very clear, threats and violence are not the answer.

I also want to bring your attention to the incredible group of women that we have here with us today. We know women have been the center of the pro-life movement, and tirelessly advocating for the lives of the unborn and the well-being of mothers everywhere. I'd like to introduce to you a few of these women in addition to our witnesses, who I'll introduce in a moment.

We have here with us today, Dr. Christine Francis. Dr. Francis is an OB/GYN in Indiana. She's chair of the Board of the American Association of Pro-Life Obstetricians and Gynecologists and a board member of the Indiana Right to Life. Dr. Francis spent time working with orphans in Romania and Burma and working for 3 years as the only OB/GYN at a mission hospital in rural Kenya. She has dedicated her life, professionally and personally, to treating women, protecting the lives of the unborn, and educating people on the dangers of the abortion industry. We are also fortunate to have someone like her in the practice of medicine.

Also, Dr.—also, Catherine Glenn Foster—Catherine Glenn Foster with us, who has in the past been a witness before this Committee. She serves as president and CEO of the Americans United for Life. Catherine often shared her story of having an abortion at 19, due to the extreme emotional and psychological pressure she faced. Catherine felt alone after her decision. I'm sorry for the loss that you experienced, Catherine, and I hope that we can do better to give young women the love and support they deserve, no matter what.

Janet Durig is the executive director of the Capitol Hill Pregnancy Center, just down the road from us a short way. Capitol Hill Pregnancy Center provides compassionate care, as well as complete, accurate information pertaining to pregnancy and pregnancy options. They, too, also have dealt with vandalism of their clinic. However, they continue to provide services such as counseling and childbirth and parenting classes. Thank you, Janet, for the work that the center does to serve those in the DC area who need support the most.

I also want to thank representatives of the incredible groups that we have here today, March for Life, Susan B. Anthony List, Concerned Women of America, Iowa Catholic Bishops, Family Research Council, to name a few. You all also do incredible work in zealously advocating for the lives of the unborn, as well as women's health, and for that I thank you.

Let's have a productive discussion today, on how we can best support women and families coming forward. But, as I said before,

threatening Justices, pregnancy centers, and churches is not the answer. I hope the extreme rhetoric that gives rise to this violence won't be a part of our conversation today. Mr. Chairman, I'd like to request to enter into the record the statements from Live Action and the American Association of Pro-Life and Obstetricians and Gynecologists. Thank you.

Chair DURBIN. Without objection. Let me start on a positive and bipartisan note, in light of your opening statement, Senator Grassley. I have stated time and again, political violence, in furtherance of any cause is unacceptable, period. No matter who commits it, no matter what theology fuels it. I condemn all violence and threats of violence in the strongest possible terms, whether the targets are pregnancy counseling centers or abortion clinics, period. Violence is never an appropriate form of protest.

This Committee has passed legislation that will protect our judges, and I'm glad we did it. I'm sorry to say that one of the most important bills, the Daniel Anderl Judicial Security and Privacy Act, which would give the Supreme Court Police greater discretion in protecting the Justices and their families, among other provisions to protect judges, has been held up on the floor. I can say that the person holding it up is a junior Senator, Republican Senator from Kentucky. I think it's a serious mistake. Lives are at risk as we fail to put this into law and to give even more resources to the judiciary to protect their members.

Today we welcome five witnesses, and I thank them for joining us. Before we swear them in, I'll briefly introduce the Democratic witnesses, then turn to Senator Grassley to introduce the Republican witnesses.

Our first witness is Illinois Lieutenant Governor Juliana Stratton. She's the 48th Lieutenant Governor in the history of our State. She previously served as a Member of the Illinois House of Representatives, and I'm grateful for you traveling here, Lieutenant Governor.

Professor Khiara Bridges, professor of law at the University of California Berkeley School of Law. I also want to thank Professor Bridges' mother, Deborah, who is here celebrating her birthday. I understand she's in the audience and we welcome her.

Dr. Colleen McNicholas is an OB/GYN and the chief medical officer of Planned Parenthood of the St. Louis region, in Southwest Missouri. Thanks for joining us today, Dr. McNicholas.

Let me turn to Senator Grassley, before I administer the oath, for his introductions.

Senator GRASSLEY. My first person is Denise Harle. Ms. Harle serves as senior counsel Alliance Defending Freedom, where she is director of the Center for Life. In this role, Ms. Harle leads her team's litigation and advocacy effort to defend pro-life legislation around the country. She also networks with pro-life allies, speaks publicly on behalf of her organization, and works to defend the First Amendment freedoms of pro-life health care professionals and pregnancy resource centers. Since joining ADF, Ms. Harle took the primary role in drafting the briefs to the U.S. Supreme Court in *NIFLA v. Becerra*, resulting in a free speech victory for California pro-life pregnancy centers. We welcome you.

Next, we have Heidi Matzke. Ms. Matzke is executive director of the Alternative Pregnancy Center and has worked with them for 7 years. The center is a non-profit, pro-life women's medical clinic, which seeks to address the holistic aspect of an unplanned pregnancy, including the medical, emotional, material, and spiritual needs of the mother. These services are free through the clinic. The center provides pregnancy tests, ultrasound, abortion pill reversals, STD testing and treatment, prenatal care, gynecological care, abortion recovery classes, and contraceptive education. Prior to working at the center, Ms. Matzke worked as director of health services for the Christian Financial Strategies. We welcome you, as well.

Chair DURBIN. Thank you, Senator Grassley. Let me explain the traditional procedure before the Committee. Each of the witnesses will be given 5 minutes for an opening statement. Then Members will be recognized in order for 5 minutes of questioning. Before we proceed though, I ask the witnesses to please stand and raise their right hand for the administration of an oath.

[Witnesses are sworn in.]

Let the record reflect that all five witnesses answered in the affirmative. Now for their opening statements, I first recognize Lieutenant Governor Stratton. Please proceed.

**STATEMENT OF HON. JULIANA STRATTON,
LIEUTENANT GOVERNOR, STATE OF ILLINOIS,
SPRINGFIELD, ILLINOIS**

Lt. Gov. STRATTON. Good morning, and thank you, Chairman Durbin, Ranking Member Grassley, and the distinguished Members of the Senate Judiciary Committee, for the opportunity to testify today. I'm Juliana Stratton, Lieutenant Governor of the great State of Illinois, and I use she/her pronouns.

Since coming into office, Governor J.B. Pritzker and I have been focused on the health, safety, and access to opportunities for all women of Illinois, of all backgrounds and ages. One way that we've worked to make that a reality is by preserving and protecting legal abortion in Illinois. In 2019, Governor Pritzker signed the Reproductive Health Act, which enshrined reproductive rights into State law, repealed outdated laws criminalizing abortion, and requires private health insurance plans to cover abortion as the vital reproductive health procedure that it is.

We made a vow that our State will be a beacon of hope for all. This was a promise that we made to the people of Illinois, and I come before you today because people throughout the entire Midwest are relying on our commitment to protect and preserve women's rights, namely, the right to an abortion.

It is no secret that Illinois stands out as one of the only States in the U.S. heartland, where our laws on legal abortion have not been impacted by the Supreme Court's overturning of *Roe v. Wade*. We are not just an oasis of reproductive care but an island, and here's what that looks like. It looks like disenfranchised, yet determined patients coming from every surrounding State, but also from as far away as Tennessee, Texas, Louisiana, Alabama, and Florida. It looks like the entire staff of our State's abortion clinics fielding phone calls for appointments, because the number of out-of-state patients have doubled since *Roe v. Wade* was overturned. That's on

top of the nearly 10,000 women, who already came to Illinois seeking abortion care, according to 2020 data by the Illinois Department of Public Health.

In the coming months and years, these numbers will inevitably increase, and sadly, too, will the preventable suffering and pain of women and families across the Nation, facing the negative ramifications of a post-*Roe* America. Because of the history of systemic racism, we know that inequities are amplified within the Black and Latinx communities. A post-*Roe* America will be devastating for Black women, who's maternal mortality rate is already two to three times higher than that of white women, because of structural racism and misogyny. One study projects that without safe and legal access to abortions, that number will increase by over 30 percent among Black women, and nearly 20 percent for Hispanic women. Let's take a moment to just let that sink in.

We are facing a future rife, with needless death, despite 61 percent of Americans believing abortion should be legal in most or all cases, according to a Pew Research Center survey conducted in March 2022. It's hard to overestimate just how devastating the outcome of this ruling is and will be, despite our years of preparation. Before the threats to *Roe v. Wade* were fully realized, Illinois was proactive, upholding bodily autonomy and protecting the right to an abortion. Still, the overturning of *Roe v. Wade* has sent us down a dark, agonizing path. The Supreme Court's decision does not, quote, "leave abortion up to the States," when every State will be impacted. To be clear, this means that every city, town, county, urban, suburban, and rural, and our rural and unincorporated areas already experience inequities when it comes to accessing health care overall. The weight of this ruling will surely be felt across State borders.

In Illinois, and in States like ours, we are bracing for what is to come, as these diverse communities across the Nation turn to us. Governor Pritzker called on the President to move forward on key items that will address how States like ours will be affected, like creating a centralized hub for providers and patients to ease the burden on facility capacity amid higher demand. Most of all, Illinois and other States with legal abortion need more access to Federal money to support demand.

I commend President Biden for the steps he has taken to safeguard access to reproductive care through executive order on Friday, which included actions to expand access to contraceptives. This is a great start. In Illinois, all hands are on deck, as we brace for what is coming, because we know we are the only lifeline for so many, after so much has been taken away from women, from the American people. I say this, not just as the Lieutenant Governor of Illinois, but as a mother of four daughters, my daughters who now have fewer rights than I had.

In Illinois, excuse me—based on Justice Clarence Thomas' concurring opinion, it is likely this may not be the last rights that will be stripped from future generations, as access to contraceptives and the right to love and marry who you choose, have already come under threat with the overturning of *Roe v. Wade*. In Illinois, we will not go back. We will not be silent or stand on the sidelines, and I thank Governor Pritzker, Illinois' legislative leaders, and our

State's General Assembly, and all the community advocates who have joined forces to ensure just that. We already know how dangerous it is to turn back the clock of progress, and I ask each of you, as leaders, help us push forward, before it's too late. Thank you.

[The prepared statement of Lieutenant Governor Stratton appears as a submission for the record.]

Chair DURBIN. Thank you for your statement, Lieutenant Governor. We extended the period for your statement a little bit, and the same courtesy will be extended to all of the witnesses. Ms. Harle.

**STATEMENT OF DENISE HARLE, SENIOR
COUNSEL AND DIRECTOR OF THE CENTER
FOR LIFE, ALLIANCE DEFENDING FREEDOM,
TALLAHASSEE, FLORIDA**

Ms. HARLE. Chairman Durbin, Ranking Member Grassley, and Members of the Committee, I'm Denise Harle, senior counsel and director of the Center for Life at Alliance Defending Freedom. The *Dobbs* decision provides tremendous hope for women and unborn children across this country. For the first time in half a century, the people, through our elected representatives, have the legal authority to affirm the dignity of women and fully protect unborn babies. The Supreme Court was correct to overrule its egregious decision in *Roe v. Wade*, where seven male justices insulted women's dignity by saying that motherhood forces upon us a distressful life and future.

I am here today with my own mom and my precious 4-month-old baby girl, and I have two children at home. I join with millions of mothers nationwide in saying that the ruling in *Roe* was a shameful, dehumanizing, and false characterization of the role that women and moms hold in our society. I know that every woman's story is unique, and for that some women finding out you're pregnant is very difficult and unwelcome news. But pregnancy is not a barrier to success, and motherhood doesn't ruin a woman's chance to have a happy, fulfilled life. To say otherwise is demeaning and degrading.

Dobbs was also a victory for the Constitution. As the decision explains, nothing in our Constitution's text, history, or structure supports a so-called right to abortion. Even constitutional law scholars who are pro-abortion have admitted this. Harvard Law Professor Laurence Tribe said *Roe* was a verbal smoke screen, and that the substantive judgment on which it rests is nowhere to be found. The late pro-abortion icon, Justice Ginsburg, called *Roe* a heavy-handed judicial intervention that was difficult to justify, and legally, scientifically, morally, it is.

Under the *Roe* regime, the United States became an extreme outlier in abortion law. Seventy-five percent of nations around the world don't permit elective abortion at all, or at most limit it to 12 weeks. Under *Roe*, the United States joined a handful of countries, including human rights abusers China and North Korea, to allow abortion on demand after 20 weeks of pregnancy.

The *Dobbs* decision unshackled States from this judicial power grab in *Roe*, that was based on falsehoods about history and

science. We can apply scientific knowledge that we've gained since that infamous decision. Medical advancements in the past 50 years have made it crystal clear that States have a compelling interest in protecting unborn children at every stage of development. With the help of ultrasounds, we've learned that babies in the first 12 weeks develop heartbeats and brainwaves. They move around and kick. They can hiccup, suck their thumbs, even taste what their mom eats.

It's entirely reasonable and right for Americans to protect these tiny humans, and the American citizens are prepared to do so. In fact, reports that Americans supported *Roe* are extremely misleading. *Roe* allowed for abortion up to the moment of birth, but nearly 90 percent of Americans oppose abortion in the third trimester, let alone until birth.

Now, for the women who find themselves overwhelmed by the prospect of motherhood, there is hope, and it doesn't involve destroying the baby for a fee. We need to be pointing pregnant moms toward real help. Thousands of pregnancy resource centers around the Nation stand ready to support women at no cost, with tangible services, both during and after a mother's pregnancy. Many States are also pouring resources into creative programs to ensure that every pregnant mom can access the critical support she needs. Churches, adoption agencies, and other civic organizations are redoubling their efforts.

Dobbs marks a new day for our country, the opportunity to build a better society than the one the Court forced upon us in 1973. A society that not only affirms that life is a human right, but that embraces motherhood by providing opportunities for women to thrive as moms. We as a Nation can no longer use *Roe* as an excuse to treat pregnancy as a woman's problem that she alone must solve. It's time to implement innovative support systems and empower women to pursue full and flourishing lives for their families and themselves. The post-*Roe* legal landscape is changing as we speak, and I am so grateful that we are entering a new era where the American people have the opportunity to lead the world in upholding the dignity of women, of their children, and of human life. Thank you for your time.

[The prepared statement of Ms. Harle appears as a submission for the record.]

Chair DURBIN. Thank you. Professor Bridges.

**STATEMENT OF KHIARA M. BRIDGES,
PROFESSOR OF LAW, UC BERKELEY SCHOOL
OF LAW, BERKELEY, CALIFORNIA**

Professor BRIDGES. Chairman Durbin, Ranking Member Grassley, and Members of the Senate Committee on the Judiciary, thank you for the opportunity to testify before you today. My name is Khiara Bridges, and I am a Professor of Law at the University of California Berkeley School of Law. I am here today to explain how the U.S. Supreme Court's radical decision in *Dobbs v. Jackson Women's Health Organization* to take away constitutional protection for reproductive freedom harms people of color.

In *Dobbs*, the Court upheld Mississippi's ban on abortions after 15 weeks of pregnancy, and in the process, overturned *Roe v. Wade*.

Dobbs declares that *Roe* erred when it interpreted the Fourteenth Amendment's Due Process Clause to protect a right to terminate a pre-viability pregnancy insofar as that clause only protects rights that are, quote, "deeply rooted in the Nation's history and tradition, and implicit in the concept of ordered liberty", end quote.

For the *Dobbs* majority, the country's laws in 1868, the year that the Fourteenth Amendment was ratified, determine whether abortion rights can be so characterized. After canvassing abortion regulations in 1868, the majority concludes that abortion rights are not part of the Nation's history and tradition. The painfully obvious point to make is that people with the capacity for pregnancy were not part of the body politic during the period of the Nation's history that the majority believes is decisive of the constitutional inquiry. Women cannot vote in the country for another half a century after 1868. Because women could not participate in the democratic process, one could reasonably assume that their interests were not reflected in any of the Nation's laws, including the criminal laws that the *Dobbs* majority reads as foreclosing a constitutional right to terminate a pregnancy. Thus, the majority's decision to privilege the year 1868 and to attempt to define the meaning of the Constitution by looking at the Nation's practices during that time is a decision to privilege an era characterized by the formal exclusion of people with a capacity for pregnancy.

People of color specifies—people of color, specifically Black people, will feel the impact of the Court's decision in *Dobbs*, more than any other racial group. Black people's abortion rate is three to four times white people's abortion rate. This is a direct result of Black people's higher rate of unintended pregnancy, which in turn, is due to higher rates of poverty among Black people.

A frequently cited reason that individuals give for terminating an unintended pregnancy is that they cannot afford to have a child at that time. Thus, the unequal burden of poverty that Black people bear, renders them more likely to face an unintended pregnancy in the first instance, and in the second instance, to lack the funds thought necessary to carry the pregnancy to term and raise the child. As such, when States are permitted to use the criminal or civil law to make abortion inaccessible, States render unavailable a service upon which Black people desperately rely.

Further, the number of people of jails and prisons has grown tremendously since 1973. The incarcerated population has quadrupled in the last 40 years, with close to 2 million people confined in jails and prisons today. This is to say that the country currently is much more willing than it was in the generations that proceeded *Roe* to turn to jails and prisons to address its social problems, both real or imagined. Moreover, there now exists precedent for punishing people for poor pregnancy outcomes, a precedent that simply did not exist during the era of criminal abortion laws that proceeded *Roe*.

In the 1980's, during the crack/cocaine scare, States began to use creative interpretations of the criminal law to prosecute Black people who used a drug during their pregnancies. Arrests and prosecutions for substance use during pregnancy continue to the present.

Further, criminal punishment of pregnant people who have suffered poor birth outcomes occur outside of the context of substance

use. For example, prosecutors brought charges against a depressed pregnant woman who attempted suicide and suffered a miscarriage as a result. I could go on and on. Although a number of abortion rights opponents currently claim to consider the pregnant person who has an abortion to be a victim, I am skeptical about the sincerity or endurance of this belief in light of our current practice of punishing pregnant people for their pregnancy outcomes.

Importantly, even if Black people attempted to self-manage abortion despite the threat of criminal punishment as frequently as people of other races, we should fully expect that Black people will be more frequently and more harshly punished for breaking the law. We should have this expectation because as a general matter, Black people are more likely than their non-Black counterparts to be arrested, prosecuted, indicted, and convicted for the same conduct. And they serve longer sentences than their non-Black counterparts, even when controlling for relevant factors.

In conclusion, I cannot overstate the level of harm and chaos that the *Dobbs* decision has already caused people seeking abortion care providers and practical support organizations. The crisis and access to abortion care in the United States highlights the need for a bold, holistic, and intersectional policy response, that puts within its range of vision everything from the need for comprehensive, paid family and medical leave, to laws that urgently protect the right to both. Thank you.

[The prepared statement of Professor Bridges appears as a submission for the record.]

Chair DURBIN. Thank you, Professor. Ms. Matzke, did I pronounce your name correctly?

Ms. MATZKE. Yes.

Chair DURBIN. Please proceed.

**STATEMENT OF HEIDI MATZKE, EXECUTIVE
DIRECTOR, ALTERNATIVES PREGNANCY
CENTER, SACRAMENTO, CALIFORNIA**

Ms. MATZKE. Mr. Chairman, Ranking Member Grassley, and Members of the Committee, thank you so much for the privilege and honor of being here today. My name is Heidi Matzke, and I am the executive director of Alternatives Pregnancy Center in Sacramento, California.

I came into this role by a roundabout road, that began in a very emotional place. A number of years ago, on the day my sister and I were supposed to leave for college, she showed up at the door and collapsed on the ground. I said, "What's wrong?" as I looked into her eyes. She looked up at me and she said, "I'm pregnant." I still remember the fear in her eyes. I see that fear almost every single day in the eyes of women who come into our center. They need help, they need someone to talk to, and they need hope. I know because my sister needed all of those things. Our family needed all of those things, and we found them in a local pregnancy care center, and years later, because I wanted to give that same help, and hope, and support to others, I became the Director at Alternatives.

As an organization of mostly women serving women, the staff of our clinic offers our patients compassionate, holistic care, ministering in whatever gentle ways we can to their physical, emotional,

and even spiritual needs. So, it grieves me that since the Supreme Court announces *Dobbs* decision, a great deal of misinformation has been spread about who we are, and what we do.

Let me share with you some of the facts. Our clinic is one of nearly 3,000 pregnancy care centers serving women across America. Each year, hundreds of thousands come to our clinics, looking for free medical care, emotional support, and practical resources that will enable them to carry their pregnancies to term. Our clinic alone, in Sacramento, provides over \$1 million of free medical services each year to women who come to us. We charge them nothing. That means we never financially benefit from any choice a woman makes. We make no profit of any kind off the women who turn to us for help. We offer pregnancy tests, ultrasounds, prenatal care up to 24 weeks, well-woman visits, we test and treat for sexually transmitted diseases. We offer abortion pill reversal services, abortion recovery counseling, and parenting classes. And if finances are a problem, we have diapers, wipes, baby formula, baby food, baby clothing, baby supplies. And if a woman needs a hotel room, we provide that as well. We pay for all of that. It doesn't matter who she is, where she comes from, or what her past is.

At our center, all medical services are provided by a staff of licensed medical professionals, including doctors, nurses, nurse practitioners, and medical assistants. They are deeply compassionate people because most of them have experienced abortion for themselves. Our OB/GYN doctor was an abortionist.

When a woman comes in, so afraid of what an unplanned pregnancy will mean for her life, her ambitions, her relationships, we do not urge her, in that moment, to make any decision. We listen, we try to hear her heart, we offer professional services and emotional support. Whether she chooses parenting, adoption, or abortion, we will continue to be there for her, for years if necessary. Many women choose abortion because they lack the resources and support they need to confidently choose to parent. Over the last 5 years, American pregnancy care centers have served nearly 2 million women who were faced with an unplanned pregnancy and wanted an alternative to abortion.

Yet, pregnancy care centers from coast to coast are being targeted for violent assaults, of vandalism, and hateful attacks online, and in the media. Just last week, as the exhibit shows, a man approached our care center with an armed machete. We have been forced to hire 24-hour onsite security. We have had to reinforce doors and bulletproof our walls. We have had to paint our building with anti-graffiti coating. We've added cameras, armed our staff with pepper spray, and stopped running our mobile clinic because of threats of violence. We have been forced to expend valuable resources, resources for women of up to \$150,000, just to protect ourselves. Why? Because we offer free care to women.

What we do, though, is worth the risk. Every community needs a place for women facing unplanned pregnancies who are seeking dependable medical resources in a safe, caring environment during one of the most difficult times of their lives. "You are pregnant," three of the most powerful words a woman will hear in her life. For some, the words bring incredible joy, and for others, incredible fear. Both deserve support. I thank you for the privilege of sharing with

you a brief glimpse of hope, service, and compassion our pregnancy centers, and so many others across this great country provide to women every single day.

[The prepared statement of Ms. Matzke appears as a submission for the record.]

Chair DURBIN. Thank you, Ms. Matzke. Dr. McNicholas.

**STATEMENT OF DR. COLLEEN P. McNICHOLAS,
CHIEF MEDICAL OFFICER, PLANNED PARENTHOOD
OF THE ST. LOUIS REGION AND SOUTHWEST
MISSOURI, ST. LOUIS, MISSOURI**

Dr. McNICHOLAS. Thank you, Chair Durbin. My name is Dr. Colleen McNicholas, and I use she/her pronouns. I'm a board-certified OB/GYN, trained to provide the full spectrum of sexual and reproductive health care, including abortion care. I practice in Missouri and Illinois, two States where people are living such vastly different realities, that it should be considered by each one of you to be un-American. On June 24th, when the Supreme Court overruled *Roe v. Wade*, it effectively created two nations. One, where those whose reproductive freedom belongs to themselves, and another, whose reproductive freedom belongs to a small group of politicians who have effectively appointed themselves as decision-makers over our bodies, our lives, and our futures.

Today, I'm here to speak for patients, the patients I serve every day, people from across the Midwest and South, who navigate a ridiculous obstacle course just to access basic care. While it may take us years to understand how the Supreme Court decision in the *Dobbs v. Jackson* case will have impacted our public health outcomes, we already know, just 18 days into this post-*Roe* reality, how it's disastrously complicating people's lives and putting doctors in impossible situations.

Since ceasing abortion care at our health center in St. Louis, which was the last remaining abortion clinic in Missouri, our health center in Illinois just across the Mississippi River has cared for patients who have traveled as far as a thousand miles each way. Each one of those patients has told me they had no choice but to travel hours and hours for care. Almost overnight, our Illinois clinic has seen appointments triple, and that's already on top of a double booked schedule we were sustaining in the wake of Texas and Oklahoma's abortion bans.

As we've long said, overturning *Roe* will not stop the need for abortion. The Supreme Court's decision has already pushed people, the people each one of you represents, into extreme and sometimes dangerous circumstances, in order to access one of the safest and most common health care procedures.

In Missouri, and several other States, abortion is banned except in a medical emergency. In other words, in order for doctors to avoid prison time, instead of treating a patient before their health condition becomes life threatening, doctors must now contemplate how sick is sick enough before providing lifesaving abortion care. People will suffer unnecessary harm as doctors wait for permission from hospital lawyers to tell them that they can proceed. In some circumstances, the abortion care will come too late.

Not only is this agenda unpopular, it is deeply anti-life. We already know that abortion care is inextricably linked to maternal health outcomes. In Missouri, Black maternal mortality is four times higher than that for white women. Forcing people to continue pregnancies they do not want or cannot bear will cost lives. Forcing people into parenting without passing policies that address childcare costs, paid family leave, or a formula shortage will cost lives. The anti-abortion agenda is anti-life and hypocrisy at its worst.

I have a plea for our allies, too, those of you who have long stood with us and committed to protecting reproductive freedom. Listen to those of us who have been warning about this moment for years. Work with critical access States to ensure that abortion remains accessible. Use every bit of your power to do something.

On June 24th, 1 hour before the Supreme Court dismantled abortion rights, I was sitting next to HHS Secretary Xavier Becerra, along with partners and allies in Missouri, including the Congresswoman from the First District, Representative Cori Bush. In that meeting, we asked the Biden administration to declare a public health emergency, to support the patients who will have to flee their home States for abortion care, as 36 million people of reproductive age now, or soon, will live in a State where abortion is banned.

Senators, I come before you tired, frustrated, and angry. Those of us on the front lines, the abortion activists, that President Biden's team just this weekend referred to as out of step, we are the ones who are holding back this public health crisis that's about to sweep the country. I speak on behalf of my colleagues, abortion providers and advocates, we deserve better. We need action, and we need it now. We're out of time. Thank you for inviting me to share about this moment in history, which I am certain will be a stain as we move forward. Abortion is normal. It is an act of love, and it is fundamentally health care.

[The prepared statement of Dr. McNicholas appears as a submission for the record.]

Chair DURBIN. Thank you, Dr. McNicholas. We'll now go into 5-minute rounds for the Members to ask questions, and I'll begin. Dr. McNicholas, you've already addressed this issue, but I want to return to it, because I think it is critically important. There are some who say that those who support the abortion procedures are alarmists and exaggerating the danger that women face because of the *Dobbs* decision. I think you've alluded to this, and I want to make it part of the record. The United States already has the highest maternal mortality rates of comparable nations. In other words, more women die in childbirth in this country than most other countries. We are one of only 13 countries where the maternal mortality rate is worse today than it was 25 years ago. Every year, 900 women nationwide die as a result of pregnancy related complications. Seventy thousand suffer near fatal outcomes. Women of color are three times more likely to die as a result of pregnancy than white women. Yet, it could get much worse.

A recent study estimated that a nationwide ban on abortion would increase maternal mortality in the United States by 20 percent. Among Black women, the estimate is in the increase of 33

percent. By ending the Constitutional right to abortion, the Supreme Court has ensured that maternal mortality in the United States will increase. In States, incidentally, with the most restrictive abortion laws already, there's a 7-percent higher maternal mortality rate than States with fewer restrictions.

Tell me the practical side of this, the cases that you've run into as a practicing physician, as a doctor, where you've had to make this decision, life or death decision when it comes to the mother.

Dr. McNICHOLAS. Thank you, Senator Durbin. I first want to acknowledge the fact that you're right. This country has a disappointing and quite embarrassing maternal mortality rate already, and we are on the cusp of seeing that rate increase. The six States with the highest maternal mortality rate are the six States that immediately moved to ban abortion, and that is not a coincidence.

In addition to the public health implications that we won't know for years, impacts on long-term maternal mortality rate, we are already seeing mass chaos among OB/GYNs, emergency room physicians, and quite frankly, pharmacists. We're talking about people being denied or delayed care for pregnancy and non-pregnancy related conditions. Lupus, arthritis, cancer—medications that we use frequently to control those conditions are being denied to patients because they might also contribute to miscarriage or could be used for abortion in other indications.

OB/GYNs who are sitting on patients in emergency rooms while they bleed, while their vital signs become unstable, while they're waiting for hospital lawyers to decide is this patient sick enough. When the consequence of violating a law is criminal, doctors are put in impossible positions where they know the right care, they know what to do to help somebody, but yet they have to wait, making folks sustain totally preventable harm. It is quite embarrassing. It should be shameful.

Chair DURBIN. Professor Bridges, you made a reference in your testimony to 1868, and you used as an example when Justice Alito referred to the historical precedence and went back to 1868, but at that moment in American history, women were not legally entitled to vote. I also note that in that moment women could not own property or enter into a contract in the United States of America. In 1868, not a single woman practiced law in the United States, and that was the historic basis that Justice Alito wanted to use for the *Dobbs* decision. Would you comment again on that particular aspect of this, when we talk about historic precedent?

Professor BRIDGES. Absolutely, thank you for the question. It's a complete choice to elevate the year 1868 as the moment of Constitutional significance, in terms of constitutional interpretation. Again, it was a period of time in which women were simply not part of the body politic. It wasn't until social movements that occurred later in this country's history, in the 1970's, that we started to see movements for women's equality, and women could actually become something that we can call equal citizens.

I also wanted to—I guess just give me time to just note the selectivity of Justice Alito's historical inquiry. He chooses to elevate 1868 in the context of abortion rights, because it will lead to the result that he likes. In other cases, in other contexts, he doesn't en-

gage in a historical inquiry at all. In his affirmative action jurisprudence, 1868 is also the relevant time that we should look for when interpreting the Equal Protection Clause. We should be interrogating what the Framers thought when they ratified the Equal Protection Clause in terms of did they think that there ought to be race conscious efforts to make newly—newly freed, formally enslaved people of color members of the body politic. If he engages into historical inquiry, he will have to lead to a conclusion that affirmative action is constitutional. He doesn't engage in that historical inquiry because it will not lead to results that he likes.

Chair DURBIN. Thank you. Lieutenant Governor Stratton, I'm a little over my time, but I want to give you a chance to respond to efforts that are underway on the maternal mortality issue, and protection of women. I have to give you fair warning that your statement that Illinois is a unique Midwestern State on the subject is going to be challenged by a Senator from Minnesota. Lieutenant Governor.

Lt. Gov. STRATTON. Thank you for that question and just the ability to add what the witnesses have already stated. In addition to that, I would point out that this will not only just have a disproportionate impact on Black women. When we often talk about the issue of maternal mortality, then we raise the issue of how it disproportionately impacts Black women. But the issue of restricting abortion access, the abortion bans, and other restrictions also will have a disproportionate impact on those women who are from lower income communities, on immigrant women, on young women, on women from rural communities, on our LGBTQ+ community. There are so many wide-ranging ramifications, and the bottom line is that everyone should be able to decide for themselves what is best for their own health care, in conjunction with their physician. This is not something that should be decided with a political agenda. It is not something that should be a decision made by politicians. These are decisions that are very personal and should be made, and when they have health implications, as we're talking about maternal mortality, then this is an example of why it is not a politician's determination. It should be that individual's decision with their health care professional.

Chair DURBIN. Thank you, Lieutenant Governor. Senator Grassley.

Senator GRASSLEY. Ms. Matzke, I'm going to repeat some statistics you gave. According to Charlotte Lozier Institute, pro-life pregnancy centers performed more than 86,000 free ultrasounds, 731,003 pregnancy tests last year, 291,000 clients attended parenting and prenatal education classes, and 2,500 locations offer material assistance that babies need when the family can't support it. Can you tell us how you help pregnant women, and even more importantly, would there be a disparate impact on these communities if your centers weren't available?

Ms. MATZKE. Yes, Senator Grassley. Thank you for the question. We give women free medical care, free parenting classes, and baby supplies, free medical and emotional support after an abortion. Along with that, pregnancy care centers throughout the entire country give \$266 million a year of free medical care and resources to the community nationwide. It is important to know that preg-

nancy centers often support women, even after they've had an abortion. As a matter of fact, we had a 19-year-old young woman come into our clinic, who did not want an abortion. She was forced to take the abortion pill by her parents. She testified to the fact that when she took the abortion pill, she was isolated in a bathroom, all by herself. There was no support. There was no doctor there. There was no nurse there. There was no pain medication other than ibuprofen. She testifies to physically going into labor on the floor, on the toilet, and in her bathroom. At one point she said she looked down, and what they told her was a clump of cells, was a fully formed baby laying on the floor. Devastated, she claims she picked that baby up, and carried it around, put it in a plastic bag, and several weeks later, took it to a memorial and buried it. This is not health care. A woman, alone, by herself, in a bathroom, experiencing tremendous pain, and seeing the effects of it. A young woman who has an abortion at an abortion clinic never has to drive by that abortion clinic ever again. A young woman who goes into labor on the floor in her bathroom, and physically sees everything that comes out of her, and experiences the pain in the midst of that moment, has to wake up every single morning and relive that experience. Again, this is not health care.

Senator GRASSLEY. Ms. Harle, whether it's an unelected court, or the thinnest possible margins in Congress, we need to respect our institutions and their limitations. The Supreme Court shouldn't be taking power away from legislatures to make national policy from the bench, neither should the filibuster be destroyed to enact a bill that allows abortion until birth, a policy 8 in 10 Americans reject.

To you, what are the constitutional and practical problems with the various proposals that we've seen and to enshrine abortion at the Federal level?

Ms. HARLE. There are a couple of problems. As a constitutional matter, Congress does not have the authority in its Constitutional powers to impose a national abortion regime upon the States. You can't find that in the Commerce Clause. You can't find that anywhere in Congress' powers. That would be a gross overreach and would trample on principles of federalism.

As a policy matter, it's also problematic. The example that I'm aware of, the current so-called Women's Health Protection Act, which has a nice name, but if you read it, is actually an abortion on demand through all 9 months of pregnancy bill. That as a policy is—it's horrific. It's completely out of step with what the American people want. Americans are overwhelmingly opposed to abortion on demand up to the moment of birth, and the Women's Health Protection Act would actually allow a baby to be dismembered, torn apart limb from limb, just before entering the birth canal, for any reason whatsoever or no reason at all.

It would also overturn hundreds of State laws that are modest in common sense and that protect life. As a constitutional matter, I don't think a congressional attempt to mandate abortion would be upheld in court, and as a policy matter, it is a horrific idea, and I think we should be embarrassed, that the United States is even considering something like that.

Senator GRASSLEY. Thank you, Mr. Chairman.

Chair DURBIN. Thank you, Senator Grassley. Senator Feinstein.

Senator FEINSTEIN. Thanks, Mr. Chairman. I was just thinking back 50 years ago, when abortion was illegal, and I was sitting on the California Women's Board of Terms and Parole, setting sentences for women who committed abortion. I remember how terrible it was. Before the Supreme Court decided *Roe v. Wade* nearly 50 years ago, abortions were risky. They were difficult to obtain. Women would travel to Mexico to seek an abortion from an unauthorized provider, or they would attempt to self-induce an abortion, using dangerous and potentially life-threatening methods.

We know from those times, and I know from those times, that banning abortion care will not stop people from seeking abortions. It will only make abortion more deadly. Overturning *Roe* does nothing more than endanger the lives of women. I'm really deeply concerned that State efforts to ban and criminalize abortion will once again emerge and will harm the ability of women to seek vital, medical care.

Dr. McNicholas, from your experience as a provider, what impact have you seen from these State abortion bans, on women who are seeking reproductive health care? And Professor Bridges, what can Congress do to help protect people seeking an abortion?

Dr. McNICHOLAS. Thank you so much for the question, Senator Feinstein. I will start by saying and acknowledging and agreeing that the legalization of abortion has never been the driver of its necessity. That was true before *Roe* and that will be true now post-*Dobbs*.

Pre-decision, you know, there were States like Missouri, who had made it so difficult that the *Roe* decision was inadequate and pushed abortion out of access for many already. The reality is right now in this moment, today, there are thousands, tens of thousands of people, who are navigating which bill can go unpaid, how to find somebody to watch their kids, making sure their transportation can get them thousands of miles to the next clinic, all in search of basic health care.

What we know is that abortion bans, and restrictions alike, disproportionately affect people who live in marginalized identities and are worse for people who exist in the intersections of oppression. We will see more people be harmed by these decisions, both as pregnancy outcomes, as well as people who are being denied and delayed care outside of the abortion realm.

Senator FEINSTEIN. As of this past weekend, 21 States either have an abortion ban in effect, are expected to implement a ban soon, or have severely restricted abortion access in the State. These bans are forcing women to leave their home States in order to seek safe and legal reproductive health care. Some States with abortion bans in place have begun discussing the potential next step of banning people from traveling to seek abortion care outside of their home State. My home State, California, recently passed legislation that would help protect abortion providers and individuals from other States who seek abortion care in California.

Professor Bridges, if some States take this next step of banning travel to seek abortions, what legal protection should States hoping to protect abortion access put in place to prevent harm to patients visiting their States for care?

Professor BRIDGES. Thank you for the question, Senator. We have a clearly established constitutional right to travel in *Saenz v. Roe* in 1999. The Supreme Court interpreted the Constitution as protecting a right to travel, but that does not mean that that right is secure. We've seen in *Dobbs* that 50 years of precedent can be overturned, just simply based on the membership of the Court.

I want to back up just a little bit and respond to your question about what can Congress do in response to the reversal of *Roe*. Congress can and should repeal the Hyde Amendment. The Hyde Amendment prevents Federal funds from being used on abortion care. It has made it impossible for low-income people to rely on their health insurance, Medicaid, to cover the cost of abortion care. It also makes it impossible for people who rely on Indian Health Services, Native people, to turn to the clinics and the facilities that fulfill the Federal Government's obligation to Native people, to provide health care.

Also, I just want to note that Congress can and should pass Federal legislation that creates a statutory right to an abortion. The Women's Health Protection Act is a nice first step. There is no question that Congress has the authority to pass the WHPA. This is because health care—they have the power under the Commerce Clause. Health care is an activity that substantially affects interstate commerce. The Court in *NFIB v. Sebelius*, which upheld the Affordable Care Act, did not cast doubt on Congress' ability to regulate health care, because it is an activity that substantially affects interstate commerce. Congress certainly has the power to pass the WHPA and other efforts. Thank you.

Senator FEINSTEIN. Thank you very much. It would be helpful, any statement with particulars in it that you care to put into writing and submit to the Committee. I would certainly appreciate, so—

Professor BRIDGES. Will do.

Senator FEINSTEIN [continuing]. Thank you. Thank you, Mr. Chairman.

Chair DURBIN. Thank you, Senator Feinstein. Senator Cotton.

Senator COTTON. Over the last few months, we've seen a marked increase in violence and intimidation by pro-abortion groups. Left-wing mobs have gathered outside the homes of Supreme Court Justices to try to intimidate them and affect their decision in the *Dobbs* case, a blatant violation of Federal law. Yet, the weak and hopelessly partisan Attorney General Merrick Garland refused to enforce that Federal law. It's gotten so bad that the Supreme Court Marshal has had to go to the Governors of Virginia and Maryland and plead with them to protect our Supreme Court Justices at their homes. In one case, a Democratic hit man even traveled from California to try to assassinate Brett Kavanaugh at his home.

It's not just Supreme Court Justices targeted. Pro-abortion groups, including one calling itself Jane's Revenge, has claimed credit for firebombing a pro-life organization in Madison, Wisconsin, and numerous other firebombing attacks and acts of vandalism against pro-life groups in more than a dozen States. The same group even attacked and vandalized the campaign office of a Republican Congressman. This weekend, three separate churches in Maryland were all attacked, all three vandalized and desecrated,

and two were set on fire. Those attacks are currently under investigation but are also believed to be related to pro-abortion causes and groups.

I'd like to ask each of you, starting with Lieutenant Governor, do you condemn the violent attacks, fire bombings, and vandalism by groups like Jane's Revenge?

Lt. Gov. STRATTON. Thank you, Senator. Let me just say I will emphasize that violence against anyone is wrong, and no one should experience threats to their safety or their well-being. But I would also urge everyone to bring the same energy to the attacks that are taking place against abortion providers and clinics. All across the board, violence is unacceptable, and we know that we are seeing violent acts as well as threats and attacks also on abortion providers and clinics. That also needs to be addressed with that same energy. We know that arson, bombings, assaults, which have increased exponentially. Stalkings have gone up 600 percent since 2020, against those that are abortion providers. So, no, I condemn any acts of violence and absolutely do not believe anybody should be—experience threats to their well-being and safety. But that should apply equally across the board, and everyone should be working just as hard to make sure that abortion providers and clinics also get that same protection.

Senator COTTON. Thank you. Ms. Harle.

Ms. HARLE. I do condemn all violence, and I would just note that abortion is an act of violence against the most innocent and vulnerable human beings.

Senator COTTON. Thank you. Professor.

Professor BRIDGES. I condemn violence, and I would like to note that forced birth is an act of violence as well. I have some additional statistics to share. There has been a 450 percent increase in blockades at clinics that provide abortion services, and 163 percent increase in the planting of hoax devices in suspicious packages at clinics that provide abortion care. One hundred twenty-nine percent increase in invasions at clinics that provide abortion care, and 128 percent increase in assault and battery. Yes, we should keep that same energy across the board and protect everyone who's providing abortion care.

Senator COTTON. Ms. Matzke.

Ms. MATZKE. Yes, I also condemn that violence. Violence should never be carried out on anyone at any time, and pregnancy centers here recently, since the overturning, the violence has been overwhelming that we have sustained. And the amount of money we have had to spend to protect ourselves just so we can offer free services to women is unbelievable.

Senator COTTON. Doctor.

Dr. MCNICHOLAS. Thank you so much. I appreciate the outrage for the violence. In fact, my own family would appreciate some outrage in protection of ourselves. Dr. Lynn Weller, murdered in 1977, would have appreciated some outrage. Dr. David Gunn, murdered in 1993; Dr. John Britton, in 1994; James Barret, a volunteer, murdered in 1994; Shannon Lowney, murdered at the age of 25, in 1994; Leanne Nichols, 38, murdered in 1994. Dr. Barnett Slepian, 1998, murdered in Buffalo, New York, after returning home from his synagogue and just hours after his wife forwarded the threat

to the police. Robert Sanderson, an off-duty police officer at a clinic, murdered by who everyone now knows as Eric Rudolph, in 1998. Of course, Dr. George Tiller, in 2009, murdered in his own church, would have appreciated your outrage as well.

Senator COTTON. I'm sorry. I didn't hear an answer to my question. Do you condemn the violence committed by groups like Jane's Revenge?

Dr. McNICHOLAS. Echoing all of my fellow panelists here, I absolutely condemn violence against everyone, including abortion providers.

Senator COTTON. Thank you.

Chair DURBIN. Senator Klobuchar.

Senator KLOBUCHAR. Thank you very much, Senator Durbin. By the way, thank you for that answer. That was—going through the names, I think, really reiterates to many people up here that we condemn violence, but there have been a lot of people who have lost their lives, simply by trying to guarantee women what were once their guaranteed rights under the Constitution and now is in our hands.

For nearly 50 years, *Roe v. Wade* protected a woman's right to make her own health care decisions, ensuring that women, their families, and their doctors were in charge of the most personal choices in their life, not politicians. This ruling means that not only will women receive different treatment under the law than men, but there will be, as we've discussed today, a patchwork of laws across the country.

Look at what we're seeing right now. Louisiana passed a law that subjects abortion providers to criminal penalties. In Missouri, a bill was recently introduced that would allow private citizens to sue people, who help women leave the State to get abortion care. Mississippi's Governor refused to rule out banning contraception. As Senator Durbin noted, our State, like Illinois, is also an island in the heartland, but a good place. I'm very proud that our State has stood up in Minnesota for reproductive rights of women.

After the *Dobbs* decision, I met with a group of health care workers from the Planned Parenthood Clinic in Moorhead, Minnesota, and I talked to the head of the Red River Women's Clinic in Fargo, North Dakota. She has resorted to a GoFundMe page in order to make sure that she can keep providing services in the upper Midwest, and in fact, is moving her clinic to Minnesota. All of the proprietors that I've talked to have been resolute in their desire to continue to serve the health care needs of women.

I would start with you, Professor Bridges, because Minnesota is surrounded by States with abortion restrictions, providers expect to see 10 to 25 percent more people coming to our State. Can you talk about the strain that a sudden increase in women seeking care has on both patients and providers?

Professor BRIDGES. Absolutely, I can speak on that, but I also will invite the Lieutenant Governor Stratton to weigh in, as well. We saw that after Texas passed S.B. 8, effectively ending abortion in the State, after 6 weeks of pregnancy, before most people know that they are pregnant, there was an incredible influx from patients in Texas in clinics in the surrounding States, Oklahoma, and Kansas.

Some clinics reported a thousand percent increase in patients from Texas after S.B. 8 went into effect. Some clinics in Kansas provided information that 50 percent of their clients were now from Texas. That makes it difficult, of course, for people from Texas to access abortion care because now they have to travel hundreds of miles for abortion care. It also makes it difficult for the residents of Oklahoma and Kansas to access the care in their——

Senator KLOBUCHAR. Exactly.

Professor BRIDGES [continuing]. State, because the supply simply cannot meet the demand.

Senator KLOBUCHAR. Given some of the things I mentioned, are you concerned that under the Court's sweeping decision there are no limit on what States can do to make it nearly impossible for women to seek care?

Professor BRIDGES. There are limits, right? I mentioned *Saenz v. Roe*, which was decided in 1999, in which the Supreme Court held that there was a Constitutional right to travel. However, we have seen that the Supreme Court cares very little for precedent. The Supreme Court doesn't feel bound by precedent, and so if that precedent leads to result that it doesn't like, we can expect it to be reversed, just as we saw *Roe* reversed simply because of the membership of the Court.

Senator KLOBUCHAR. Okay, one last question. I'm concerned of the view that private health data could put providers and people seeking abortions at risk. One report showed that it only cost about \$160 to buy a week's worth of location data on people who visited Planned Parenthood. That's why Senator Baldwin and I have partnered together to urge the FTC to regulate data brokers who are selling data about people who are seeking abortions. Yesterday, the FTC issued a statement committing to fully enforcing the law against illegal use of highly sensitive data. In the wake of the *Dobbs* decision, do you agree that it is important to protect data privacy, particularly in States that have outlawed abortion?

Professor BRIDGES. It is essential that we protect data privacy. Whenever we're online, we leave a digital footprint. That footprint can now be used as incriminating evidence, if prosecutors are interested in pressing criminal charges against people seeking basic health care.

Senator KLOBUCHAR. Okay, very, very good. Thank you. Just one last thing, Lieutenant Governor, if you wanted to add anything on the front of the States like Illinois and Minnesota and the impact on these States.

Lt. Gov. STRATTON. I want to begin, Senator, by acknowledging the great leadership in the State of Minnesota, and I will also just add to your question regarding the protection of data and privacy issues. We know that the potential criminalization of patients coming to our State is certainly of top of mind in Illinois, but it's not just the patients. It's also the abortion care providers that also could potentially risk that same sort of criminalization. We are working with our States, leaders are gathering to talk about how we can continue to expand and further enshrine reproductive rights into State law. Because, again, everyone should be able to feel safe and be able to have access to health care between them and their physician.

Senator KLOBUCHAR. Very good, and our Governor, Tim Walz, and Peggy Flanagan, our Lieutenant Governor, I know have great respect, as I do, for you and Governor Pritzker. Thank you very much.

Lt. Gov. STRATTON. Thank you.

Chair DURBIN. Thank you, Senator Klobuchar. Senator Lee? I'm sorry, maybe Senator Cornyn was first. You two want to work it out.

[Laughter.]

Senator LEE. Thank you, Mr. Chairman. It's important we focus on what we're actually discussing today. We aren't talking about procedures that culminate in and have as their sole intended purpose the termination of a baby's life. These are babies. It's also important that we recognize, in response to those who have said that the *Dobbs* decision was somehow undemocratic, nothing could be further from the truth. In fact, the *Dobbs* decision was a victory for Republican democracy. There really is no way to argue otherwise with any credibility.

What the Court did in *Dobbs* was to return this question, this question of whether, or in what circumstances, abortion will be allowed, returning that back to the people, and to their elected lawmakers. This is a decision that is not taken off the table by the Constitution, and because it's not taken off the table by the Constitution, it belongs to the people, who can exercise that decision through their elected lawmakers. The American people will now be able to say whether, and in what circumstances, and in what places abortion will be regulated. This is how Republican democracy in America works. This is how our Republic was always intended and established to function.

Justice Alito, my former boss, in his well-written majority opinion, explained this point well. He said, quote, "Our decision returns the issue of abortion to those legislative bodies, and it allows women on both sides of the abortion issue to seek to affect the legislative process by influencing public opinion, lobbying legislators, voting, and running for office", close quote. That's it, page 65 of the *Dobbs* majority opinion.

Seems to me that the abortion industry, and the left, and those incumbent politicians whose campaigns are funded by the abortion industry have gone to great lengths to scare the American people, convincing them that *Dobbs* does something that it doesn't do. It saddens me that they're doing all of this for the cause of saying that it's okay, and, in fact, it's protected by the Constitution, to exterminate, to extinguish, an unborn human life. Makes me wonder whether those making these scurrilous arguments are simply afraid of American Republican democracy, simply afraid of the American people, simply afraid that when able to make this decision on their own, freed from the judicial oligarchy that has reigned over this era, this area of the law for the last 49 years, that they won't make the same decision, that the radical left would make. It seems to me to be the most plausible explanation for why they are so upset, and why they're calling it undemocratic. Nothing could be further from the truth.

It's also important to note that this reign falls disproportionately on some communities. It falls disproportionately on some races

more than others. Black babies are at greater risk of being aborted than white babies. A New York City Health Department report, one that was released just about 4 years ago, found that between 2012 and 2016, when this study was conducted, that Black mothers aborted 136,426 babies, while giving birth to only 118,127 babies. That's right. Thousands, thousands of more Black babies were aborted than born in New York City during that relevant time period.

It shouldn't come as a surprise as you consider that Planned Parenthood's founder, Margaret Sanger, was a big fan of eugenics, and her plans were not what anyone would want to defend today, on that front. She's someone who wanted to, quote, unquote, "assist the race toward the elimination of the unfit." These are not laudable goals.

Ms. Harle, these reports on the Black women, the rate at which Black women in New York City are getting abortions, they're heartbreaking. They're breathtaking. I hope to see States enacting stronger protections for life, including, among other things, laws prohibiting abortions based on the race, sex, or disability of the baby. I hope these laws would protect all babies, including Black babies. In your view, Ms. Harle, is race, sex, or disability a valid reason for aborting an unborn baby?

Ms. HARLE. Absolutely not. No one should be discriminated against based on their race, or their sex, or their genetic makeup. Certainly, no one should be killed because of any of those factors. These are the sorts of laws that States have been attempting to pass to protect the most vulnerable citizens from fatal, lethal discrimination, simply based on who they are, or what they might look like. This is what *Roe* has blocked States from doing. The people of the States were enacting, you know, voting for lawmakers, who would enact these good policies. *Roe* was blocking it, but now, the power has been given back to the people of the States to choose the sort of life affirming, life protecting policies that they want in their States and in their communities.

Senator LEE. Mr. Chairman, I see my time's expired. I do want to note that what Ms. Harle just said is very legitimate, and the doomsday calls from those on the left are ignoring common sense. They're ignoring what human instinct tells us about protecting the most vulnerable among us. Members of this Committee, including some who are now attacking the *Dobbs* decision, once shared these views. Mr. Chairman, as I wrap up my remarks, I submit—I ask unanimous consent to submit for the record a copy of a letter that you wrote on August 4th, 1989, in which you said, among other things, quote, "I believe we should end abortion on demand. I continue to believe the Supreme Court's decision in *Roe v. Wade* should be reversed", end quote. Thank you, Mr. Chairman.

[The information appears as a submission for the record.]

Chair DURBIN. Without objection. Thank you, Senator Lee, and now Senator Hirono.

Senator HIRONO. Thank you, Mr. Chairman. Lieutenant Governor Stratton, I completely agree with you that it is the woman, not a bunch of politicians, who should decide her bodily autonomy. As I listen to the—all of my colleagues who support the Supreme Court's recent decision, they lose sight, in my view, intentionally.

They lose sight of the fact that who should be making the decision about what to do with our own bodies? Us, or a bunch of politicians?

Professor Bridges, you noted that Justice Alito chose 1868 as the historical basis for his decision in overturning *Roe*, and I agree with you. What is so special about 1868? Not only that, with the attitude or the approach of originalism, the Justices who take that approach go all the way back to our Founding Fathers and pretend that they know what our Founding Fathers meant when they drafted the Constitution. I use the word pretend because who the heck would know what our Founding Fathers meant. Is there any reference to AR-15 rifles in our Constitution? No.

You noted that this is an outcome-based approach to our Constitution, and that is what Justice Alito applies. When this Committee had the hearing on the now Justices Gorsuch, Kavanaugh, and Coney Barrett, of course they said *Roe* was precedent. Every single decision of the Supreme Court is a precedent, but the one group that can overturn precedent is the Supreme Court, and they are very busy doing so. In fact, I want to note—and I'm sure you're familiar, Professor, with the decision that was made overturning *Abood*, which was basically a 40-year-old Supreme Court precedent that enabled public sector unions to collect union fees. In that decision called *Janus*, they just very summarily overturned that 40-year decision, thanks to the fact that Justice Gorsuch got on the Court, because when Justice Scalia died, and they had a previous decision called *Fredericks*, it was 4-to-4 decision. The minute Justice Gorsuch got on that Court, it was a 5-to-4 decision, overturning *Abood*.

That is what the Supreme Court is busy doing, overturning precedent. I don't know what's going to happen to other decisions that protect constitutional rights, such as what Justice Thomas signaled, *Obergefell*, the same-sex marriage protection. That could be out the window if the Court applies to these kinds of cases a rational basis test rather than strict scrutiny.

Professor, do you share the concern that I have about where this Court is going to go with some of these other decisions that have earlier been made?

Professor BRIDGES. Absolutely, I am very concerned about where the Court is going to go. The logic of the *Dobbs* decision—the method of constitutional interpretation that the majority uses in the *Dobbs* decision should frighten everyone who holds dear these rights that are necessary for people to live fully human lives with dignity in this country.

Obergefell v. Hodges—finding that there is a right to marry someone of the same sex. If you interrogate what was happening in 1868, no such right exists. *Lawrence v. Texas*—finding that there is a right to be free from criminal punishment for consensual sexual contact with an adult. Such a right didn't exist in 1868. *Griswold v. Connecticut*. *Skinner v. Oklahoma*. *Pierce v. Society of Sisters*. *Meyer v. Nebraska*. I could go on and on. These rights that are important for marginalized people—marginalized people. Vulnerable people need these rights. Those rights simply were not contemplated by the people who drafted and ratified the Constitution in 1789, in 1791, or in 1868, so we should all be terrified.

Senator HIRONO. Agree with you. We have a radical group of very conservative Justices, who are going to be making further decisions like this. I have a question for Dr. McNicholas. You talked about the chaos that has been created as a result of this decision. I've been talking with some doctors in Hawaii. By the way, Hawaii was the first State in the union to decriminalize abortion before the *Roe* decision. In talking with some of the doctors, there is even an impact, potential impact on what doctors, soon-to-be doctors are taught in medical school. For example, D&C is a procedure that is utilized for miscarriages. Could medical schools in States like Texas no longer teach doctors how to do D&Cs because they may be accused of performing an abortion?

Dr. McNICHOLAS. I appreciate that question, Senator. Yes, in fact, we will be creating an entire cohort of physicians who are underprepared to take care of pregnancy emergencies. I think it's important to note that medications and procedures are simply that. What changes is the indication. The medications we use for medication abortion, the procedures that we use to perform procedures, are the same exact medicines and procedures we use for people who are experiencing pregnancy loss.

Senator HIRONO. Thank you. Thank you, Mr. Chairman.

Chair DURBIN. Thank you, Senator Hirono. Senator Blackburn.

Senator BLACKBURN. Thank you, Mr. Chairman, and thank you to each of you for taking the time to be here with us today. I really appreciate it. Ms. Harle, I want to come to you first, if I may. The *Dobbs* decision—I've been so interested to see the way the different legal scholars have approached this, and I have read that Justice Ginsburg had weighed in on the failures of *Roe*. Noting I'm going to quote from her. She said, quote, "It seemed entirely to remove the ball from the legislators' court", end quote. Justice Alito had quoted Professor John Hart Ely's characterization that *Roe* was—and I'm quoting his statement—"not constitutional law." As you look at this, how do you explain the flawed reasoning of *Roe*, and how *Dobbs* corrected the flaw?

Ms. HARLE. That's correct. Legal scholars on the right and the left have roundly criticized *Roe*'s reasoning. Justice Ginsburg, who was a proponent of abortion as a policy matter, recognized that its reasoning was fundamentally flawed, and she actually predicted that it would very likely be overturned. If I can connect this to the discussion about the year 1868, the reason that is the touchpoint is because the abortion advocates have insisted that the right to abortion somehow emanates out of the penumbras of nonexistent words in the Due Process Clause of the Fourteenth Amendment. Or they also sometimes say it may be in the Fourth, or the Fifth, or the Ninth, or other amendments. It's not there in the text, but 1868 is the touchpoint because the Fourteenth Amendment argument, the due process argument, is what the abortion advocates—

Senator BLACKBURN. Okay, well let's turn to why the States are in the best position to handle this, because I read the Harvard/Harris poll. Forty-four percent of those polled wanted their State legislatures to set the abortion standards. Only 31 percent wanted Congress to do this, and only 25 percent wanted judges. Why are the States in the best position to do this in a fair and equitable way?

Ms. HARLE. That's how the people get their voice heard, is that they—through their elected lawmakers, in their States, have a voice and a vote in enacting the policy. In 1973, 46 States completely protected life, with extremely limited exceptions, and *Roe* overturned that. Even that recently, that's what the American people wanted.

Senator BLACKBURN. What advice would you give States that are looking at taking this up?

Ms. HARLE. This is an opportunity. This is an opportunity, finally, that States have had the shackles removed from *Roe*'s judicial power grab. It's an opportunity for the people to have a voice through their elected lawmakers, to enact policies that support the dignity of women, that protect unborn life, that protect the health and safety and welfare of the citizens. Protect the integrity of the medical profession to, you know, remove this barbaric procedure that destroys families, destroys communities, and has ended the lives of more than 60 million babies.

Senator BLACKBURN. I've talked to women on all sides of this issue, as you can well imagine, and I find it so interesting. Once they realize that much of what they've heard in the mainstream media about their being a Federal abortion ban is incorrect, and they realize this goes to the States, that changes the nature of the conversation.

Ms. Matzke, I want to come to you for just a moment. Planned Parenthood gets about a half a billion dollars a year that they can use to fund clinic work and provide health care, but what I have heard from many of the clinics in Tennessee, is that Planned Parenthood doesn't provide the services that they need for maternal care, the services that they need post-pregnancy. Talk with me a little bit about the services, what people are asking for. I thought this would be interesting to us as a Committee, Mr. Chairman. When we talk about all this money that Planned Parenthood gets, but then they don't meet these needs for women who are pregnant, and do want to carry that baby to term and have that baby. When they come to you, what services are they asking you for that Planned Parenthood doesn't provide?

Ms. MATZKE. First off, thank you, Mrs. Blackburn, for asking that question, because it is vitally important for everyone here to recognize the fact that as the director of Alternatives Pregnancy Center, it is my responsibility to go out and raise, by myself, non-government funds, over \$1.5 million every year. I have to figure out where \$1.5 million is going to come from, so we can provide free services to women facing unplanned pregnancies. Ironically, where we are at, in Sacramento, California, Planned Parenthood actually refers patients to us. Once a woman walks into them—this has happened countless times in the last multiple months—if they do not choose abortion, they are referred to Alternatives Pregnancy Center to be cared for. Alternatives Pregnancy Center offers all the support that they need, medical as well as material support, so the fact that Planned Parenthood sees the value of who we are, and what we offer to women, I think is important for everyone here to understand.

Senator BLACKBURN. Well, and Mr. Chairman, I think as we look at this issue, this is something that we would want to look at as

to why they do not offer that full array of health care services for women. Why are they choosing to make that referral to an agency to receive those full services, when they're receiving hundreds of millions and billions of dollars? I thank you. I yield my time.

Chair DURBIN. Thank you, Senator Blackburn. Senator Whitehouse.

Senator WHITEHOUSE. Thank you, Chairman, and thanks to the witnesses for being here. There's been a certain amount of talk during this hearing about the environment in which the Justices who wrote the *Dobbs* decision have had to operate since that decision, and I just wanted to flag in the general category of protest behavior the experience that I had with clinics in Rhode Island, in the 90's, when I was U.S. Attorney in Rhode Island. I flag it, in part, because during Justice Ketanji Brown Jackson's hearings, as a witness was brought forward to propose the narrative that these engagements between protesters and people seeking services at clinics were done in a spirit of peaceful and loving engagement. I lived a very different experience than that in Rhode Island and in Massachusetts when I became U.S. attorney. The environment outside of our Planned Parenthood clinic in Providence was so hostile that we were well-aware of it in law enforcement. Planned Parenthood had had to figure out ways to have people escort women coming for services into their premises through extremely hostile and abusive crowds. It reached a very bloody culmination in December 1994, when a clinic protester—we think that protesters went back and forth between Massachusetts and Rhode Island pretty often. A clinic protester went into a clinic in Massachusetts and murdered the receptionist and shot up the place, wounding others, and then moved on to another clinic outside of Boston, and murdered an employee and shot others and then disappeared. Didn't know where they were going. I got the news right away, and I called up the U.S. Marshal and I said, "Nobody knows where this guy is, right?" They said, "Nobody knows where this guy is." Because we knew of all of the threats and all of the abusive behavior that was happening outside of the Planned Parenthood clinic in Providence, I said, "Well, since we don't know where he is, we could be next. We'd better get over there right now." So, he and I went, and it was a cold December day, and we just stood outside of the Planned Parenthood clinic and the Marshals and FBI agents ended up joining us. Then the Providence Police took over security, and as it happened, the shooter had drove right by on the highway, just a couple hundred yards away, and went on southward, where he was ultimately arrested, I think in Virginia. He had gone right by, and I'll never know whether he pulled off and drove by and saw the activity and just decided to go on or whether he was going by anyway.

That was the environment that we were working in with these clinic protesters. I want to make sure that that is absolutely clear on the record. This business of this all being, you know, peaceful and loving engagement is just not consistent with what I saw with my own eyes and with what the people in those two blood spattered clinics in Boston had to experience.

I want to ask a very narrow question of Dr. McNicholas, if I could, and that is whether there are occasions when, entirely apart

from the wishes of the mom, there are circumstances in which a doctor in a pregnancy will make a decision or recommendation for a patient that an abortion is now medically necessary? Either to save the life of the mother or for other reasons in which it is the independent medical conclusion of the doctor who—and doctors have to make hard decisions all the time—that the best decision in this case is that you have to go ahead with the procedure, either to save the mother's life, or for the sake of other children, or whatever. Is that a thing that happens in real life?

Dr. McNICHOLAS. Thank you so much, Senator, and before I answer your question, briefly, I just want to again state the names of the two women that were murdered that you referenced. That's Shannon Lowney. She was 25, and Leanna Nichols was 38.

Senator WHITEHOUSE. Thank you.

Dr. McNICHOLAS. Absolutely, every single day we see pregnancy complications that put people's lives at risk, and it is imperative that physicians have every tool at their disposal to be able to make recommendations. I say recommendations intentionally because we never tell people what they have to do. We give them information. We tell them what the risk is, and the potential complications, including death.

Senator WHITEHOUSE. What effect is *Dobbs* compounded by these anti-abortion laws in State legislatures having on doctors' abilities to make those decisions and provide those services to women, when medically necessary?

Dr. McNICHOLAS. In addition to the hat I wear as Chief Medical Officer for Planned Parenthood, I'm also an elected official for the American College of Obstetricians and Gynecologists, and we are hearing, every single day, from our members, that they are afraid. They're afraid to make decisions that they know are the best health care for people. They're afraid of how sick they have to wait for people to get before they can take care of them. It is, you know—health conditions evolve, sometimes minute to minute, sometimes day to day, sometimes it takes weeks. The truth is that if we are setting up a system by which we are forcing people to sustain preventable morbidity and mortality, we are totally leaving an entire population of people behind. We are telling women that not only are they not allowed the decision to control their own body, but now we're not going to allow you to control your own body and make decisions when it means that you could potentially be leaving the three children you have behind when you die from that delayed care. It is quite disgraceful. It happens every single day, and ACOG is hearing every single day from people on the ground, right? I tell my 12-year-old all the time, intent and impact are different, and whatever the intent is of overturning *Roe*, the impact is that it is utter chaos and people are being harmed.

Senator WHITEHOUSE. Thank you for telling us about that impact.

Chair DURBIN. Thank you, Senator Whitehouse. Senator Cruz.

Senator CRUZ. Thank you, Mr. Chairman. The Supreme Court's decision in *Dobbs* was a victory for democracy in America. Abortion is an issue on which the American people have strong and passionate views and disagree, as the witnesses here at this hearing demonstrate. Those disagreements have been longstanding, and the

way our Constitution operates, typically, on issues in which there is sharp disagreement, it is the democratic process that resolves that disagreement.

When the Supreme Court decided *Roe v. Wade* in 1973, seven unelected judges said to the American people, "Your views don't matter. Your desire to protect innocent life doesn't matter. We know better than you, and we are going to prevent you from making decisions about protecting life." The consequence of that has been five decades of deep political division because the democratic process was prevented from operating.

Now, that a 6-3 Majority of the Supreme Court has overturned that decision, questions of abortion will return to the elected branches of government. The democratic process will be allowed to operate. That will mean in bright blue States, tragically, we'll continue to see unlimited abortion on demand. In redder States, we will see some meaningful restrictions on abortions. Those restrictions will vary State by State, depending on the values and mores of their citizens. That's how our Constitution was meant to operate.

If you disagree with the abortion laws in your State, you have an outlet to express that disagreement. You have an outlet to be involved in the political process. You have an outlet to advocate for what you believe the law should be. You're not forced to live under the rule of unelected judges operating as philosopher kings and decreeing the rules for 330 million Americans.

I believe abortion is a tragedy, the over 60 million unborn children who've never breathed a breath of air, who've never lived, who've never danced, who've never hugged, who've never loved. Our country is far poorer for the millions of African-American children who never had a chance to live and contribute to our country.

Unfortunately, one of the consequences of the Court taking this out of the Democratic process is today's modern Democrat party has become radicalized on abortion. The case *Planned Parenthood v. Casey*, a lot of people don't know that the *Casey* in question there was Governor Bob Casey, who's a Democrat and who was pro-life. Today's Democrat party has said, "If you're pro-life, get the hell out. Your views are not welcome in our party."

Part of the reason that Democrats in this hearing are painting the *Dobbs* decision in such apocalyptic terms, is they know their view of abortion, which is unlimited abortion on demand up until the moment of birth, partial birth abortion, with Government funding, with no parental notification, and no parental consent is supported by a tiny minority of Americans. They know that the voters, when given a chance, don't support that radical view, and I will point out that there was a time when Democrats used to say the same thing.

We all remember Bill Clinton, who said he wanted to see abortion safe, legal, and rare. Today's Democratic party doesn't want it rare. It wants as much abortion as possible. I'll tell you this, when *Roe v. Wade* was decided, one Democrat who spoke up against it was a fellow named Joseph Robinette Biden, who said in 1974, quote, "I don't like the Supreme Court decision on abortion. I think it went too far. I don't think that a woman has a sole right to say what should happen to her body." That was Joe Biden in 1974. Now, you may say, "Okay, that was a long time ago." All right let's

go to 2007, just 15 years ago, 2007 Joe Biden—Tim Russert says, “You supported that ban on late term abortions.” Biden said, “I did, and I do.” That was 15 years ago.

Just weeks ago, the Democrats in this body voted to strike down every restriction on abortion across this country, including bans on partial birth abortion, and every single Democrat but one voted for it. Maybe you might say, “You know what? Joe Biden was out of step.” Well, there’s someone else who had similar views, the Chairman of this Committee.

In a June 1983 letter, the Chairman of this Committee wrote, quote, “I have clearly studied the issue of abortion in depth, and favor the Eagleton Amendment, which states clearly that the right to abortion is not guaranteed by the U.S. Constitution. The effect of this amendment will be to return us to the legal environment which existed before *Roe v. Wade* in 1973.” Signed Richard J. Durbin, Member of Congress. That view continued in August 1989. Chairman Durbin wrote, and again I quote, “I believe we should end abortion on demand, and at every opportunity I have translated this belief into votes in the House of Representatives.” He continued to say, “I continue to believe the Supreme Court’s decision in *Roe v. Wade* should be reversed.” That was the view of a lot of Democrats not that long ago. But today’s Democratic party is afraid of the voters on this issue. What the Supreme Court has done is returned this deeply personal, deeply important, deeply contentious issue to the voters. To let the American people decide, that’s democracy. All of us should be happy about that fact.

Chair DURBIN. Thank you, Senator Cruz. Senator Booker.

Senator BOOKER. Thank you, Mr. Chairman, and thank you to all the women who’ve come here to testify. I know it’s a sacrifice to come in for such an important day. Ms. Harle, can I just ask you a quick question, and just for the sake of time, could you just give me from your heart, a yes or a no? If Congress were to pass a national abortion ban, would that be something that you would support?

Ms. HARLE. I think our laws should protect all human life.

Senator BOOKER. Thank you.

Ms. HARLE. Yes.

Senator BOOKER. Thank you very much. Ms. Stratton, there’s been a lot—something said by my colleagues about, I seem to imply, that allowing women to have access to safe abortion care is somehow racist against African Americans. Would you take brief moment to address that for me?

Lt. Gov. STRATTON. Absolutely, thank you, Senator for that question. First and foremost, I would think, as we look at the disproportionate impact that abortion bans and restrictions have on Black women in particular, and the harm that has been caused, it is cruel to deny that access to abortion is actually what is liberating for Black women. To be able to have bodily autonomy and the ability to decide what’s best for their bodies, for their lives, and their futures.

I am the mother, as I said in my opening remarks, of four daughters, three of whom are adults, and I had to have a very painful conversation with them, first upon the *Leak* decision, and then, of course, with the *Dobbs* ruling, about how could they possibly have

fewer rights than their mother had. They should be able to decide for themselves and make a personal decision about what is in their futures, and we've already had a conversation about maternal mortality rates, infant mortality rates, related to the racial disparities that are attached to that.

This is—you know, to talk about what happens with children and recognizing that after a child is born that they do not have access to resources. They are not given what's needed to address the systemic racism that they are going to experience throughout their lives, to make sure that there's no help that's given to these families, Black and brown families across our country, in the wake of these abortion bans and restrictions. It's contradictory to so much of what we have heard today. This is not about helping. This is only going to harm and cause immeasurable suffering.

Senator BOOKER. Thank you, and Dr. Bridges, and Dr. McNicholas, maybe to that point, I've been looking at just data and seeing that States that provide a great access to contraception, free access to contraception, actually lower rates of unwanted pregnancies, like Colorado, lower rates of abortion by empowering women, and low-income women in particular. In the dissent of the *Dobbs* case, they pointed out, what to me was absurd. The reality that many of the States moving to create the most restrictive bans on abortion are the very States that aren't doing the things that are obvious to lower the rates of maternal death, like expanding Medicaid. This argument that they value life by not providing access to contraception, by not expanding Medicaid, their States have some of the worst records for women dying in pregnancy-related causes. It seems rank hypocrisy to me, and especially as it affects African-American women who die three times more. I was wondering if you just maybe, Dr. McNicholas and Dr. Bridges, could just as cogently as possible in the limited time I have left, can you just talk about how these bans, in the name of life, are actually causing so much more death in communities, especially for the most vulnerable women.

Professor BRIDGES. I'm just going to take 30 seconds and then I'll pass it to you. Thank you so much for that question. I want to also point out that the States that are passing the most restrictive laws around abortion are also the States that are preventing people from voting. Senator Lee, Senator Cruz have talked about, "Oh, this decision just returned—this *Dobbs* decision just returned it to the elected representatives of States to—and people can battle it out in these laboratories of democracy," as to whether they want to protect fetal life over the interest of the pregnant person. These are the same States that are stopping people from voting. Texas has the most restrictive voting laws on the books. Texas's S.B. 8 doesn't represent the will of the majority of Texans. Texas S.B. 8 represents the will of the majority of Texans that were able to vote. In order for this to be a democracy, we have to protect voting rights, and I leave it to everyone in this room, as well as the rest of Congress, to protect voting rights so that we can be a real democracy.

Senator BOOKER. With the indulgence of the Chair, would you please respond?

Dr. McNICHOLAS. Thank you so much. I think it's been well-represented here that maternal mortality is the highest in States that are banning abortion and preventing access to things like expanding Medicaid. I will add one more thing, which is that as a physician who gets to care for many Black women, ultimately, at the end of the day, I trust that Black women know what they want and what they need for their own health care.

Senator BOOKER. Thank you. Thank you for the indulgence, Mr. Chairman.

Senator COONS [presiding]. Senator Cornyn.

Senator CORNYN. Thank you, Mr. Chairman. Professor Bridges, you, in your testimony talked about the prevalence of abortion, the percentage of Black babies that are aborted as opposed to non-Black babies. I think you said three or four times more Black babies than non-Black babies are aborted. You also talk about systemic racism. Do you see any systemic racism associated with the prevalence of abortion for Black babies, as opposed to non-Black babies?

Professor BRIDGES. Absolutely. The higher rates of unintended pregnancy that lead to higher abortion rates among Black people is a result of structural racism, systemic racism. I understand systemic racism not to be boogie men who are trying to dupe Black people into abortion care. I understand structural racism to be the systems that have made it so that Black people disproportionately bear the burdens of poverty in this country, the systems that have denied them the basics that they need in order to live humane lives, like food, clothing, shelter, health care—

Senator CORNYN. So, you believe—

Professor BRIDGES [continuing]. A system that responds with the criminal legal system—

Senator CORNYN. You believe that there ought to be more Black babies aborted. Is that right?

Professor BRIDGES. I believe that we ought to create the conditions under which people can lead lives that are filled with dignity and humanity, and being able to—

Senator CORNYN. To your way of thinking, that happens when more Black babies are aborted?

Professor BRIDGES. I believe, I trust, I love Black people with the capacity for pregnancy. I think they have agency, they have intelligence, they know what is best for themselves, and I would love to create the conditions under which they can live lives that are filled with dignity and humanity.

Senator CORNYN. Do you think a baby that is delivered alive has value?

Professor BRIDGES. Yes.

Senator CORNYN. Do you think a baby that is not yet born has value?

Professor BRIDGES. I believe that a person with a capacity for pregnancy has value. They have intelligence. They have agency—

Senator CORNYN. No, I'm talking about the baby.

Professor BRIDGES. I'm talking about the person with the capacity for pregnancy—

Senator CORNYN. You're not answering the question I'm asking—

Professor BRIDGES. I'm answering——

Senator CORNYN. Do you think that a——

Professor BRIDGES. I'm answering a more interesting question to me.

Senator CORNYN. Do you think that a baby that is not yet born—let's say the day before this mother delivers—do you think that baby has value?

Professor BRIDGES. I think that the person with the capacity for pregnancy has value, and they have the—they should have the ability to control what happens to their lives.

Senator CORNYN. Well, and I'd just note that you refuse to answer the question. Ms. Harle, the Declaration of Independence talks about certain inalienable rights, life, liberty, and the pursuit of happiness. When do you think that inalienable right to life attaches?

Ms. HARLE. Thank you. Yes, life is a human right, and when I answered Senator Booker's question earlier that I think our laws should protect all human life, I think I was focusing on the hard part, and I didn't mean to suggest that it's a matter of congressional authority to enact the law that you described, but I do think that the American people understand that you have no rights if you don't have the right to life. That is a principle that our Nation was founded upon, and every human being from its earliest existence has its own DNA and has a future. If we don't extinguish it, it has a future. And that is a human right. It is the value and mores, as Senator Cruz was speaking of, that goes back to the founding of nation, even at common law, and all the way up until 1973 when those life affirming laws in 46 States were turned on their heads by the Supreme Court. I believe that's what the American people believe. Life is a human right.

Senator CORNYN. Governor Stratton, as I listen to your testimony, it seems to me that you're advocating for abortion, at any time, for any reason, at any point during a woman's pregnancy. Is that correct?

Lt. Gov. STRATTON. What I'm advocating for is for everyone to have the right to determine what's best for their life, their body, and their future——

Senator CORNYN. At any time, at any point in the pregnancy. Is that correct?

Lt. Gov. STRATTON. I'm advocating for everyone to have the right to make the personal decision about what's best for their life, their body, and their future.

Senator CORNYN. I don't——

Lt. Gov. STRATTON. Everyone should have that right.

Senator CORNYN. Do you not understand my question? My question is are you advocating that there's a right to abortion at any time, for any reason, at any point during a pregnancy?

Lt. Gov. STRATTON. I'm not sure if you understand my answer, but what I'm saying——

Senator CORNYN. No, I understand that you're not answering the question——

Lt. Gov. STRATTON. Okay. Then we're—I——

Senator CORNYN. What amazes me is the advocacy for unlimited abortion rights, where there is zero value placed on an unborn

child. I think Senator Cruz pointed out, obviously, abortion is a very emotional and divisive issue in our society. One reason why we haven't had conversations like this is because the Supreme Court has said, "You can't talk about it because it's out of bounds." It's in the Constitution, as opposed to it being decided in a legislative forum like the States.

What I don't understand is the argument that a unborn child has zero value, the day before it's delivered, but then has value the day after it's born. Ms. Matzke, can you help explain that?

Ms. MATZKE. Thank you so much, Senator. Yes, I actually can. As a matter of fact, here in California there is a law that's about to be passed called the A.B. 2223, and this law basically will allow—as a woman is in the midst of a chemical abortion and she delivers a baby alive on the floor at any stage of pregnancy or in a hospital, that baby, if this law is passed, has the ability to be born alive and left to die.

No matter what, a baby in the womb, or outside of the womb has value, and we are not just talking about the value of a life in the womb right now. We are also talking about the value of a life in California, after it is born, and allowing it to die, up to 28 days after birth.

Senator COONS. Thank you. As we've heard today in testimony, both from my colleagues and from this panel, the conservative, activist majority on the Supreme Court abandoned decades of precedent protecting the rights of women to choose their reproductive health course. It has immediate consequences for the autonomy and the health of millions and millions of women in this country. I am concerned that the restrictions that we've seen in *Dobbs*' wake will further exacerbate inequalities and access to health care in this country.

Some of the States, as my colleague, Senator Booker just observed, that are rushing to restrict this right also have among the highest maternal mortality rates in this country. I am grateful that President Biden promptly took steps to mitigate the impacts of the Court's policy decision. These topics are intensely emotional and divisive and are challenging for us to work through in an appropriate, safe, and constructive way in the democratic process. They are and should be the focus of discussion, debate, and action here and in the months ahead.

I'm going to focus my questions today on the radical, legal, implications of this activist Court's decision in *Dobbs*, and the very real human consequences and impact. Weeks ago, generations of women and girls in our country understood the Constitution protected them against being forced to bear children against their will. Today those same women and girls have been told that the right to make their own decisions about reproductive health is not a right, a freedom guaranteed under our laws, and depending on where they live, that the State may force them to carry a pregnancy to term and give birth.

If I might, Professor Bridges, the conservative history and tradition analysis, as I understand it, seems to fundamentally short-change the rights of women and other groups of people, racial, religious minorities, who had no power in the democratic process at the relevant time when key decisions were made and thus is fun-

damentally flawed. I'd be interested in your brief comments on what's the danger of the Justices' reliance on selective historical analysis to roll back a fundamental and protected constitutional right? If this majority can engage in a moment of activism to reverse precedent that guarantees protections for women's bodily autonomy, what other fundamental rights might reasonably be imagined to be at risk?

Professor BRIDGES. Right, so, looking to the Nation's history, whether that, you know, date is 1787, when the Constitution was ratified; 1789, when the Bill of Rights was ratified; or 1868, when the Fourteenth Amendment was ratified, is to look at periods of the Nation's histories in which marginalized populations today were completely erased. I can talk about the LGBTQ community. They were not contemplated by the Framers, by those who ratified the Constitution. Their ability to live lives that are—have dignity, their ability to love who they love and to marry who they marry. That just wasn't contemplated by those folks who ratified the Constitution. People of color, immigrants, people with disabilities, people with the capacity for pregnancy, right? All of those groups were not simply thought of, and their interests were not considered during that moment in the Nation's history. I can tell you the litany of cases that we ought to be wary about being reversed. *Obergefell v. Hodges*, *Lawrence v. Texas*, *Loving v. Virginia*, *Skinner v. Oklahoma*—

Senator COONS. Professor, what's the common thread across all those cases? Some folks that are watching may not know as much as you do about the specifics of what kinds of freedoms are protected by the whole line of cases.

Professor BRIDGES. We're talking about—the Court framed these cases. The link that links them is this: Using the liberty term of the Due Process Clause to recognize that people need the capacity to make decisions about their personal lives, about whether they create a family, about how they raise their family, about decisions regarding love and sex and marriage. And, so, to pull *Roe* out of that thread of cases that have all recognized the right to privacy and liberty interests, is to create chaos and create uncertainty, with regard to cases that came after, and that's *Lawrence v. Texas*, protecting same-sex contact, same-sex marriage, as well as the cases that came before.

Senator COONS. Thank you, Professor. That's an insightful comment on how much else is at risk here and why this impacts fundamental rights that many of us, millions of us come to rely on to make decisions about our own life, about our families, about who we love, how we love, and when and how we choose to have children.

Lt. Governor, if I might—I'm almost out of time. Nothing in the *Dobbs* opinion blocks States from subjecting abortion providers, women and girls, and others seeking abortion care, and trying to help them access abortion care to criminal penalties. Is that correct? There's nothing in the *Dobbs* decision that blocks States from imposing criminal penalties for seeking to access abortion care. Do you expect, as a result of this decision, we'll have now a whole series of efforts at the State level that will result in contentious liti-

gation and imposition, potential criminal penalties of folks who are simply trying to help family members access abortion care?

Lt. Gov. STRATTON. I think that we are in the midst of seeing the kind of chaos that has been created by this decision in what is happening all across the country, where we are seeing different decisions, legislation that's been both proposed and passed. We've seen trigger laws. We've seen people seeking to travel from State to State and cross State lines. It is chaotic, and it is something that is causing harm and causes insurmountable challenges, quite frankly, for those who are trying to figure out what's possible. We need to make sure that people have the right to make decisions about what's best for them, with their physician, not from politicians. That's exactly what has been opened up with this decision.

Senator COONS. Thank you, Lieutenant Governor. Thank you to all of our witnesses. Mr. Chairman.

Chair DURBIN [presiding]. Thank you, Senator Coons. We're voting on the floor, so we're trying to both things. Senator Hawley.

Senator HAWLEY. Thank you, Mr. Chairman. Thanks to all of the witnesses for being here. Before—I want to visit with you Ms. Matzke, but before I do, I just want to clear one thing up. Professor Bridges, you said several times—you've used a phrase—I want to make sure I understand what you mean by it. You've referred to people with a capacity for pregnancy. Would that be women?

Professor BRIDGES. Many women, cis women, have the capacity for pregnancy. Many cis women do not have the capacity for pregnancy. There are also trans men who are capable of pregnancy, as well as nonbinary people who are capable of pregnancy.

Senator HAWLEY. This isn't really a women's rights issue, it's a—

Professor BRIDGES. We can recognize that this impacts women while also recognizing that it impacts other groups. Those things are not mutually exclusive, Senator Hawley.

Senator HAWLEY. Your view is that the core of this right then is about what?

Professor BRIDGES. I want to recognize that your line of questioning is transphobic, and it opens up trans people to violence by not recognizing them.

Senator HAWLEY. Wow, you're saying that I'm opening up people to violence by asking whether or not women are the folks who can have pregnancies?

Professor BRIDGES. I want to note that one out of five transgender persons have attempted suicide, so I think it's important—

Senator HAWLEY. Because of my line of questioning? We can't talk about it?

Professor BRIDGES. Because denying that trans people exist, and pretending not to know that they exist is—

Senator HAWLEY. I'm denying that trans people exist by asking—

Professor BRIDGES. Are you? Are you?

Senator HAWLEY [continuing]. You if you're talking about—

Professor BRIDGES. Are you?

Senator HAWLEY [continuing]. Women having pregnancies?

Professor BRIDGES. Do you believe that men can get pregnant?

Senator HAWLEY. No, I don't think men can get pregnant.

Professor BRIDGES. You are denying that trans people exist.

Senator HAWLEY. That leads to violence? Is this how you run your classroom. Are students allowed to question you, or——

Professor BRIDGES. Absolutely.

Senator HAWLEY [continuing]. Are they also treated like this where——

Professor BRIDGES. No, no, no.

Senator HAWLEY [continuing]. They are told that they're opening up people to violence by questioning?

Professor BRIDGES. Oh, we have a good time in my class. You should join.

Senator HAWLEY. I bet.

Professor BRIDGES. You might learn a lot.

Senator HAWLEY. Wow. I would learn a lot. I've learned a lot just in this exchange.

Professor BRIDGES. I know. Absolutely.

Senator HAWLEY. Extraordinary.

Professor BRIDGES. Yes.

Senator HAWLEY. Ms. Matzke, let me ask you something. You provide health care to women free of charge, right? Is that right?

Ms. MATZKE. Absolutely.

Senator HAWLEY. You've done this for many years?

Ms. MATZKE. Yes.

Senator HAWLEY. You have licensed medical professionals at your pregnancy care center. Is that right?

Ms. MATZKE. That is correct.

Senator HAWLEY. What are some of the resources that you provide for women who come to you in a time of need? Just give us a—you've talked about it in your written testimony—but just give us a sense of it.

Ms. MATZKE. We have three OB/GYN doctors, five registered nurses, nurse practitioners, physician assistants, phlebotomists, medical assistants. We provide prenatal care, OB/GYN care. We provide pregnancy tests, ultrasounds, well-woman visits, breast exams. We provide a wide range of medical services, yes.

Senator HAWLEY. What do you think about the D.C. politicians now saying that your clinic and the other 3,000 pregnancy care centers around this country are fake medical clinics? For instance, Senator Warren has said, "It's now more important than ever to crack down on so-called crisis pregnancy centers that mislead and deceive patients." Senator Menendez, "Crisis pregnancy centers jeopardize women's health and well-being, all while elevating unproven theories about birth control." Senator Warner wrote to Google asking them to censor search results for care centers like yours, saying, "Directing women to fake clinics that traffic in misinformation is dangerous to women's health and undermines the integrity of Google's search results."

Do you run a fake clinic? Is that what's happening here? You don't provide actually medical care to actual women?

Ms. MATZKE. We absolutely do not run a fake clinic, and we have a full medical staff. Like I said, many of our medical professionals have experienced abortion themselves, including our OB/GYN doctor, who used to perform abortions. Our entire medical staff is

there for women, whether they choose abortion and walk out the door, or whether they choose life for their baby and we support them for years after that.

Senator HAWLEY. Do you think there ought to be an ideological test to be able to get medical care in this country? I mean, is that—should we say to women, “Well, you have to agree with the D.C. Democrats ideology; otherwise you can’t go get medical care”? Or maybe for you and the physicians who work at your pregnancy care center, or the thousands of others across the country, should we impose an ideological test on them and say that, “Well, you have to agree with the D.C. Democrats’ position on abortion, or you can’t provide medical care to women?” Should we do that in this country?

Ms. MATZKE. Absolutely not.

Senator HAWLEY. I just want to ask in my few remaining seconds here. Ms. Harle, the *Dobbs* decision as I understand it—I’ve read it now a number of times—it gives to voters the decision as to what law should be pertaining to life and pertaining to abortion in all 50 States and other jurisdictions around the country. I’m just curious, do you know what percentage of voters in this country support the D.C. Democrats’ position that they want to impose on the entire country, a one size fits all rule they want to impose, from the top down. Do you know what percentage of voters support their position, which is also by the way, the same position taken by North Korea, China, other notable violators of human rights? Do you know what percentage it is?

Ms. HARLE. I know that nearly 90 percent of Americans oppose abortion in the third trimester. The number that would support abortion up to the moment of birth has to be miniscule. It’s a horrific policy.

Senator HAWLEY. Yes, I mean, based on the most recent Harvard poll that was just released just a few days ago, less than 10 percent of voters say that they would support abortion into the final month of pregnancy, and yet that is the law that the D.C. politicians want to impose on every voter in America. To take this away from the people, take it away from my State, take it away from all the other States and the voters in the States, but impose this law, uniformly, that is not supported by 90 percent of the American people. Talk about anti-Democratic. At the same time, they want to shut down 3,000 pregnancy care centers all around this country. That’s radical. Thank you for being here.

Chair DURBIN. Senator Padilla.

Senator PADILLA. Thank you, Mr. Chair. Thank you all for your participation here today. As I believe you’re all aware, this last Friday, President Biden signed a crucial executive order, seeking to protect access to reproductive health care nationwide. While I appreciate the President’s efforts and the importance that his administration has placed on this issue, as we’ve discussed here at the hearing today, people of color, economically disadvantaged families, immigrants, and members of Tribal communities have faced significant barriers to receiving adequate health care, even before *Roe* was overturned. Those barriers will only further increase now.

In a country where the Black maternal mortality rate is triple that of white women, we should not be forcing anyone to carry

pregnancies to term, if they wish to terminate for health or other reasons, period. If we are serious about protecting lives in America, we should be ensuring that mothers across the country have every medical resource available. Anything less is simply unacceptable.

My first question is for Professor Bridges, since you are from my home State of California. In your written testimony, you mentioned how the harshest effects of *Dobbs* will fall on Black people, Black women, Black families. Can you describe how this decision will impact the maternal mortality rate for Black women?

Professor BRIDGES. Absolutely. As you've already noted, Black people with the capacity for pregnancy have a maternal mortality rate that is three to four times the rate of their white counterparts. I also think it's important to mention maternal morbidity, severe maternal morbidity. Our rates are twice that of our white counterparts, meaning that we have to undergo a lifesaving intervention, like mechanical ventilation, like a hysterectomy, in order to keep our lives during pregnancy, childbirth, or the postpartum period. Removing abortion access, removing the ability to safely terminate a pregnancy compels birth, which is simply more dangerous for Black people. I want to just mention that this is not inevitable. Black people don't have a gene that causes us just to die. These are social causes of these disparities of maternal mortality and morbidity, meaning that we, as a society, have not invested the resources that can make pregnancy, childbirth, and the post-partum period safe for Black people.

Senator PADILLA. Thank you. A question for Lieutenant Governor Stratton. Note respect that Illinois has taken steps to ensure that abortion remains legal for all, regardless of their background. Can you elaborate a little bit on how the elimination of abortion restrictions is essential in achieving reproductive, as well as economic and racial justice?

Lt. Gov. STRATTON. Absolutely, thank you, Senator, for that question. First and foremost, in addition to the conversations that we have been having about maternal mortality and the disproportionate impact on Black women in particular, I want to talk about some of the other long-lasting restrictions that we will see from—the long-lasting impacts of the restrictions or bans to abortion. This includes an increased risk of intimate partner violence. We know that for pregnant people, intimate partner violence and, in fact, it's one of the leading causes of homicide for—homicide is one of the leading causes of death for pregnant women. We know that it will be increased health problems regardless of not just because of maternal mortality, but also other health issues that can exist far beyond that point of giving birth, as well as the financial and economic risks. The strain, increased evictions, increased poverty, living in long-term poverty, being in debt. Listen, I am a mother to four daughters, and I can tell you for anybody who is a parent, raising a child is expensive. To talk about forcing someone to, you know, become a parent, and give birth, and to carry out a pregnancy to term, when that is not what that person wants, that as has been stated before by Professor Bridges is a form of violence. People should be able to choose what's best for themselves. Politicians are not health care professionals, and we should be able to have that bodily autonomy to decide, not just what's best for our

bodies, but what's best for our futures. Maybe it's not the right time to start a family. We should be able to decide that for ourselves, as it has been for close to the last 50 years.

Senator PADILLA. Thank you. Mr. Chair, I know my time is limited. I'll truncate my final question if that's okay—just to ask one final question. Recognizing that in the majority opinion, Justice Alito wrote that Americans need not worry about the broader implications of the right-wing majority's decision to overturn *Roe*. He said it's limited to this. Yet, and in it's concurrent to Justice Alito's opinion, Justice Thomas makes it explicitly clear that those other rights are not actually secure. It has invited the Supreme Court to take up cases to revisit other areas of what we had believed to be settled law.

Professor Bridges, does the reasoning in Justice Alito's opinion striking down *Roe* actually—is it possible, or likely it could be applied to other areas of settled law that could go backward on access to contraception, rights as it pertains to marriage, intimate relations, and other fundamental rights?

Professor BRIDGES. Absolutely, the Court's protestations that it is not at all touching those cases rings very hollow. The logic of the decision, the methodology of constitutional interpretation leave all of those decisions that Justice Thomas himself highlighted open to revisiting and reversal.

Senator PADILLA. Thank you. Thank you, Mr. Chairman.

Chair DURBIN. Senator Ossoff.

Senator OSSOFF. Thank you, Mr. Chairman. Thank you to our panelists. Thank you for your testimony and your presence today. I believe I may be concluding this hearing—one more after this? I would like to focus these few minutes, if I might, on the real-world impact on the consequences for women's health, women's lives, women's risk of death or grievous injury. Of laws such as the one we have on the books, not yet enforced, but perhaps soon. H.B. 481 in Georgia, which bans abortions beginning at 6 weeks, before many women even know their pregnant, with very limited exceptions. In other States, where even more draconian and extreme bans on abortion are on the books, just waiting to be enforced as this decision and its implications make their way through the courts.

Dr. McNicholas, based upon your experience, when a State government steps in and decides it will regulate pregnancy and forbid a woman in consultation with her doctor from making the personal choice about her pregnancy, as early as 6 weeks in pregnancy, what are the implications for women's health?

Dr. McNICHOLAS. Thank you so much, Senator, for raising the issue. I want to recognize you're probably the closest to the issue in some personal experience with your wife being an OB/GYN, so certainly you have heard some of the stories already. You know, the truth is pregnancy is complicated, and it can become life threatening at any moment. You know, I'm going to go radical here and say I've heard lots of talk about whether this should be decided at the State level or at the Federal level. I'm going to go bold and say it actually should be considered in the medical world. This is a health care issue. This isn't a legal issue, or it shouldn't be decided by State representatives or Federal representatives. It should

be decided by a patient and their family. They are the only person who can know whether it is appropriate to start a family or to expand their family.

I have had so many examples over my lifetime and my career of just how complicated pregnancy can get, and just how quickly somebody can go from completely healthy to on the verge of death. Pregnancy is no joke, and as we see more and more States deny access to this lifesaving care, we will see more people harmed. We are already seeing that. You know, in the wake of Texas' and Oklahoma's bans, we saw an increase of more than 120 percent of people outside of our area.

You know, all this talk about abortion later in pregnancy, I'm going to tell you that the only relevant fact about abortion later in pregnancy right now, is that these bans will, in fact, push people to later in pregnancy when they are having their abortions. It will not be because of the work that I do that people get abortion later in pregnancy, it will be because of all of these people that support bans. That is why people will have abortion later in pregnancy.

Senator OSSOFF. I'd like to continue, Doctor, with the discussion on the impact on the practice of medicine. These are extraordinarily complex medical cases.

Dr. McNICHOLAS. Yes, absolutely. You know, particularly for folks who are experiencing either worsening chronic medical conditions, or new conditions related to pregnancy specifically, it is so imperative that physicians, their entire care team, which include obstetricians, and perinatologist, and neonatologist, and pediatricians, that they have every single tool available to them, so that they can present patients with all of their options to preserve their health.

You know, as I think about the phone calls I'm getting from physicians across the State of Missouri, in my role, again, as an ACOG leadership, what I'm hearing people say is, "My hospital sent me a policy that says, 'I have to wait until their blood count drops, or until their vitals are unstable before I can take them'. I have to wait until it's clear that they are so sick, that their infection is so bad that they now require intensive care." These are completely preventable occurrences in a person's life that not only impact that pregnancy, but every pregnancy to potentially follow. We're talking about people leaving families, you know? If and when these people are dying from delayed care, they're leaving behind kids. They're leaving behind families. There is some real tragic impact that we are going to see in the coming days, weeks, and months.

Senator OSSOFF. In sum, Doctor, I might ask you your opinion, who are the people in the world best qualified to determine when someone's life is at risk, when someone's health is at risk, and what health care someone needs?

Dr. McNICHOLAS. You know, about 16 years of education, and lots of years of practicing, sitting at the bedside with patients, and learning from my colleagues in different specialties, physicians and health care providers are the ones who are best prepared to decide. The truth is, that's why we've seen in the recent days more than 75 professional medical organizations sign on to a statement detesting this decision. We're not talking just OB/GYNs. We're talking rheumatologists and oncologists and psychiatrists and anesthe-

siologists, people who may peripherally touch abortion care, but recognize how dangerous it is that physicians are now being told that it isn't their clinical expertise that should guide the health care that they provide. That it is actually the Attorney General or a lawyer's opinion about whether that is sick enough. It's tragic and it will put people at harm.

Senator OSSOFF. Mr. Chairman, I yield back.

Chair DURBIN. Thank you. We are joined by Senator Blumenthal, who is recovering from Covid, and I hope he is with us. Dick, are you there?

Senator BLUMENTHAL. I'm with you, Mr. Chairman, and hope that you can hear me and that the witnesses can hear me. I want to begin by thanking every one of them for being with us today, and I apologize for being with you remotely. This hearing has been enlightening, and I want to just begin by saying that in the last few weeks, I've traveled around the State of Connecticut to clinics and visiting providers in Waterbury, New Haven, New London, Hartford, and as much as I have felt their anguish and anger, their fear about the future, I'm also impressed by their resilience, and their resolve to continue providing these essential health care services.

Connecticut, fortunately, decades ago enacted a law that enshrines *Roe v. Wade*. I helped to lead that effort in the 1990's and consequently, Connecticut has been confident of those rights over these times. Now we face, at the Federal level, the same challenge. I'm helping to lead the effort on the Women's Health Protection Act, which would incorporate *Roe v. Wade* into our statutes. Let me just say very bluntly, any Senator, any person who says they are in favor of choice should be in favor of the Women's Health Protection Act. Senators who say they are pro-choice should vote in favor of the Women's Health Protection Act, and unfortunately, no Republican voted in favor of it the last time we had a vote, just months ago. That is truly one of the ways to protect reproductive rights.

We also have other legislation pending, such as Senator Hirono's bill to protect privacy of medical records, rights of travel. The House will be hopefully voting this week on some of those steps. In the meantime, I commend President Biden for moving forward with protections and urge, again, that he declare a national emergency. We truly face an emergency every bit as dire as the opioid epidemic and Covid crisis, which have prompted declarations of emergency in the past. I urge that President Biden, as we said to him in a letter recently, declare that emergency.

Just very bluntly, I was so impressed by the Illinois Lieutenant Governor's testimony that we face a future rife with needless death. The plain fact is that *Dobbs* is a death sentence for many women around our country, and they will come to States like Connecticut, which has moved forward in the past year with the Reproductive Freedom Defense Act. It provides protections unparalleled, as far as I know, among any State, so far, in the country. Although, a number have enacted *Roe* protections, such as Illinois and Delaware and others, either by statute or executive order.

Connecticut has gone further by creating rights of action for individuals who are pursued by bounty hunters to call back the costs.

It said, in effect, that it will not cooperate with extradition attempts or other kinds of criminal enforcement attempts by Texas or Oklahoma or other States that have laws. Eventually, it will probably be about 26 of them.

Here is my question to Lieutenant Governor Stratton. States like Connecticut and Illinois face an impending surge of women seeking their rights, health care rights, reproductive rights, human rights in our States. What we face is unprecedented cost to our health care system, to the providers of clinics. What would you recommend—and I understand resources may be a part of it—that the Federal Government to do to help those states that face this impending crisis?

Lt. Gov. STRATTON. Thank you, Senator, for that question and let me begin by saying that I hope you are well and on the road to recovery, a full and complete recovery. This administration, the Biden-Harris administration, should explore all of the available tools at its disposal to the broadest extent that they can under the law to protect access to abortion. This administration must also challenge the *Roe* decision through the Department of Justice guidance and protections and through as much administrative action as possible.

As you mentioned, Senator, this is a national health crisis. It is not going to work. We've seen the chaos that has happened, and it's not going to work with everyone doing their own thing. People will die, and that is just the fact. We are seeing that already. We know that the action of this administration cannot be unilateral, so I thank you for your leadership on the Women's Health Protection Act. We need to make sure that the administration works with Congress to pass additional abortion protections and signed—and get the Women's Health Protection Act passed and signed into law, codifying a right to reproductive freedom, eliminate the Hyde Amendment restrictions, because we know that that also prevents people from getting access to care, and passing and signing into law the EACH Act to make sure health insurance will cover, through Federal funds, health coverage will be available.

Then, of course, each of these laws must be implemented. It is, again, a call to make sure everything is done. As I mentioned in my remarks, which you have, my opening remarks, we've also talked about creating some sort of hub so that there can be some sort of coordination among States to make sure that women, that people, Americans are getting the health care that they deserve and need.

Senator BLUMENTHAL. Thanks for that answer, Governor. In the couple of moments I have left, let me just emphasize that we need a kind of reproductive rights for health care triage right now, facing a tremendous burden that States like Illinois and Connecticut, which provide a kind of safe harbor, will face going forward with our providers and clinics. Every one of the measures you've just mentioned and more need to be explored, particularly public health emergency declaration, which would enable more resources under Medicare and Medicaid to be provided, because resources will be so very important. I thank you for your leadership and I believe that women who are residents of safe harbor States like Connecticut will be assured by the resolve of our Governor and our legislature

that they will stay true to course. We must prepare to provide this essential right to women around the country who will come to our States, and make sure that we have the resources to fill the gap. Thank you so much, Mr. Chairman.

Chair DURBIN. Thank you, Senator Blumenthal. I thank everyone who's been part of this, and if no other Members are seeking recognition, if you'll bear with me for a point of personal privilege for just a few moments.

The letters which were displayed by Senator Cruz and Senator Lee are not new. I've seen them over and over again. They are 30 and 40 years old, and it's true that my position on this subject did change, but it might be of interest to you why it changed. When I was a Member of the House of Representatives, there was a major offer to send money to Planned Parenthood for family planning and birth control that could not be used for abortion procedures. In my mind, that was sensible. Family planning and birth control gives to a woman and a family an option to control and plan their pregnancies. Isn't that what we want? Unplanned pregnancies are what lead us, many times, to an abortion decision.

I voted for this family planning and birth control, and the pro-life group said, "That's it. We're never going to support you again. You've broken with us." Then I started looking at this issue thinking, "If they can't even buy birth control, how can this be a sensible approach?" I sat down. I know exactly where I was, in Quincy, Illinois, at a home for young people who were in trouble in their teens. I sat down with two young women who were about to turn 18, one a victim of incest, one a victim of rape, and they told me their stories. I didn't ask them to, but they wanted to tell me.

I left that meeting with a kind of understanding that I'd never had before about the complexity of the decision behind the abortion procedure many times. Some people think it's just a simple thing of, "I don't want to be bothered." I think it's much more serious, in most instances. I thought to myself, "As an individual Member of Congress, are you ready to pass a law that applies to every woman in America?" No, it really has to be her decision. We can regulate it as we should. But at that point I made my break, and I've run/stood for election in the House, in the Senate, many times since then. I've seen these letters before, and I'm sure I will see them again.

I thank you all for being here. With the *Dobbs* decision, young Americans have been thrust into a world in which they do have fewer rights than their parents and grandparents. That stark reality is a condemnation of the Court's conservative majority, and the extent to which they've shaken American people's faith in the rule of law.

To our sons and daughters across America who are fearful of the world that's coming their way, Francis Bacon once said, "Truth is the daughter of time, not authority. Progress may not always follow a linear path, and while it can move at a plodding pace, in due time, progress and truth will arrive." To quote Justices Kagan, Sotomayor, and Breyer's dissent, "The Framers of the Constitution understood that the world changes. They defined rights and general terms to permit future evolution in their scope and meaning. The story of America is the story of that future evolution, and it's

the responsibility of all lawmakers to move forward. We have a lot of work to do to leave Americans in the future in a better position than the world that we have handed them." This hearing is the first, I think, organized serious hearing in the Senate on this subject. It won't be the last. The conversation continues, and I thank all the members of the panel for joining us today. With that, the Senate Judiciary Committee stands adjourned.

[Whereupon, at 12:40 p.m., the hearing was adjourned.]

[Additional material submitted for the record follows.]

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TESTIMONY
BEFORE THE SENATE JUDICIARY COMMITTEE
ON
A POST-ROE AMERICA: THE LEGAL
CONSEQUENCES OF THE *DOBBS* DECISION

BY

DENISE MAYO HARLE

SENIOR COUNSEL AND DIRECTOR OF THE CENTER FOR LIFE

ALLIANCE DEFENDING FREEDOM

JULY 12, 2022

Dear Chairman Durbin, Ranking Member Grassley, and Members of the Committee:

A teenage girl who unexpectedly becomes pregnant walks into a state-funded pregnancy resource center where she finds a compassionate community willing to help with medical expenses, baby formula and newborn clothes, parenting classes, counseling, connections to community support networks, and even educational and job-retraining opportunities. A couple who learns that their child has Down Syndrome is given information about public and private programs to equip them to parent a child with special needs and to help their beautiful child navigate a full and meaningful life. And while one State's legislature enacts a bill that protects life upon the detection of a heartbeat, another State works to expand funding opportunities for pregnancy centers, adoption providers, and other social service organizations helping women and their children.

This is what a post-*Roe* America looks like: a nation where States are unshackled from the judicially imposed restraints of *Roe* so that the "people's elected representatives" can not only affirm that life is a human right but can also innovate and cultivate a true culture of life that wholistically uplifts and supports women.

And while States may disagree where to draw the line on how women and their unborn children should be valued, they can still draw inspiration from the laws and policies each State enacts to provide more comprehensive care for women with unintended or challenging pregnancies. Alabama may seek to mimic California's funding of drug treatment programs for mothers and infants.¹ Massachusetts could implement Oklahoma's law that requires the Department of Health to maintain a directory of agencies and services available to a woman through pregnancy, childbirth, and her child's early development.²

A post-*Roe* America should be defined by a shared pursuit to provide a pregnant young woman with information about and access to care, resources, and a vast support network of both public and private entities that will walk with her and her child for years to come. By an unwavering commitment to recognize the value of individuals with disabilities – including those in the womb. And by an agreement that our country is best served when our judiciary respects the text of the Constitution and

¹ Cal. Health & Safety Code §§ 123605, 123610.

² Okla. Stat. Ann. tit. 63, § 1-752.

the authority of States to enact laws that affirm the dignity of all life – including the lives of women and their unborn children.

Reversing the Heavy-Handed Judicial Intervention of *Roe*

A so-called right to abortion “has no basis in the Constitution’s text or in our Nation’s history.”⁵ The U.S. Supreme Court made an egregious error when it decided *Roe v. Wade* and declared a newly discovered right to abortion emanating from other unspecified rights.⁶ For decades, legal scholars across the ideological spectrum roundly criticized *Roe*’s reasoning and conclusion: from higher education where Professor John Hart Ely declared that *Roe* was “not constitutional law”⁷ and Professor Mark Tushnet acknowledged it was a “totally unreasoned judicial opinion,”⁸ to the late Justice Ruth Bader Ginsburg, a staunch abortion advocate, calling *Roe* a “[h]eavy-handed judicial intervention [that] was difficult to justify.”⁹ In short, *Roe* was an indefensible power grab by the majority of the Court, depriving States of their ability to support women and protect their unborn children, and stripping citizens of the ability to determine policies affirming the dignity of life through their elected representatives.

At the stroke of a pen, *Roe* upended the laws of almost every State. The seven men in the *Roe* majority told women that pregnancy “force[d] upon [them] a distressful life and future.”¹⁰ The Court substituted itself as a policymaker and declared the taking of an innocent, unborn life – an act that States had long deemed *illegal* – to be a *fundamental right*. Indeed, when *Roe* was decided in 1973, the overwhelming majority of States prohibited abortion in most or all circumstances.¹¹ This was nothing new. At common law, abortion was unlawful at all stages of pregnancy and criminal in some because it involved ending an innocent human life.¹² “By the time of the adoption of the Fourteenth Amendment, three-quarters of the States had made abortion a crime at any stage of pregnancy, and the remaining States would soon follow.”¹³ Even while recognizing that States have an “important and

⁵ *Dobbs v. Jackson Women’s Health Org.*, No. 19-1392, 2022 WL 2276808, at *42 (2022).

⁶ *Id.* at *26 (concluding that “*Roe* was also egregiously wrong and deeply damaging”).

⁷ John Hart Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L. J. 920, 947 (1973).

⁸ Mark V. Tushnet, RED, WHITE, AND BLUE: A CRITICAL ANALYSIS OF CONSTITUTIONAL LAW 54 (1988).

⁹ Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to Roe v. Wade*, 63 N.C. L. REV. 375, 385 (1985).

¹⁰ *Roe v. Wade*, 410 U.S. 113, 153 (1973).

¹¹ *Dobbs*, 2022 WL 2276808, at *22.

¹² *Id.* at *12-14.

¹³ *Id.* at *12.

legitimate interest” in unborn life from the outset of pregnancy¹² – as the existing laws reflected – the Court in *Roe* held that the people could suddenly do nothing to protect life until the third trimester of pregnancy, at which point the child can feel pain, move its fingers, and perhaps even smile.¹³

When the Supreme Court revisited *Roe* in *Planned Parenthood v. Casey* in 1992, it did not defend *Roe*’s reasoning, but rather discarded *Roe*’s legal test and replaced it with a new one. While *Roe* claimed that “privacy” somehow granted the right to take an innocent human life,¹⁴ *Casey* said the purported right was grounded in the “liberty” to make “intimate and personal choices.”¹⁵ Whereas *Roe* determined that the asserted constitutional right to abortion varied by trimester of pregnancy, *Casey* concluded that a “rigid trimester framework” was “unnecessary” and “undervalues the State’s interest in potential life.”¹⁶

Casey settled on a new “viability line” that recast the constitutional right as one dependent on the arbitrary point at which a particular child in the womb is “viable”¹⁷ – a line that varies from pregnancy to pregnancy, based on several factors (including the mother’s magnesium intake, fetal weight, and access to a high-quality NICU), and one that has also changed over time with scientific advancement. The plurality in *Casey* further added a new doctrine of unknown origin: the “undue burden” test. Under that standard, a state law protecting unborn life or maternal health would be invalid if it “ha[d] the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion.”¹⁸

For 30 years following *Casey*, the U.S. was forced into becoming an outlier in the international community—one of only a handful of countries like China and North Korea that permitted elective abortions past 20 weeks.¹⁹ In that time, courts struggled unsuccessfully to apply the undue burden standard alongside the viability line, while States attempted with great frustration to safeguard what

¹² *Roe*, 410 U.S. at 162.

¹³ *The Voyage of Life: Weeks 13 & 14*, CHARLOTTE LOZIER INSTITUTE, <https://lozierinstitute.org/fetal-development/weeks-13-14/> (last visited July 10, 2022).

¹⁴ *Id.* at 154.

¹⁵ *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 851 (1992).

¹⁶ *Id.* at 872, 873.

¹⁷ *Id.* at 870.

¹⁸ *Id.* at 877.

¹⁹ Charlotte Lozier Institute, *Gestational Limits on Abortion in the United States Compared to International Norms* (Feb. 1, 2014), <https://lozierinstitute.org/internationalabortionnorms/>; Angelina B. Nguyen, Charlotte Lozier Institute, *Mississippi’s 15-Week Gestational Limit on Abortion is Mainstream Compared to European Laws*, ON POINT, Issue 63 (July 2021) <https://lozierinstitute.org/wp-content/uploads/2021/07/On-Point-63.pdf>.

Casey acknowledged was their “legitimate interests from the outset of the pregnancy in protecting ... the life of the fetus that may become a child.”²⁰ Those well-recognized state interests include (1) respecting and preserving prenatal life; (2) mitigating fetal pain; (3) protecting the mother’s health and safety; (4) eliminating gruesome procedures such as partial-birth or dismemberment abortion; (5) preserving the medical professionals’ integrity; and (6) preventing discrimination based on race, sex, or disability.²¹

On June 24, 2022, the Supreme Court corrected the grave judicial error begun in *Roe* and perpetuated in *Casey*, freeing the people’s elected representatives to once again craft policy solutions to the harms abortion imposes on unborn children and their mothers. No longer will courts clothe themselves with legislative power, substituting their own judgment of the weight of immeasurable interests like the right to human life and how to comprehensively support women and their families who find themselves in challenging situations. No longer will a judicial fiat block States from ensuring that their next generation is not killed in the womb.

At its core, *Dobbs* is a modest yet scholarly opinion. It rejects *Roe*’s unsupported, unworkable, and unsustainable reasoning and confirms that the Constitution never contained a right to take an innocent human life. *Dobbs* clarified that a rational-basis test applies to state laws limiting abortion.²² Under this deferential standard, States may – as they long had before *Roe* – pass laws that advance women’s health and well-being and protect their unborn children.

In a Post-*Roe* America, States are Free to Protect Life

The *Dobbs* decision “return[s] the issue of abortion to the people’s elected representatives.”²³ In reality, abortion law and policy have been debated at the municipal, state, and federal level since long before *Roe*. This debate has accelerated in recent years, and how to affirm the dignity of all life will remain a much-deliberated issue in legislatures for years to come.

Dobbs makes possible what *Roe* prohibited. It empowers States to protect life at its earliest stages and to better ensure that women are valued and supported and not subject to a dangerous,

²⁰ *Casey*, 505 U.S. at 846.

²¹ *Dobbs*, 2022 WL 2276808, at *42.

²² *Id.*

²³ *Id.* at *7.

irreversible, and life-altering procedure – one that implicates “a difficult and painful moral decision” that is “fraught with emotional consequences.”²⁴ Some States will choose this newly available path. Others, however, will choose not to use their power to promote equality for women, celebrate motherhood, and protect the lives of their most vulnerable citizens, even though many such measures were even permitted under *Roe*. And some of these States will even continue to follow the lead of totalitarian regimes like China and North Korea and maintain their extreme abortion laws and policies that perpetrate significant human rights abuses.²⁵

Legitimate State Interests Informing Life-Affirming Laws

Dobbs firmly establishes that a “law regulating abortion, like other health and welfare laws, is entitled to a ‘strong presumption of validity’”²⁶ and “must be sustained if there is a rational basis on which the legislature could have thought that it would serve legitimate state interests”²⁷ – including those state interests discussed above.²⁸

Even during the *Roe* era, the Supreme Court repeatedly recognized that a State “may use its voice and its regulatory authority to show its profound respect for the life within the woman.”²⁹ Our current knowledge of fetal development effectively underscores the importance and legitimacy of this “profound respect” for unborn life.

For example, by 4 to 5 weeks gestation, “almost all major organs have started to form, including the lungs, liver, kidneys, stomach, and pancreas.”³⁰ The unborn child “starts receiving nutrients and oxygen and expelling waste using the umbilical cord and placenta.”³¹ By 5 to 6 weeks gestation, the unborn child responds to touch,³² and by week 6 to 7, the unborn child’s “heart has

²⁴ *Gonzales v. Carhart*, 550 U.S. 124, 159 (2007).

²⁵ Sean Salai, *U.S. in League with China, North Korea on Abortion*, THE WASHINGTON TIMES (Jan. 31, 2022),

<https://www.washingtontimes.com/news/2022/jan/31/report-us-china-north-korea-have-most-permissive-a/>.

²⁶ *Dobbs*, 2022 WL 2276808, at *42 (quoting *Heller v. Doe*, 509 U.S. 312, 319 (1993)).

²⁷ *Id.*

²⁸ *Supra* n.21 and accompanying text.

²⁹ *Gonzales*, 550 U.S. at 157; *accord Casey*, 505 U.S. at 877 (recognizing as a legitimate interest the State’s “profound respect for the life of the unborn”).

³⁰ *The Voyage of Life: Week 4 to 5*, CHARLOTTE LOZIER INSTITUTE, <https://lozierinstitute.org/fetal-development/week-4-to-5/> (last visited July 7, 2022).

³¹ *Id.*

³² *The Voyage of Life: Week 5 to 6*, CHARLOTTE LOZIER INSTITUTE, <https://lozierinstitute.org/fetal-development/week-5-to-6/> (last visited July 7, 2022).

formed all four chambers” and has a heart rate that peaks at 170 beats per minute (“almost twice as fast as” her mother’s).⁵³

In recent years, medical evidence demonstrating the unborn child’s ability to feel pain has developed significantly. Notably, we’ve learned that the basic anatomical organization of the human nervous system is established by 6 weeks gestation.⁵⁴ A 2020 comprehensive review of the scientific literature on neural development, psychology of pain sensation, and moral implications of fetal pain concluded that unborn babies may experience pain at 12 weeks gestation.⁵⁵

The Supreme Court has also repeatedly recognized a State’s well-established “legitimate interests from the outset of the pregnancy in protecting the health of [women],”⁵⁶ as the “medical, emotional, and psychological consequences of an abortion are serious and can be lasting.”⁵⁷ Current medical evidence provides compelling support for state action to limit or regulate abortion and dispels the myth that abortion is generally safe.

Abortion can cause serious physical and psychological (both short- and long-term) complications for mothers, including:

- uterine perforation
- uterine scarring
- cervical perforation or other injury
- infection
- bleeding
- hemorrhage
- blood clots
- incomplete abortion (retained tissue)
- pelvic inflammatory disease
- endometritis
- missed ectopic pregnancy
- cardiac arrest
- respiratory arrest
- renal failure
- metabolic disorder
- shock
- embolism
- coma
- placenta previa in later pregnancies
- preterm birth in subsequent pregnancies
- free fluid in the abdomen
- organ damage
- adverse reactions to anesthesia and other drugs
- psychological or emotional complications
- depression
- anxiety
- sleeping disorders
- death⁵⁸

⁵³ *The Voyage of Life: Week 6 to 7*, CHARLOTTE LOZIER INSTITUTE, <https://lozierinstitute.org/fetal-development/week-6-to-7/> (last visited July 7, 2022).

⁵⁴ *Fact Sheet: Science of Fetal Pain*, CHARLOTTE LOZIER INSTITUTE (Feb. 19, 2020), <https://lozierinstitute.org/fact-sheet-science-of-fetal-pain/>.

⁵⁵ *Id.*

⁵⁶ *Casey*, 505 U.S. at 846.

⁵⁷ *H.L. v. Matheson*, 450 U.S. 398, 411 (1981).

⁵⁸ See, e.g., P.K. Coleman, *Abortion and Mental Health: Quantitative Synthesis and Analysis of Research Published 1995-2009*, 199 BRIT. J. OF PSYCHIATRY 180 (2011); P. Shah et al., *Induced Termination of Pregnancy and Low Birthweight and Preterm Birth: A Systematic Review and Meta-Analysis*, 116 BJOG 1425 (2009); H.M. Swingle et al., *Abortion and the Risk of Subsequent Preterm*

Abortion also has a higher medical risk when the procedure is performed later in pregnancy. Compared to abortion at eight weeks, the relative risk of mortality increases by 38% for each additional week at higher gestations.³⁰ So, a woman seeking an abortion at 20 weeks is 35 times more likely to die from the abortion than she was in the first trimester. At 21 weeks, she is 91 times more likely to die from the abortion than she was in the first trimester.

In *Gonzales v. Carhart*, the Supreme Court determined that government could regulate the “brutal and inhumane” partial-birth abortion procedure to avoid “coarsen[ing] society to the humanity of not only newborns, but all vulnerable and innocent human life.”⁴⁰ The Eleventh Circuit later extended this precept to the dismemberment abortion procedure, the most common method of abortion after the first-trimester, concluding that “[t]he State has an actual and substantial interest in lessening, as much as it can, the gruesomeness and brutality of dismemberment abortions.”⁴¹

All abortion procedures are gruesome and inhumane. Dilation and curettage (D&C) abortion forcibly sucks the unborn child into tiny pieces and out of her mother’s womb and then scrapes out any remaining body parts with a scalpel. Dilation and extraction (dismemberment or D&E) abortion involves crushing the unborn child and tearing her apart limb from limb with forceps, after which the abortionist must count the baby’s body parts to ensure that none were left in the mother’s womb. And while abortion proponents suggest that chemical (or drug-induced) abortions are more humane, let’s be clear about how they work: they starve the unborn child of nutrients until her life is extinguished. Each of these methods is a horrific act of violence against a vulnerable, living child.

Roe’s legacy is a society increasingly “coarsen[ed] ... to the dignity of human life”⁴² and accepting of acts that purposely destroy human life. By prohibiting or limiting the taking of unborn life, States exercise their right to affirm the value of human life at all stages.

Birth: A Systematic Review and Meta-Analysis, 54 J. REPROD. MED. 95 (2009); R.H. van Oppenraaij et al., *Predicting Adverse Obstetric Outcome After Early Pregnancy Events and Complications: A Review*, 15 HUMAN REPROD. UPDATE ADVANCE ACCESS 409 (2009); J.M. Thorp et al., *Long-Term Physical and Psychological Health Consequences of Induced Abortion: Review of the Evidence*, 58 OBSTET. & GYNECOL. SURVEY 67, 75 (2003); J.M. Barrett, *Induced Abortion: A Risk Factor for Placenta Previa*, 147 AM. J. OBSTET. & GYNECOL. 769 (1981).

³⁰ L. Bartlett et al., *Risk Factors for Legal Induced Abortion-Related Mortality in the United States*, 103 OBSTET. GYNECOL. 729 (2004).

⁴⁰ *Gonzales*, 550 U.S. at 157.

⁴¹ *W. Ala. Women’s Center v. Williamson*, 900 F.3d 1310, 1320 (11th Cir. 2018).

⁴² *Dobbs*, 2022 WL 2276808, at *67 (Roberts, J., concurring) (cleaned up).

For more than a decade, the Supreme Court has recognized that a State “may use its regulatory power to bar certain [abortion] procedures and substitute others, all in furtherance of its legitimate interests in regulating the medical profession in order to promote respect for life, including life of the unborn.”⁴³ States may also regulate abortion to protect the integrity of the medical profession and their Hippocratic oath to do no harm.⁴⁴ Any gruesome or inhumane abortion procedure “confuses the medical, legal, and ethical duties of physicians to preserve and promote life, as the physician acts directly against the physical life of a child” and “undermines the public’s perception of the appropriate role of a physician.”⁴⁵

Finally, as Justice Thomas noted in his concurring opinion in *Bax v. Planned Parenthood of Indiana and Kentucky*, States have a “compelling interest in preventing abortion from becoming a tool of modern-day eugenics,” since “[e]ach of the immutable characteristics protected by [a limit on discriminatory abortions, including race, sex, and disability] can be known relatively early in a pregnancy, and [such a limit] prevents them from becoming the sole criterion for deciding whether the child will live or die.”⁴⁶

Life-Affirming State Laws Leading Up To and After Dobbs

States can rely on any one of these or other interests to enact or enforce life-affirming laws and policies after *Dobbs*. These pro-life laws and policies may take many forms, including affirming that there is no “right” to abortion or to taxpayer funding of abortion under the State’s constitution;⁴⁷ gestational and other limits on abortion; commonsense health-and-safety standards such as informed consent and medically supported regulations on abortion businesses; and conscience protections for healthcare professionals with moral, religious, or other objections to abortion.

The States’ interests in protecting unborn life, maternal health and safety, and the integrity of the medical profession, as well as the other state interests affirmed by the Court in *Dobbs*, provide a rational basis for state laws that affirm life. As of today, 21 States have laws that protect unborn life

⁴³ *Gonzales*, 550 U.S. at 158.

⁴⁴ *See id.* at 157.

⁴⁵ *See, e.g.*, Partial Birth Abortion Ban Act of 2003, S.3, 108th Cong. §§ 2(14)(J) and 2(14)(K).

⁴⁶ 139 S. Ct. 1780, 1783 (2019).

⁴⁷ Four States have already added pro-life constitutional amendments (Alabama, Louisiana, Tennessee, and West Virginia). Voters in two additional States will consider such matters in 2022 (Kansas and Kentucky).

at all stages either in effect or that they are actively defending in court.⁴⁸ Eleven States have laws that protect life upon the detection of a heartbeat.⁴⁹ And at least 17 have laws preventing discriminatory abortions based on race, sex, and/or disability.⁵⁰ All of these laws had been previously blocked by *Roe*'s error.

Commonsense regulations on the abortion procedure itself have also been enacted or are under consideration in most States. These include abortion clinic health-and-safety standards, ultrasound requirements, reflection periods, informed-consent enhancements, and unborn-infant dignity statutes ensuring the respectful disposition of the remains of deceased unborn children and prohibiting the sale of their tiny body parts.⁵¹ Many of these modest laws were enforceable even prior to *Dobbs*, and the state interests identified in *Dobbs* justify enacting and enforcing these laws.

Although scores of pro-life laws were wrongly enjoined under *Roe* and *Casey*, States are already seeking or will soon seek to have those injunctions lifted so that these laws can provide their long-intended protection for unborn life, maternal health and safety, and the integrity of the medical profession.

State Laws Ensuring Access to Abortion After Dobbs

Twenty States and the District of Columbia currently fail to support and respect women and protect their unborn from abortion in any meaningful way.⁵² Many of these States allow for abortion up until the moment of birth. This failure stems from state court decisions declaring a state constitutional right to abortion, state statutes rejecting even modest protections for life, or state legislation declaring abortion a "fundamental right."

⁴⁸ These include (1) pre-*Roe* laws that were enjoined or not enforced because of *Roe* and (2) so-called "Trigger Laws" that protect life upon the overturning of *Roe*. See, e.g., Family Policy Alliance, *Where Does Your State Stand on Protecting Life?*, <https://familypolicyalliance.com/after-roe/> (last visited July 10, 2022).

⁴⁹ Some of these states also have laws that provide more comprehensive protection for unborn life.

⁵⁰ Guttmacher Institute, *Abortion Bans in Cases of Sex or Race Selection or Genetic Anomaly* (July 1, 2022), <https://www.guttmacher.org/state-policy/explore/abortion-bans-cases-sex-or-race-selection-or-genetic-anomaly>.

⁵¹ Sadly, some in Congress seek to unconstitutionally restrict the authority of the States to protect life through proposals like the Women's Health Protection Act of 2021, H.R. 3755, 117th Cong. (2021). While the Constitution permits Congress to regulate interstate commerce – which provided the basis for 2003's Partial-Birth Abortion Ban Act – there is an important distinction between regulating abortion that affects interstate commerce versus directly banning States from enacting pro-life measures. The Constitution does not permit the latter.

⁵² Family Policy Alliance, *supra* n.48.

Many of these States have also enacted or are considering additional measures that threaten the dignity of women and their unborn children, such as by affirmatively amending their state constitutions to include a “right” to abortion,⁵³ allowing non-physicians to perform abortions, increasing state taxpayer funding of abortion, and instituting insurance-coverage mandates. Some have also considered measures to repeal life-affirming laws such as parental-involvement protections for minor girls.⁵⁴

More recently, California, New Jersey, New York, Washington, and other States proposed measures to encourage women from States with laws affirming the dignity of life to travel to their States to obtain unrestricted and relatively unregulated abortion procedures that take the life of an unborn child and harm her mother. Each State supporting the abortion industry seemingly seeks to encourage the death of its youngest and most vulnerable, while failing to respect women and bolster real solutions for pregnant mothers.

In a Post-Roe America, States Provide Care for Mothers and Infant

Long before the *Dobbs* decision, States were taking meaningful action to provide compassionate care and wholistic support to women facing unexpected pregnancies. Beginning with Texas in 1999, all fifty States have enacted “Safe Haven Laws” that permit a new mother to safely and anonymously place her child in a safe location like a hospital without fear of prosecution or punishment of any kind.⁵⁵ Other States have increased their support for adoption and foster care providers by passing laws that preserve a diversity of adoption and foster care providers in the State and ensure birth moms have the choice to place their child in a home that shares her values.⁵⁶ Mothers who do not feel able to parent have numerous safe and loving alternatives to raising their children themselves.

States are also ensuring that expectant mothers have access to the latest information about state medical-assistance benefits, pre- and post-natal care for both mother and child, and other

⁵³ As of the date of this testimony, voters in California and Vermont will decide whether to adopt pro-abortion constitutional amendments in November 2022.

⁵⁴ Sara Burnett, *Illinois Governor Repeals Parental Notification of Abortion*, ASSOCIATED PRESS (Dec. 17, 2021), <https://apnews.com/article/lifestyle-reproductive-rights-illinois-04bcefa21d7781b64147c4867c6b0432>.

⁵⁵ Hannah Howard, *Safe Haven Laws: An Invitation to Life*, CHARLOTTE LOZIER INSTITUTE (Dec. 1, 2021), <https://lozierinstitute.org/safe-haven-laws-an-invitation-to-life/>.

⁵⁶ *Which States Protect the Freedom of All Adoption and Foster Care Providers?*, KEEP KIDS FIRST, <https://keepkidsfirst.com/adoption-map/> (last visited July 7, 2022).

essential services provided by public and private agencies. For instance, last year Arizona enacted a law requiring its Department of Health Services to maintain “a list of public and private agencies and services available to assist a woman through pregnancy, on childbirth and while her child is dependent.”⁵⁷ Other States, including Florida, Indiana, Louisiana, Michigan, Mississippi, North Carolina, North Dakota, and Ohio, have similar requirements to ensure that mothers know about the many services available to help them navigate the challenges of an unplanned pregnancy.⁵⁸

While Planned Parenthood and others in the abortion industry convince women, particularly those in minority and low-income areas, that abortion is the only solution for an unintended pregnancy,⁵⁹ States dispel this lie by directing more and more funding into organizations and programs that provide long-term, critical support for these mothers and their infants.

- In 2022, Arkansas passed a law designating up to \$1 million in new funding for pregnancy care centers, maternity homes, adoption providers, and other social-service organizations that “provide material support and other assistance to individuals facing an unintended pregnancy.”⁶⁰
- Fourteen States, including Florida, Kansas, Louisiana, Missouri, Oklahoma, Pennsylvania, Texas, and Wisconsin, also provide direct government funding to pregnancy resource centers and similar organizations that offer various services to mothers to enable them to have the healthcare, material support, counseling, and training they need to welcome a new child into the world.⁶¹ Texas, in particular, has been a leader in funding services for expectant mothers,

⁵⁷ Ariz. Rev. Stat. Ann. § 36-2153.01(A)(1).

⁵⁸ Fla. Stat. Ann. § 390.0111; Ind. Code Ann. § 16-34-2-1.1; La. Stat. Ann. § 40:1061.17; Mich. Comp. Laws Ann. § 333.17015; Miss. Code Ann. § 41-41-33; N.C. Gen. Stat. Ann. § 90-21.82; N.D. Cent. Code § 14-02.1-02; Ohio Rev. Code Ann. § 2317.56.

⁵⁹ Planned Parenthood’s history of targeting its services to Black women and other minorities is well documented. Seventy-nine percent of Planned Parenthood’s abortion facilities are located within walking distance of Black or Hispanic neighborhoods. Susan Enouen, *New Research Shows Planned Parenthood Targets Minority Neighborhoods*, LIFE ISSUES CONNECTOR, 3 (Oct. 2012), <http://www.protechnblacklife.org/pdf/PP-Targets-10-2012.pdf>.

⁶⁰ 2022 Ark. Laws Act 187 (S.B. 102).

<https://www.arkleg.state.ar.us/Acts/FTPDocument?path=%2FFACTS%2F2022F%2FPublic%2F&file=187.pdf&dlBicnumSession=2021%2F2022F>.

⁶¹ Jeannéane Maxon, *Fact Sheet: State Alternatives to Abortion Funding*, CHARLOTTE LOZIER INSTITUTE (June 28, 2022), <https://lozierinstitute.org/fact-sheet-state-alternatives-to-abortion-funding/>.

their families, and adoptive and foster parents. It provided nearly \$80 million in such funding during the 2020-21 fiscal year,⁶² and has pledged to increase that to \$100 million this year.⁶³

- One recent innovation among States has been to provide tax credits for individuals and even businesses that make charitable contributions to pregnancy care centers, adoption providers, and other organizations providing social services for mothers and infants. Missouri allows tax credits for donations to organizations “offering pregnancy testing and counseling with emotional and material support” for pregnant mothers.⁶⁴ Mississippi, which already authorized tax credits for donations to foster care providers, recently enacted the Pregnancy Resource Act that authorizes up to \$3.5 million in tax credits for contributions to qualified pregnancy resource centers.⁶⁵

And these measures are being coupled with renewed efforts to make childcare affordable for families and to increase accountability for fathers to contribute to child support.

States are also demonstrating their compassion and support for particularly vulnerable children – those with Down Syndrome or other disabilities or genetic abnormalities. Ten States prohibit abortions targeting unborn children with Down Syndrome or other actual or presumed disability.⁶⁶ Other States ensure that mothers are informed of state programs and grants available to families with children born with special needs. For example, Kansas, Idaho, Louisiana, and Utah provide information about grants, contracts, and cooperative agreements aimed at helping those with a child with Down Syndrome or other special needs.⁶⁷ And Arizona helps connect pregnant mothers receiving a diagnosis of a fatal fetal condition with perinatal hospice programs, showing the State’s recognition of the dignity and inherent worth of every life – including those that may be unlikely to survive long after birth.

⁶² Texas Health and Human Services, *Alternatives to Abortion Report for Fiscal Year 2021* (Dec. 2021), <https://www.hhs.texas.gov/sites/default/files/documents/alternatives-abortion-fy2021-rdr68.pdf>.

⁶³ Jennifer Sanders, *Texas’ Alternatives to Abortion program impact*, KXAN (June 28, 2022), <https://www.kxan.com/news/texas-abortion/texas-alternatives-to-abortion-program-impact/>.

⁶⁴ Missouri Department of Social Services, *Pregnancy Resource Center Tax Credit*, <https://dss.mo.gov/dfas/taxcredit/pregnancy.htm> (last visited July 7, 2022).

⁶⁵ H.B. 1685, 137th Legis. Sess., Reg. Sess. (Miss. 2022), <http://billstatus.ls.state.ms.us/documents/2022/pdf/HB/1600/1699/HB1685SG.pdf>.

⁶⁶ Ariz. Rev. Stat. Ann. § 36-2157; Ark. Code Ann. § 20-16-2103; Ind. Code Ann. § 16-34-4-6; Ky. Rev. Stat. Ann. § 311.731; Miss. Code Ann. § 41-41-407; Mo. Ann. Stat. § 188.052; S.D. Codified Laws § 34-23A-90; Tenn. Code Ann. § 39-15-217; Utah Code Ann. § 76-7-302.4; W. Va. Code Ann. § 16-2Q-1.

⁶⁷ Kan. Stat. Ann. § 65-1,259; Idaho Code Ann. § 39-9704; La. Stat. Ann. § 40:1109.2; Utah Code Ann. § 26-10-14.

Taken together, these various laws and policy initiatives show that a post-*Roe* America is one that will provide a comprehensive safety net of love, empowerment, life-affirming options, and support for mothers and infants both during and after pregnancy. States will continue to innovate and support new programs that provide healthcare, material needs, and other social services to pregnant women. And they will promote a culture that walks with the new family as the baby grows, helps to meet basic childcare and parenting needs, and continues to offer flexibility, care, and support to women to affirm their inherent dignity and worth.

In a Post-*Roe* America, Private Organizations Support Mothers and Children

Fifty years ago, women lacked access to the multitude of public programs like those described above. Today's culture is far more supportive of women than in 1973, when the U.S. Supreme Court was concerned about "the problem of bringing a child into a family already unable, psychologically and otherwise, to care for it."⁶⁸ On top of government support, private organizations – including pregnancy care centers, maternity homes, adoption agencies, churches, and religious social-service organizations – have arisen to fill gaps and provide resources far beyond what the government can provide.

Pregnancy centers, in particular, have stepped up and proven themselves to be highly effective at helping women through all stages of their pregnancy and beyond so they can "participate equally in the economic and social life of the Nation."⁶⁹ A significant majority of modern pregnancy centers provide medical services—nearly 3,000 today, as compared to a handful at the time of *Roe*.⁷⁰ These centers' services typically include medical-grade pregnancy testing, ultrasounds to confirm a pregnancy, sexually-transmitted-disease and infection testing, material assistance, and parenting-education courses – almost always at no cost to mothers.⁷¹ In 2019, pregnancy centers:

- Served 1.85 million people with a multitude of free or low-cost services, totaling about \$266 million in support to mothers and families.⁷²

⁶⁸ *Roe*, 410 U.S. at 155.

⁶⁹ *Casey*, 505 U.S. at 856.

⁷⁰ Moira Gaul, *Fact Sheet: Pregnancy Centers – Serving Women and Saving Lives*, CHARLOTTE LOZIER INSTITUTE (July 19, 2021), <https://lozierinstitute.org/fact-sheet-pregnancy-centers-serving-women-and-saving-lives-2020/>.

⁷¹ *Id.*; Charlotte Lozier Institute, *A Legacy of Life and Love: Pregnancy Centers Stand the Test of Time* at 9, 34 (2020),

https://lozierinstitute.org/wp-content/uploads/2020/10/Pregnancy-Center-Report-2020_FINAL.pdf.

⁷² Charlotte Lozier Institute, *Fact Sheet: What Are Pregnancy Help Organizations?* (May 18, 2021),

<https://lozierinstitute.org/fact-sheet-what-are-pregnancy-help-organizations-phos/> ("PHO Fact Sheet").

- Provided over 730,000 free pregnancy tests and over 485,000 free ultrasounds,⁷³ and
- Gave away more than 2 million baby outfits, 1.2 million packs of diapers, 19,000 strollers, and 30,000 new car seats.⁷⁴

There are also about 400 maternity homes around the country serving thousands of women needing housing every year.⁷⁵ Along with providing a safe environment for a mother and her child even months after childbirth—average stay is 8 months post-birth—these homes provide educational and counseling services to help equip a new mother for parenting, job-search services, and many other resources.⁷⁶

Adoption providers are also ensuring greater support to women who choose adoption for their child. The over 3,000 such organizations across the country offer far more than adoption itself. They often provide pregnancy counseling, post-adoption support, counseling and training for adoptive parents, housing services, and even food, clothing, and school supplies to help adoptive families with the costs of welcoming a child into their home.⁷⁷

And there are many, many more charitable organizations that provide food, clothing, shelter, education, and job training to mothers and families in need. In a post-*Roe* America, a family unable to care for a child—one of the Supreme Court’s primary concerns when deciding *Roe*—now has an abundance of resources available so that both child and mother can not only survive but thrive. A post-*Roe* America is one where children are safe, women are valued, and motherhood is celebrated.

Misconceptions About Pro-life Laws in a Post-*Roe* America

In the wake of *Dobbs*, abortion proponents have circulated false information about the laws and policies that States are considering to better protect unborn life and maternal health. They perpetuate lies and promote viral misinformation claiming that pregnant mothers’ lives will be at risk in the States with the strongest protections for life.

⁷³ *Id.*

⁷⁴ Charlotte Lozier Institute, *A Legacy of Life and Love: Pregnancy Centers Stand the Test of Time*, *supra* n.71 at 16.

⁷⁵ *PHO Fact Sheet*, *supra* n.72.

⁷⁶ *Id.*

⁷⁷ *Id.*

In truth, the abortion laws of *every single State* contain a medical emergency exception to save the life of the mother. Such an exception is *pro-life*. Three examples in particular – ectopic pregnancies, miscarriages, and pregnancy complications – have been the primary subjects of misinformation and warrant addressing.

Ectopic Pregnancies: Ectopic pregnancy is a life-threatening condition in which an embryo has implanted outside the uterus. Ectopic pregnancies cannot result in childbirth. The unborn child cannot survive due to the location of implantation; often the baby dies or stops growing at an early stage. Without treatment, a mother with an ectopic pregnancy is in severe danger of losing her life due to the high likelihood of internal rupture and hemorrhaging. This risk is one reason that early ultrasounds are necessary for sound medical care during pregnancy.

Because ectopic pregnancy is life-threatening, it is a medical emergency. Treatment for ectopic pregnancy seeks to save the mother's life and is not performed with the intent to end the life of the unborn child. Under any characterization, treatment for ectopic pregnancy does not meet the legal or medical definition for abortion – a medical procedure performed for the sole purpose of killing an unborn child.⁷⁸ Women can and should be treated at any hospital in the country if they experience an ectopic pregnancy.

Miscarriages: Miscarriage, or a procedure to complete a miscarriage, is not an abortion. In a miscarriage, the unborn child has died of natural causes. At that point, it would be impossible to perform an abortion on the woman because (1) the baby is no longer alive and thus cannot have its life ended, and (2) the woman is no longer considered pregnant and therefore cannot have her pregnancy terminated. Although the treatment for some incomplete miscarriages involves a surgical procedure like those used in some first-trimester abortions⁷⁹ or use of the abortion drug misoprostol, under no legal or medical definition would removal of tissue remaining in the uterus after a miscarriage be an abortion.⁸⁰

⁷⁸ Planned Parenthood's own website acknowledges this: "Treating an ectopic pregnancy isn't the same thing as getting an abortion. ... The medical procedures for abortions are not the same as the medical procedures for an ectopic pregnancy." *Ectopic Pregnancy*, PLANNED PARENTHOOD, <https://www.plannedparenthood.org/learn/pregnancy/ectopic-pregnancy> (last visited July 7, 2022).

⁷⁹ *Dilation and curettage (D&C)*, MAYO CLINIC, <https://www.mayoclinic.org/tests-procedures/dilation-and-curettage/about/pac-20384910> (last visited July 7, 2022).

⁸⁰ Again, Planned Parenthood recognizes the clear difference between abortion and miscarriage because "[m]iscarriage is

Pregnancy Complications: Procedures that save the mother's life during a rare pregnancy complication are not abortions. In such instances, a baby would be delivered early, likely by caesarian-section, and treatment would be given to attempt to save the baby's life, as well as the mother's. In no instance would an abortion—that is, stopping to first kill the child in the womb before separating her from her mother—be the method used. These tragic scenarios would, in any event, fall under the medical-emergency exception in abortion laws.

In a Post-Roe America, the U.S. Can Lead the World in Respecting Life

Roe v. Wade made the United States an extreme outlier—one of only a handful of nations in the world permitting abortion on demand of an unborn child who can hear her mother's voice.⁸¹ With its companion case, *Doe v. Bolton*, decided the same day, *Roe* took this nation from one where life was widely recognized as a human right and completely protected in forty-six States, to one in which no unborn child was safe.

Though the *Dobbs* decision overturning *Roe* may not automatically restore every state protection that *Roe* wrongly invalidated, it provides a crucial opportunity for States to come in line with international human-rights norms. Globally, 75% of nations either never permit elective abortion or limit it at 12 weeks.⁸² Only three out of 50 European nation-states and regions allow elective abortion after 15 weeks gestation, which is the gestational limit challenged by the abortion providers in *Dobbs*.⁸³

The United States' status as an extreme outlier in legally sanctioning the death of its youngest, devaluing women, and threatening women's physical and psychological health has been a stain on our nation and society. The overturning of *Roe* and *Carey* enables States to choose policies much more humane, sensible, and safe than those of North Korea and China, and to create a culture that respects and promotes life, advances the health and well-being of women, and honors motherhood. The *Dobbs*

when an embryo or fetus dies...." *What is a Miscarriage?*, PLANNED PARENTHOOD, <https://www.plannedparenthood.org/learn/pregnancy/miscarriage> (last visited July 7, 2022).

⁸¹ *Fetal Development: The 2nd Trimester*, MAYO CLINIC, <https://www.mayoclinic.org/healthy-lifestyle/pregnancy-week-by-week/in-depth/fetal-development/art-20046151> (last visited July 7, 2022) ("Twenty-five weeks into [1] pregnancy, or 23 weeks after conception, your baby might be able to respond to familiar sounds, such as your voice....").

⁸² Luke Coppen and Hannah Brockhaus, *How Does U.S. Abortion Law Compare to Those in European Countries?*, CATHOLIC NEWS AGENCY (Oct. 11, 2021), <https://www.catholicnewsagency.com/news/249247/united-states-europe-abortion-law-comparison>.

⁸³ *Id.*

decision will allow the United States—if the people and their elected representatives in the States collectively choose – to become an international leader in advancing human rights, the dignity of women, and the most vulnerable in society.

Conclusion

Roe v. Wade and *Planned Parenthood v. Casey* were constitutional travesties that deprived States of their ability to support women and protect their unborn children. These court decisions handcuffed state legislatures from affirming the dignity of women and the lives of their unborn children, even in the most modest ways.

The Supreme Court’s decision in *Dobbs* corrected the grievous error of *Roe* and *Casey*. Recognizing that the so-called right to abortion “has no basis in the Constitution’s text or in our Nation’s history,”⁸³ the Court removed the shackles that long prohibited the people from protecting innocent life. States and communities now have the chance to affirm that life is a human right and ensure that women have real support — not the kind that pits them against their children to make a profit—but meaningful and comprehensive opportunities to choose motherhood and live full and flourishing lives.

In a post-*Roe* America, States will continue to innovate and support new programs that provide healthcare, material needs, and other services to women with unexpected pregnancies. These measures include laws that guarantee mothers can safely entrust their child to one of the many providers in our nation’s adoption and foster care system. Legislatures can promote respect for the dignity of particularly vulnerable children, especially those with Down Syndrome and other disabilities or genetic abnormalities, while ensuring that mothers know about state resources available to help them care for their children.

States will continue to support women by ensuring that expectant mothers know about state medical assistance benefits, pre- and post-natal care for both mother and child, and other services provided by public and private agencies. And many States are funding these efforts with millions of

⁸³ *Dobbs*, 2022 WL 2276808, at *42.

dollars in financial backing for pregnancy care centers, maternity homes providing expectant and new mothers with housing, and other social service organizations that assist mothers and their children.

These efforts that provide 360-degree care for mothers and newborns show that a post-*Roe* America can be one where a woman who finds herself pregnant will have the full support of her community, offering a wide variety of resources she needs throughout the pregnancy and as she steps boldly and confidently into the rest of her life knowing that she is not alone but fully capable of living a life of meaning and purpose.

Today, thanks to *Dobbs*, the dignity of women, the unborn, and life is affirmed. And the American people once again have a voice and a vote to speak through their state legislatures to finally advance policies and laws that protect the unborn, value women, and honor motherhood.

Denise Harle

SENIOR COUNSEL, DIRECTOR OF THE CENTER FOR LIFE



Denise Harle serves as senior counsel with Alliance Defending Freedom, where she is the director of the Center for Life. In this role, Harle leads her team's litigation and advocacy efforts to defend pro-life legislation around the nation. She also networks with pro-life allies, speaks publicly on behalf of ADF, and works to defend the First Amendment freedoms of pro-life health care professionals and pregnancy resource centers. Since joining ADF, Harle took the primary role in drafting the briefs to the U.S. Supreme Court in *NIFLA v. Becerra*, resulting in a free speech victory for California pro-life pregnancy centers.

Prior to joining ADF, Harle served as deputy solicitor general in the Office of the Florida Attorney General, where she drafted appellate briefs and presented oral arguments on behalf of the State in a wide variety of constitutional cases, including defending the constitutionality of pro-life laws. In 2017, she participated in the prestigious Supreme Court Fellow program, sponsored by the National Association of Attorneys General. She clerked for Justice Ricky L. Polston on the Florida Supreme Court and worked for several years as an appellate litigator at a large firm in California.

Harle earned bachelor's degrees in psychology and interdisciplinary social science from Florida State University, a master's degree in political science from Stanford University, and a Juris Doctor from Duke University School of Law. At Duke, she served as the executive editor of *Law & Contemporary Problems*. Gov. Ron DeSantis appointed Harle to the Florida Faith-Based and Community-Based Advisory Council in 2021 to support churches and nonprofits as they care for vulnerable members of society. A member of the state bars of California, Florida, and Georgia, she is admitted to multiple federal district and appellate courts, as well as the U.S. Supreme Court.

TESTIMONY OF KHIARA M. BRIDGES

PROFESSOR OF LAW, UC BERKELEY SCHOOL OF LAW

BEFORE THE SENATE COMMITTEE ON THE JUDICIARY

“A Post-Roe America: The Legal Consequences of the *Dobbs* Decision”

JULY 12, 2022

Chairman Durbin, Ranking Member Grassley, and Members of the Senate Committee on the Judiciary, thank you for the opportunity to testify before you today. My name is Khiara M. Bridges, and I am a Professor of Law at the University of California, Berkeley, School of Law, where I teach Criminal Law, Family Law, and Reproductive Rights and Justice. I also serve as the Faculty Director of the Berkeley Center on Reproductive Rights and Justice. I am here today to explain how the U.S. Supreme Court’s radical decision in *Dobbs v. Jackson Women’s Health Organization* to take away constitutional protection for reproductive freedom inflicts a racial injury.

In *Dobbs v. Jackson Women’s Health Organization*, the Court upheld Mississippi’s ban on abortions after fifteen weeks of pregnancy and, in the process, overturned *Roe v. Wade*.¹ This radical decision to take away federal constitutional protection for the right to abortion reverses 50 years of the Supreme Court’s precedent. Justice Alito, writing for a five-person majority, argued that *Roe* was “egregiously wrong” and being “egregiously wrong,” the Court was not bound by stare decisis to respect it as precedent.² Chief Justice Roberts concurred in the judgment, contending that the Court should go no further than to discard the viability line and permit states to proscribe abortion at the moment that the pregnant person has had a “reasonable opportunity” to terminate the pregnancy—which, in Chief Justice Roberts view, always occurs by the fifteenth week of pregnancy in nonexceptional cases.³

¹ In their petition for certiorari, petitioners asked the Court to overrule *Roe* and *Casey* only to the extent that those decisions prohibited states from banning abortion prior to viability. Petition for Writ of Certiorari at 15, *Dobbs v. Jackson Women’s Health Org.*, No. 19-1392 (U.S. June 24, 2022). However, in their brief on the merits, petitioners asked the Court to reverse *Roe* altogether. Brief for Petitioner, *Dobbs v. Jackson Women’s Health Organization*, No. 19-1392 (U.S. June 24, 2022) We can explain the evolution of the petitioners’ request from an evisceration of *Roe* (through an elimination of the viability line) to the eradication of *Roe* (through its complete overruling) in terms of a change in the Court’s personnel: In the time separating the filing of the petition of certiorari and the filing of the brief on the merits, Justice Ruth Bader Ginsburg had died, and the Senate had confirmed Justice Amy Coney Barrett as her replacement. See Barbara Sprunt, *Amy Coney Barrett Confirmed to Supreme Court, Takes Constitutional Oath*, NPR (Oct. 26, 2020), <https://www.npr.org/2020/10/26/927640619/senate-confirms-amy-coney-barrett-to-the-supreme-court>.

² *Dobbs v. Jackson Women’s Health Org.*, No. 19-1392, slip op. at 6, 70 (U.S. June 24, 2022).

³ *Id.* at 1 (Roberts, C.J., concurring).

The Court's decision will likely lead to half of U.S. states immediately taking action to ban abortion outright, forcing people to travel hundreds if not thousands of miles to access abortion care far from their communities or to carry pregnancies to term against their will.⁴ It is impossible to capture the level of harm and chaos that will ensue in the coming weeks and months. The inability to make decisions about one's bodily autonomy impacts every aspect of a person's life—from their health to their economic stability and their ability to care for their families. Further, the harms of the Court's decision will fall hardest on people who are already vulnerable—Black, Indigenous, and other people of color, people with disabilities, young people, LGBTQI+ people, and others whose access to abortion is additionally frustrated by structural inequities in access to health care.

I. The Decision of the Majority Opinion to Privilege the Nation's "History and Tradition" in 1868, When People with the Capacity for Pregnancy Were Not Part of the Body Politic, Was an Exercise of Power to Support the Desired Outcome of Overturning *Roe*.

Dobbs declares that *Roe* erred when it interpreted the Fourteenth Amendment's Due Process Clause to protect a right to terminate a pre-viability pregnancy insofar as that clause only protects rights that are "deeply rooted in this Nation's history and tradition and implicit in the concept of ordered liberty."⁵ For the *Dobbs* majority, the country's laws in 1868—the year that the Fourteenth Amendment was ratified—determine whether abortion rights can be so characterized.⁶ After canvassing abortion regulations in 1868, the majority concludes that abortion rights are not part of the nation's "history and tradition," as "[u]ntil the latter part of the 20th century, such a right was entirely unknown in American law."⁷ Indeed, when the Fourteenth Amendment was adopted, three quarters of the States made abortion a crime at all stages of pregnancy.⁸

The painfully obvious point to make is that people with the capacity for pregnancy⁹ were not part of the body politic during the period of the nation's history that the majority believes is decisive

⁴ *What If Roe Fell?*, CTR. FOR REPRO. RIGHTS, <https://reproductiverights.org/maps/what-if-ro-fell/>.

⁵ *Dobbs v. Jackson Women's Health Org.*, No. 19-1392, slip op. at 5.

⁶ *See id.* at 36.

⁷ *Id.* at 5.

⁸ *See id.* at 23 (observing that "[b]y 1868, ... 23 out of 37 [states] had enacted statutes making abortion a crime even if it was performed before quickening").

⁹ In recognition of the fact that cis women are not the only people who can become pregnant, this testimony uses the language of "people with the capacity for pregnancy" or similar phrases so as to avoid erasing trans men and nonbinary people from the population of people affected by pregnancy regulations. *See* Sachiko Ragosta, *Abortion Care Is Not Just for Cis Women*, MS. MAGAZINE (Mar. 11, 2021), <https://msmagazine.com/2021/03/11/abortion-reproductive-health-cisgender-women-trans-men-transgender-nonbinary/>. When referring to historical periods during which "women," in particular, were denied rights vis-a-vis "men," this testimony uses the language of "women."

of the constitutional inquiry. Women could not vote in the country for another half a century after 1868.¹⁰

Because women could not participate in the democratic process, one could reasonably assume that their interests were not reflected in *any* of the nation's laws, including the criminal laws that the *Dobbs* majority reads as foreclosing a constitutional right to terminate a pregnancy. Thus, the majority's choice to privilege the year 1868 and to attempt to divine the meaning of the Constitution by looking at the nation's practices during that time is a choice to privilege an era characterized by the formal exclusion of people with the capacity for pregnancy.

When one settles on 1868 as the relevant year for the purpose of interpreting what the Constitution requires vis-à-vis people capable of pregnancy, one has overdetermined the inquiry. Indeed, a decision to privilege any historical moment prior to the era in which social movements challenged traditional gender norms is a decision to read reproductive rights and other gender rights out of the Constitution.

It is worth emphasizing that Justice Alito (and four other Justices) *decided* to privilege the year 1868 when interpreting the Constitution with respect to abortion rights. Justice Alito could have decided not to engage in an historical inquiry at all. He has done it before. In his dissent in *Fisher II*, in which the Court upheld the constitutionality of Texas's facially race-conscious admissions program, Justice Alito (and Justices Roberts and Thomas, who joined the dissenting opinion) did not look to what was happening in the country in 1868 to divine the meaning of the Equal Protection Clause and to determine whether affirmative action programs are consistent with it.¹¹ In fact, the opinion engages in no investigation of history whatsoever. As Justice Alito makes a choice to eschew an historical inquiry in the context of affirmative action—likely because that inquiry will lead to results that he does not like—he makes a choice to embrace an historical inquiry in the context of abortion. This is true because the inquiry leads him to the outcome—the reversal of *Roe*—that he so desperately wanted.

We should also observe that the majority opinion in *Dobbs* is not the first to interrogate the history of abortion. The majority opinion in *Roe*—which seven Justices joined—engages in an in-depth, lengthy investigation into the history of thought around fetal life and abortion practices, ultimately finding that this history supports the existence of a fundamental right to terminate a pre-viability pregnancy.¹² Likewise, the dissent in *Dobbs* observes that abortion was legal (at least for people who were not enslaved) at least until the middle of the second trimester and long

¹⁰ See U.S. Const. amend. XIX.

¹¹ See *Fisher v. University of Texas at Austin (Fisher II)*, 579 U.S. 365 (2016) (Alito, J., dissenting).

¹² See *Roe v. Wade*, 410 U.S. 113, 129–152 (1973).

after the founding, before the spate of Victorian Era criminal laws that Justice Alito cites.¹³ The decision to elevate partial moments of history is not the apolitical exercise that the *Dobbs* majority pretends it to be. Instead, it is an exercise that is fraught with values, convictions, preferences, and, perhaps most of all, power.

II. The Majority Opinion's Method of Constitutional Interpretation Threatens Liberty Rights People Rely on to Make Deeply Personal Decisions About Their Lives, Relationships, and Families.

The Supreme Court bolstered the liberty doctrine in *Roe v. Wade* and *Planned Parenthood v. Casey*, firmly grounding the right to abortion in the liberty to make fundamental decisions about personal autonomy and bodily integrity. This liberty includes the rights to family and child-bearing recognized in *Meyer v. Nebraska* (1923) and strengthened in *Moore v. City of East Cleveland* (1977), the right to use contraception recognized in *Griswold v. Connecticut* (1965) and in *Carey v. Population Services* (1977), and the right to marry in *Loving v. Virginia* (1967), which was subsequently extended to same-sex couples in *Obergefell v. Hodges* (2015).

The method of constitutional interpretation that the *Dobbs* majority chooses to employ—interpreting the Constitution to protect only those behaviors and practices that were protected in 1868—does not bode well for the persistence of other fundamental rights that the Court recognized when it had different members. As the dissent puts it, “The majority could write just as long an opinion showing, for example, that until the mid-20th century, there was no support in American law for a constitutional right to obtain contraception.”¹⁴ Likewise, in 1868, there was no support in American law for a constitutional right to engage in consensual sex with an adult of the same sex, nor a constitutional right to marry someone of the same sex. Thus, the *Dobbs* majority’s protestations that its holding does not unsettle *Griswold v. Connecticut*, *Lawrence v. Texas*, and *Obergefell v. Hodges*—as those precedents do not involve the destruction of fetal life—ring a bit hollow.¹⁵ The methodology of constitutional interpretation that the majority

¹³ See *Dobbs*, slip op. at 13 (Breyer, J., dissenting) (“Common-law authorities did not treat abortion as a crime before ‘quickening’—the point where the fetus moved in the womb. And early American law followed the common-law rule.”); Brief for American Historical Ass’n et al. at 3 (2021) (same; “stricter statutes [were] enacted in the 1840s to 1850,” long after the American founding); James C. Mohr, *Abortion in America* 73 (1978) (“To document fully the pervasiveness of the quickening doctrine in the United States through the 1870s would take scores, if not hundreds, of pages of references. It was simply a fact of American life.”). As one court put it in 1849: “It is not material whether, speaking with physiological accuracy, life may be said to commence at the moment of quickening, or at the moment of conception, or at some intervening period. In contemplation of law life commences at the moment of quickening,” for there is “no precedent, no authority” for treating “the mere procuring of an abortion by the destruction of a *foetus* unquickened, as a crime against the person or against God and religion.” *State v. Cooper*, 22 N.J.L. 52, 55 (N.J. 1849).

¹⁴ *Dobbs*, slip op. at 5 (Breyer, J., dissenting).

¹⁵ *Id.* at 31–32 (claiming that the reversal of *Roe* “does not undermine” the substantive due process cases—including *Meyer v. Nebraska* (finding a fundamental right to parent one’s child in the manner that one sees fit), *Griswold v. Connecticut* (finding a fundamental right for the married individual to access contraception), *Eisenstadt v. Baird*

deploys to return the question of abortion's legality to the states could be just as easily be deployed to do the same with regard to the legality of contraception, same-sex marriage and same-sex sex.¹⁶ We could make the same point about the right to be free from coerced sterilization¹⁷; indeed, when asked the question in 1923, the Court did not believe the Constitution protected such a right.¹⁸

III. The Majority Opinion Erases and Subordinates Pregnant People to the Fetuses They Carry.

Another notable aspect of the majority opinion is that it professes that it embraces no “theory of life.”¹⁹ The majority says that one of the many errors that the *Roe* majority and the *Dobbs* dissenters make is that they adopt the theory that the fetus is *not* a life.²⁰

The opinion undeniably has a theory of life. And this theory is that pregnant people's plans, wishes, desires, dreams, ambitions, aspirations, and prayers, are not more significant than fetal life. This theory is that pregnant people can be subordinated to the fetuses that they carry.²¹ This is not the absence of a theory. This is not an example of the Court being “scrupulously neutral.”²² There is no neutral position. The Court has taken a side.²³ It has sided with those who believe that it is legitimate to force birth.

(finding a fundamental right for the unmarried individual to access contraception) and *Skinner v. Oklahoma* (suggesting the existence of a fundamental right to be free from compelled sterilization)—on which *Roe* relied); *id.* at 38 (accusing the dissent of “stok[ing] unfounded fear that our decision will imperil” *Griswold*, *Eisenstadt*, *Lawrence*, and *Obergefell*); *id.* at 66 (“[W]e emphasize that our decision concerns the constitutional right to abortion and no other right. Nothing in this opinion should be understood to cast doubt on precedents that do not concern abortion.”).

¹⁶ Justice Thomas's concurrence, which continues Thomas's practice of heavily citing his own prior opinions, pointedly calls for the reversal of all the Court's substantive due process precedents. *Id.* at 7 (Thomas, J., concurring) (arguing for the elimination of substantive due process “from our jurisprudence at the earliest opportunity”).

¹⁷ See *Skinner v. Oklahoma*, 316 U.S. 535 (1942).

¹⁸ See *Buck v. Bell*, 274 U.S. 200 (1927) (finding that the Constitution does not contain a fundamental right to be free from forced sterilization).

¹⁹ *Dobbs*, slip op. at 38 (“Our opinion is not based on any view about if and when prenatal life is entitled to any of the rights enjoyed after birth.”).

²⁰ *Id.* at 38 (arguing that the dissent would “impose on the people” the theory that the fetus lacks “even the most basic human right—to live—at least until an arbitrary point in pregnancy has passed.”).

²¹ The *Dobbs* dissenters would phrase the majority's theory in terms of the rightlessness of women. *Id.* at 2 (Breyer, J., dissenting) (arguing that the majority proposes that “from the very moment of fertilization, a woman has no rights to speak of”).

²² *Id.* at 3 (Kavanaugh, J., concurring).

²³ *Id.* at 21 (Breyer, J., dissenting) (arguing that with the *Dobbs* decision, the Court is “taking sides [] against women who wish to exercise the right and for States ... that want to bar them from doing so.”).

It deserves emphasizing that with *Dobbs*, the Court has not at all “g[otten] out of the area” of abortion.²⁴ *Dobbs* declares that the proper standard for reviewing abortion regulations is rational basis review and courts should ask whether a challenged regulation is rationally related to a legitimate governmental interest.²⁵ The legal questions that *Dobbs* leaves open are numerous. The Court will be adjudicating disputes about the legality of abortion regulations for quite some time. *Dobbs* simply ushers in the next stage of adjudication.

IV. The Devastating Harms of the Supreme Court’s Decision Will Fall Hardest on Black People Who Are Systemically Denied Access to Abortion Care and Criminalized by the State for Their Pregnancy Outcomes.

There should be no doubt that the demise of *Roe v. Wade* inflicts a racial injury. This section describes the source and shape of this racial injury with precision.

A. Structural Inequities Black People Face Exacerbate the Harms of Abortion Restrictions

Black people turn to abortion care more frequently than other racial groups.²⁶ Indeed, black people’s abortion rate is three to four times white people’s abortion rate.²⁷ This is a direct result of black people’s higher rate of unintended pregnancy,²⁸ which has several causes. First, the higher rate of unintended pregnancy is a function of the higher rate of poverty among black people.²⁹ Indigent people have higher rates of unintended pregnancy because poverty makes

²⁴ *Planned Parenthood v. Casey*, 505 U.S. 833, 1002 (1992) (Scalia, J., dissenting) (arguing that the Court should overrule *Roe* because “[w]e should get out of this area, where we have no right to be, and where we do neither ourselves nor the country any good by remaining.”).

²⁵ *Dobbs*, slip op. at 77.

²⁶ See Dr. Katherine Kortsmitt et al., *Abortion Surveillance—United States, 2019*, CTRS. FOR DISEASE CONTROL AND PREVENTION (Nov. 26, 2021), <https://www.cdc.gov/mmwr/volumes/70/ss/ss7009a1.htm>.

²⁷ *Id.* (noting that in 2019, “compared with non-Hispanic white women, abortion rates and ratios were 3.6 and 3.3 times higher among non-Hispanic Black women”).

²⁸ Lawrence B. Finer & Mia R. Zolna, *Declines in Unintended Pregnancy in the United States 2008–2011*, 374 NEW ENG. J. MED. 843, 843 (2016), <https://www.nejm.org/doi/full/10.1056/nejmsa1506575> (“At 79 per 1,000, the unintended pregnancy rate for non-Hispanic Black women in 2011 was more than double that of non-Hispanic white women (33 per 1,000).”); Susau A. Cohen, *Abortion and Women of Color: The Bigger Picture*, 11 GUTTMACHER POL’Y REV., 3 (Sept. 2008), https://www.guttmacher.org/sites/default/files/article_files/gpr110302.pdf.

²⁹ See *Poverty Rate by Race/Ethnicity*, KAISER FAMILY FOUND., <https://www.kff.org/other/state-indicator/poverty-rate-by-raceethnicity/?currentTimeframe=0&sortModel=%7B%22colId%22%3A%22Location%22%22sort%22%3A%22asc%22%22%7D> (last visited July 9, 2022); Lawrence B. Finer & Mia R. Zolna, *Declines in Unintended Pregnancy in the United States 2008–2011*, 374 NEW ENG. J. MED. 843, 846 (2016), <https://www.nejm.org/doi/full/10.1056/nejmsa1506575> (Low-income women experience unintended pregnancy rates significantly higher than those who are not low-income; among women living below the federal poverty line, the unintended pregnancy rate is five times higher than that experienced by higher-income women.); see also *Dobbs*, slip op. at 50 (Breyer, J., dissenting) (noting that “[w]omen living below the federal poverty line experience unintended pregnancies at rates five times higher than higher income women do”).

reproductive healthcare and effective contraception more difficult to access.³⁰ Second, higher rates of unintended pregnancy among black people with the capacity for pregnancy are a function of their decreased ability to control the conditions under which they have sex—their inability to insist upon the use of the contraception to which they have access. Indeed, there is evidence that there are higher rates of intimate partner violence among black women,³¹ a statistic that is a function of the disproportionate burdens of poverty that black people bear.³² Black people with the capacity for pregnancy are also more likely than their nonblack counterparts to experience rape during the course of their lives.³³ Additionally, black people capable of pregnancy are more likely than their nonblack counterparts to experience reproductive coercion, where sexual “partners actively try to impregnate their partner against their wishes, interfere with contraceptive use,” hassle their partner not to use contraception, or sabotage condom usage.³⁴ Higher incidences of intimate partner violence, sexual assault, and reproductive coercion among black people capable of pregnancy undoubtedly contribute to their increased frequency of unintended pregnancy.

Moreover, a frequently cited reason that individuals give for terminating an unintended pregnancy is that they cannot afford to have a child at that time.³⁵ Thus, the unequal burden of poverty that black people bear renders them more likely to face an unintended pregnancy in the first instance and, in the second instance, to lack the funds thought necessary to carry the pregnancy to term and raise the child. Thus, when states are permitted to use the criminal or civil law to make abortion inaccessible, states render unavailable a service upon which black people— for myriad complicated, oftentimes tragic reasons—disparately rely.

Of course, abortion prohibitions are not invariably successful in making the fact of unintended and unwanted pregnancy end in birth, as many people carrying an unwanted pregnancy will be able to circumvent a legal prohibition on abortion. The anti-abortion movement’s end goal has always been to enact a nationwide ban on abortion, and members of Congress have echoed their

³⁰ Susan A. Coheu, *Abortion and Women of Color: The Bigger Picture*, 11 GUTTMACHER POL’Y REV 2, 2-3 (Sept. 2008), https://www.guttmacher.org/sites/default/files/article_files/gpr110302.pdf.

³¹ See ASHA DUMONTHIER ET AL., INST. FOR WOMEN’S POL’Y RSCH., *THE STATUS OF BLACK WOMEN IN THE UNITED STATES* 119 (2017) (noting that while 31.5% of all women experience physical violence by an intimate partner, more than 40% of black women endure such violence).

³² See Carolyn M. West, *Black Women and Intimate Partner Violence: New Directions for Research*, 19 J. INTERPERSONAL VIOLENCE 1487, 1487 (2004) (noting that when controlling for income levels, “racial differences in rates of partner abuse frequently disappear, or become less pronounced”).

³³ See DuMouthier, et al., *supra* note 31, at 120–21.

³⁴ Charvonne N. Holliday et al., *Racial Differences in Pregnancy Intention, Reproductive Coercion, and Partner Violence Among Family Planning Clients: A Qualitative Exploration*, 28 WOMEN’S HEALTH ISSUES 205, 206 (2018).

³⁵ See Lawrence B. Finer et al., *Reasons U.S. Women Have Abortions: Quantitative and Qualitative Perspectives*, 37 PERSP. ON SEXUAL & REPROD. HEALTH 110, 112, 115 (2005).

clarion call.³⁶ But as long as abortion access remains legal in even a few states, people living in states that are hostile to abortion will travel to a state or jurisdiction where abortion services are still available.³⁷ However, those who are able to avoid abortion restrictions in their states of residence tend to have some degree of class-privilege—a fact that was also true in the pre-*Roe* era.³⁸ The people who can travel out-of-state to obtain abortions are able to absorb the transportation costs. They are able to take paid time off from their jobs or to afford sacrificing the wages they might have earned. They are able to arrange and pay for childcare. In this way, poverty and a lack of resources impose obstacles to the travel that allows for the circumvention of abortion restrictions.³⁹ Because black people are disproportionately impoverished and bereft of resources, they will be able to bypass abortion restriction less frequently than their nonblack counterparts. That is, black people will be forced to carry pregnancies to term and give birth more frequently than people of other races. In this way, the fall of *Roe* inflicts a racial injury.

B. The Intersection of Abortion Access and Black Maternal Health

³⁶ See, e.g., Matt Berg, *Pence: 'We must not rest' until abortion is outlawed in every state*, POLITICO (June 24, 2022), <https://www.politico.com/news/2022/06/24/pence-we-must-not-rest-until-abortion-is-outlawed-in-every-state-00042315>; Kelsey Carolan, *Texas rep 'working on' bill to expand state's abortion law nationwide*, THE HILL (July 8, 2022), <https://thehill.com/homenews/house/3550408-texas-rep-working-on-bill-to-expand-states-abortion-law-nationwide/>; Emily Brooks, *House Republicans weigh national abortion restrictions*, THE HILL (July 7, 2022), <https://thehill.com/homenews/house/3548140-house-republicans-weigh-national-abortion-restrictions/>.

³⁷ After the Supreme Court permitted Texas's SB8 to go into effect in September 2021—effectively ending legal abortions after six weeks of pregnancy in the state—Texans flocked to neighboring states to obtain abortion care. Tierney Sneed, *Texas abortion seekers flooded out-of-state-clinics after six-week ban went into effect*, *Planned Parenthood records show*, CNN (Feb. 24, 2022, 6:10 PM), <https://www.cnn.com/2022/02/24/politics/abortion-texas-clinics-surge/index.html>. Some abortion clinics in Oklahoma reported a 2500% increase in patients from Texas. *New Planned Parenthood Data Highlight The Far-Reaching Impact of Texas Abortion Ban*, PLANNED PARENTHOOD (Feb. 2, 2022). One abortion clinic in Kansas reported that after SB8 went into effect, half to 75% of its clients came from Texas. Shefali Linthra, *Abortion clinics outside Texas see surge in patients since ban*, USA TODAY (Sept. 22, 2021), <https://www.usatoday.com/story/news/nation/2021/09/22/abortion-clinics-near-texas-flooded-patients-since-states-ban/5799093001/>.

³⁸ David J. Garrow, *Abortion Before and After Roe v. Wade: An Historical Perspective*, 62 ALB. L. REV. 833, 834 (1999) (writing that in the days before *Roe*, “there were hundreds upon hundreds of doctors in this country who secretly performed abortions for women whom they knew and who could pay”).

³⁹ *Dobbs v. Jackson Women's Health Org.*, No. 19-1392, slip op. at 3–4 (U.S. June 24, 2022) (Breyer, J., dissenting) (acknowledging that “women lacking financial resources will suffer from” the *Dobbs* decision because they will not be able to afford to travel “to a distant State for a procedure” and naming the lack of “money or childcare or the ability to take time off from work” as restraints on the ability of poor people to “find ways around the State’s assertion of power”).

Poverty is not the only impediment to travel that people face. People with mental or physical disabilities may find travel difficult or unmanageable. Survivors of intimate partner violence may be rendered immobile insofar as they may need to conceal their whereabouts from an abusive partner. Young people may need to hide their destination from a parent. The necessity of crossing an immigration checkpoint may make it impossible for an undocumented person to travel. See Paula Molina Acosta & Emma Flores, *Immigration & Abortion Care: Why Reproductive Rights are Inextricable from Migration*, NAT’L P’SHP FOR WOMEN & FAMILIES (Oct. 1, 2021), <https://www.nationalpartnership.org/our-impact/blog/general/immigration-abortion-care-inextricable-from-migration.html>; NAT’L P’SHP FOR WOMEN & FAMILIES & AUTISTIC SELF ADVOCACY NETWORK, ACCESS, AUTONOMY, AND DIGNITY: ABORTION CARE FOR PEOPLE WITH DISABILITIES (Sept. 2021), <https://www.nationalpartnership.org/our-work/resources/health-care/repro/repro-disability-abortion.pdf>.

Further, when abortion is unavailable and a person is forced to carry a pregnancy to term and give birth, the riskiness of that endeavor varies across states⁴⁰—and across racial groups.⁴¹ In Mississippi, which saw fit to ask the Court to strike down *Roe* and force pregnant people to give birth against their will, black people are more than two-and-a-half times more likely than their white counterparts to die from a pregnancy-related cause.⁴² Nationally, black people are three to four times as likely as their white counterparts to die during pregnancy, childbirth, or the postpartum period.⁴³ In this way, the reversal of *Roe* inflicts a racial injury insofar as it allows states to criminalize a tool that helps black people keep their lives.

C. The Carceral State and the Criminalization of Black People's Pregnancy Outcomes

Unquestionably, we should expect that some people unable to travel to obtain safe and legal abortions out-of-state will attempt to terminate their pregnancies themselves. The advent of medication-abortion—misoprostol and mifepristone—diminishes the danger involved in terminating one's own pregnancy. The use of misoprostol and mifepristone as abortifacients is exceedingly safe when the individual ingests the medication at earlier stages of pregnancy.⁴⁴

In contrast to the increased medical safety of self-managed abortion, the legal risk is higher than ever, as there has been a significant development in the U.S. since 1973: the number of people in jails and prisons has grown tremendously. The incarcerated population has *quadrupled* in the last forty years, with close to two million people confined in jails and prisons today.⁴⁵ “The U.S. federal and state governments lock up more people and at higher rates than ...any other government[] in the world, and they do so today more than they did at any other period in U.S.

⁴⁰ See Brief of Respondents at 28, *Dobbs v. Jackson Women's Health Org.*, No. 19-1392 (U.S. June 24, 2022) (noting that while “[c]hildbirth is now 14 times more likely than abortion to result in death ..., [and t]he comparative risk is even higher in Mississippi, where it is about 75 times more dangerous to carry a pregnancy to term than to have an abortion”).

⁴¹ *Id.*

⁴² See Brief of Respondents at 28 n. 8, *Dobbs v. Jackson Women's Health Org.*, No. 19-1392 (U.S. June 24, 2022) (noting that the maternal mortality ratio for black women in Mississippi is 51.9 deaths per 100,000 live births, while the ratio for white women is 18.9 deaths per 100,000 live births).

⁴³ See *Pregnancy Mortality Surveillance System*, CTRS. FOR DISEASE CONTROL & PREVENTION (Nov. 25, 2020), <https://www.cdc.gov/reproductivehealth/maternal-mortality/pregnancy-mortality-surveillance-system.htm> (for every 100,000 live births from 2014-2017, 13.4 non-Hispanic white women died of pregnancy-related causes compared to 41.7 non-Hispanic black women). Black people are also twice as likely as white people to suffer severe maternal morbidity, in which “a pregnant or recently postpartum woman faces a life-threatening diagnosis or must undergo a life-saving medical procedure—like a hysterectomy, blood transfusion, or mechanical ventilation—to avoid death.” See Khiara M. Bridges, *Racial Disparities in Maternal Mortality*, 95 NYU L. REV. 1229, 1242–43 (2020).

⁴⁴ See Aziza Ahmed, *Floating Lungs: Forensic Science in Self-Induced Abortion Prosecutions*, 100 B.U. L. REV. 1111, 1123 (2020) (“A medication abortion is safe ...—according to advocates and health professionals—when the abortion is done within legal and medical time limits, provided by the legally required health professional, and done with medication received from a pharmacy.”).

⁴⁵ See Dorothy E. Roberts, *Foreword: Abolition Constitutionalism*, 133 HARV. L. REV. 1, 12 (2019) (“In the last forty years, the U.S. incarcerated population exploded from about 500,000 to more than two million.”).

history.”⁴⁶ This is to say that the country currently is much more willing than it was in the generations that preceded *Roe* to turn to jails and prisons to address its social problems, real or imagined.

Moreover, there exists precedent for punishing people for poor pregnancy outcomes—a precedent that simply did not exist during the era of criminal abortion laws that preceded *Roe*. In the 1980s, during the crack cocaine scare, states began to use creative interpretations of the criminal law to prosecute black people who used the drug during their pregnancies.⁴⁷ Prosecutors claimed that they sought to punish them for harming, or potentially harming, their babies.⁴⁸ Arrests and prosecutions for substance use during pregnancy continue to the present, many of which target people who have used opioids or methamphetamine while pregnant.⁴⁹ Further, criminal punishment of pregnant people who have suffered poor birth outcomes occur outside of the context of substance use. Prosecutors brought charges against a pregnant woman who fell down steps.⁵⁰ They brought charges against a depressed pregnant woman who attempted suicide.⁵¹ They brought charges against a pregnant woman who suffered a miscarriage after

⁴⁶ *Id.* at 12–13.

⁴⁷ See Khiara M. Bridges, *Race, Pregnancy, and the Opioid Epidemic: White Privilege and the Criminalization of Opioid Use During Pregnancy*, 133 HARV. L. REV. 770, 815–21 (2020). During oral arguments in *Dobbs*, Justice Thomas appeared to raise the question of whether the right to an abortion recognized in *Roe* permits states to punish pregnant people who use controlled substances. Transcript of Oral Argument at 49, *Dobbs v. v. Jackson Women's Health Org.*, No. 19-1392 (U.S. June 24, 2022).

⁴⁸ Although some of the people prosecuted for cocaine use during pregnancy had suffered poor outcomes, many others had given birth to perfectly healthy babies. Bridges, *supra* note 47, at 818. Thus, injury to the baby could not justify prosecution in the latter set of cases. In the absence of a perceptible injury, only the *risk* of harm could justify punishment. If states felt comfortable punishing people for exposing their fetuses and babies to the *risk* of harm, it seems odd to suppose that they would not feel comfortable punishing people who end fetal life altogether through abortion.

It deserves underscoring that there is little to no evidence that prenatal exposure to cocaine causes permanent injuries to babies. *Id.* Instead, the evidence shows that it is much more likely that the poverty in which the pregnant person lived caused the harm to the fetus. See Susan FitzGerald, “Crack Baby” Study Ends with Unexpected but Clear Result, PHILA. INQUIRER (July 21, 2013), https://www.inquirer.com/philly/health/20130721_Crack_baby_study_ends_with_unexpected_but_clear_result.html (quoting neonatologist Hallum Hurt concluding that “[p]overty is a more powerful influence on the outcome of inner-city children than gestational exposure to cocaine . . .”). As I have summarized elsewhere:

The longitudinal studies that have been conducted on children who had been exposed to cocaine in utero show that they do not differ from children who did not sustain in utero exposure to cocaine. These studies establish that while cocaine may have a nominal effect on children exposed to it in utero, poverty, by far, bears the greatest responsibility for infant morbidity and mortality.

Bridges, *supra* note 47, at 818.

⁴⁹ See *id.* at 821–25.

⁵⁰ Iowa Police Almost Prosecute Woman for Her Accidental Fall During Pregnancy . . . Seriously ., ACLU ME. (Feb. 11, 2010, 5:04 PM), <https://www.aclumaine.org/en/news/iowapolice-almost-prosecute-woman-her-accidental-fall-during-pregnancyseriously>.

⁵¹ Jessica Mason Pieklo, *Legal Wrap: Finally Some Justice for Bei Bei Shuai*, REWIRE NEWS GRP. (Aug. 6, 2013, 9:14 AM), <https://rewire.news/article/2013/08/06/legal-wrap-finallysome-justice-for-bei-bei-shuai/>.

being shot in the abdomen during an altercation.⁵² They have also brought charges against pregnant people who have suffered *no* adverse outcome: a pregnant woman faced charges for endangering her fetus after she drove her car without wearing a seatbelt and tried to avoid arrest by the police officers who pulled her over.⁵³ This is all to say that if there was ever a period of time when pregnant people were not conceptualized as subjects who ought to be punished for harms, or risks of harms, to their fetuses, that era has passed.

Although a number of abortion rights opponents currently claim to consider the pregnant person who has an abortion to be a victim and the person who performs or facilitates access to the abortion to be the victimizer,⁵⁴ we might be skeptical about the sincerity, or endurance, of this belief in light of our current practice of punishing pregnant people for contributing to, or simply creating the risk of, negative pregnancy outcomes.⁵⁵ Thus, *Roe*'s demise creates circumstances under which black people, who disproportionately rely on abortion services, will be overrepresented among those who are exposed to criminal punishment for attempting to self-manage their abortions.

Importantly, even if black people's abortion rates were on par with the abortion rates of nonblack people, and even if black people attempted to self-manage abortion despite the threat of criminal punishment as frequently as people of other races, we should fully expect that black people will be more frequently arrested, prosecuted, indicted, and convicted for breaking the law; we should also expect them to serve longer sentences when convicted than their nonblack counterparts. We should have this expectation because, as a general matter, black people are more likely than their nonblack counterparts to be arrested, prosecuted, indicted, and convicted for the same conduct, and they serve longer sentences than their nonblack counterparts, even when controlling for relevant factors.⁵⁶

Thus, the size and muscularity of the carceral state—as well as the attention that the carceral state gives to pregnant people who behave in non-normative ways—have increased drastically since the pre-*Roe* era of criminal abortion laws. And so, the fall of *Roe* ushers black people into a

⁵² Holly Yan & Madeline Holcombe, *A Pregnant Woman Shot in the Stomach Is Indicted in Her Unborn Child's Death*, CNN (June 28, 2019, 8:13 PM), <https://www.cnn.com/2019/06/27/us/alabama-pregnant-woman-shot-in-stomach-manslaughter-indictment-trnd/index.html>.

⁵³ See Deputy: Pregnant Woman Tries to Evade Arrest, GREENVILLE SUN (Nov. 11, 2014), https://www.greenevillesun.com/xml/nitf/deputy-pregnant-woman-tries-to-evade-arrest/article_%20fec891ba-1860-5cce-9b5d-2ff25df4b236.html.

⁵⁴ See, e.g., Veronica Stracqualursi, Leading anti-abortion groups urge state lawmakers not to pass bills criminalizing women for abortions, CNN (May 12, 2022), <https://www.cnn.com/2022/05/12/politics/anti-abortion-groups-letter-criminalizing-women/index.html>.

⁵⁵ See *Dobbs v. Jackson Women's Health Org.*, No. 19-1392, slip op. at 3 (U.S. June 24, 2022) (Breyer, J., dissenting) (observing that states may decide to "criminalize the woman's conduct too, incarcerating her for daring to seek or obtain an abortion").

⁵⁶ THE SENTENCING PROJECT, REPORT TO THE UNITED NATIONS ON RACIAL DISPARITIES IN THE U.S. CRIMINAL JUSTICE SYSTEM (2018), <https://www.sentencingproject.org/publications/un-report-on-racial-disparities/>.

regime in which they are likely to more frequently engage in criminalized behavior and in which their racial unprivilege makes them more likely to be swept into the apparatus of the criminal legal system.⁵⁷ In this way, the fall of *Roe* inflicts a racial injury.

V. Conclusion

The Supreme Court's decision in *Dobbs v. Jackson Women's Health Organization* was gravely wrong. One cannot overstate the level of harm and chaos that the decision has already caused people seeking abortion care, providers, and practical support organizations. This harm will continue to worsen in the coming months and years.

The crisis in access to abortion care in the United States highlights the need for a bold, holistic, and intersectional policy response that puts within its range of vision everything from the need for comprehensive paid family and medical leave to laws that tackle the climate crisis and urgently protect the right to vote. This response must address the systemic conditions of inequality that disproportionately affect black people and compound the harms of abortion restrictions. In this critical moment, we need the reproductive justice framework to inform policy making so that we can fight to ensure that people have the necessary economic, social, and political support to control their bodies, including when and whether to have children. The overruling of *Roe v. Wade* inflicts a racial injury and necessitates the exploration of other avenues to ground federal constitutional protections for the right to abortion, including the Thirteenth Amendment and the Fourteenth Amendment's Equal Protection Clause. Until that happens, we are left with the devastating consequences of a politically motivated Supreme Court decision that will affect the health and lives of people across the country and disproportionately impact black women and black people who can become pregnant.

⁵⁷ Relevantly, "the female incarceration rate has grown twice as quickly as the male incarceration rate over the past few decades, and black women are twice as likely as white women to be behind bars." Roberts, *supra* note 45, at 13. Roberts observes that the U.S. has a history of meting out harsher punishment to black women, writing that "[t]he wildly disparate treatment of white women and black women arrested for similar crimes is mind-boggling: for example, '[b]etween 1908 and 1938, only four white women were ever sentenced to the chain gang in Georgia, compared with almost two thousand Black women.'" *Id.* at 32.

Statement of Heidi Matzke

**Senate Committee on the Judiciary
A Post-Roe America: The Legal Consequences of the *Dobbs* Decision**

July 12, 2022

Mr. Chairman, Ranking Member Grassley, and Members of the Committee:

My name is Heidi Matzke, and I am the executive director of the Alternatives Pregnancy Center in Sacramento, California.

I came into this role by a roundabout road that began in a very emotional place. A number of years ago, on the day my sister and I were supposed to leave for college, she showed up at my door and just ... collapsed. I said, "Well, what's your problem?" And she looked up and said, "I'm pregnant."

I still remember the fear in her eyes. I see that fear, almost every day, in the eyes of the women who come into our center. They need help. They need someone to talk to. They need hope.

I know, because my sister needed all those things. My family needed all those things – and we found them in a local pregnancy care center. And years later, because I wanted to give that same help and hope and support to others ... I became the director of a pregnancy center.

As an organization of mostly women serving women, the staff of our clinic offers our patients compassionate, holistic care – ministering in whatever gentle ways we can to their physical, emotional, and even spiritual needs.

And so it grieves me that, in the weeks leading up to and following the Supreme Court's decision in *Dobbs v. Jackson Women's Health Organization*, a great deal of misinformation has been spread about pregnancy centers, including public statements made by the administration and by members of this esteemed body.

In early June, Attorney General Bonta issued a misleading consumer alert about California's pregnancy care centers. Efforts also appear to be underway in some quarters to use the power of the U.S. Congress to restrict and even outlaw the crucial work of the nearly 3,000 pregnancy care centers serving women across this country.

That would be a devastating blow to women, particularly the hundreds of thousands who each year come through the doors of clinics like the one I run ... looking for free medical care, emotional support, and practical resources that will enable them to carry their pregnancies to term. It would also be a triumph of ignorance about who we are and what we do, and about the reality of what "choice" means for women in America today.

Despite the Attorney General's unsubstantiated statement, we celebrate our differences. Not every woman faced with a difficult situation desires abortion. Alternatives Pregnancy Center, and the many others like us, provide free essential services to expectant mothers.

Let me share with you what we actually do.

We offer the women who come to us pregnancy tests. Ultrasounds. Prenatal care up to 24 weeks. Well-woman visits. We test for and treat sexually transmitted diseases. We offer abortion pill reversals, abortion recovery counseling, and parenting classes.

If finances are a problem, we have diapers, wipes, and baby formula. Baby food, baby clothing, and baby supplies. We offer community resource and adoption referrals. If a woman needs a hotel room, we'll pay for that. It doesn't matter who she is, where she comes from, or her past.

If she wants to hear them, we explain her three options: parenting, adoption, or abortion. Even if she chooses abortion, we continue to be there for her, after the procedure. For years, if necessary.

Our clinic alone provides over \$1 million in free services each year to the women who come to us. We charge nothing. That means we never financially benefit from any choice a woman makes. We make no profit of any kind off the women who turn to us for help.

Ironically, many of our patients are referred to us by a well-known abortion provider. A woman goes to them for an ultrasound, but that provider isn't willing to perform one for a woman not already determined to abort her child. So, they send her to us, because we offer the ultrasound for free ... regardless of what the woman chooses to do about her baby.

At our center, ultrasounds and all of our other services are provided by a staff of licensed medical professionals, including OBGYNs, NPs, RNs, and medical assistants. They are deeply compassionate people, because most of them have experienced the effects of abortion themselves; our OB-GYN used to perform them.

When a woman comes in, so afraid of what an unplanned pregnancy will mean for her life, her ambitions, her relationships, we don't urge her to make a decision. We listen. We try to hear her heart. We offer professional services and emotional and spiritual support.

And what we offer is sorely needed. In 2019, the CDC reported nearly 630,000 abortions in America. Many of those women chose abortion because they lacked the resources and support they needed to confidently choose to parent. The kind of resources and support provided by clinics like ours.

Over the last five years, pregnancy care centers like ours have served nearly two million women who were faced with an unplanned pregnancy and wanted an alternative to abortion.

But these facts are not being reported. Instead – whether from ignorance about who we are or from the spreading of deliberate misinformation about what we do – pregnancy care centers from coast to coast have been the targets of violent assaults of vandalism and hateful attacks online

and in the media. Just last week, we had to call police when a man approached our care center with threats and a machete.

Our Sacramento center has been forced to hire 24-hour on-site security. We've had to reinforce doors and bulletproof walls and windows. We've removed rocks from our landscaping to inhibit vandalism. We've painted the building with graffiti-proof coating. We've added cameras, armed our staff with pepper spray, and stopped running our mobile clinic because of threats of violence.

My staff and I live on constant alert. We have been forced to expend valuable resources on these crucial safety measures, so we can continue to provide the women of our community with free medical care and services in the safest possible environment.

What we do is worth the risk. There is a place for clinics like ours in every community – a place for women facing unplanned pregnancies who are seeking dependable medical resources in a safe, caring environment during one of the most difficult times of their lives.

A place where people will encourage them – not exploit them – in their moment of greatest vulnerability.

“You are pregnant” – those are three of the most powerful words a woman will hear in her life. For some, the words bring incredible joy; for others, incredible fear. Both types of women deserve support. And we are here for them both.

We have been given a tremendous opportunity and responsibility to serve and empower women to live full and successful lives. It is an honor to wake up each morning to serve women and families in my community, and I thank you for the privilege of sharing with you a brief glimpse of the hope, service, and compassion our pregnancy center – and so many others across this great country – provide each day.

Thank you.

Testimony of

Dr. Colleen McNicholas
Chief Medical Officer
Planned Parenthood of the St. Louis Region and Southwest Missouri

United States Senate Committee on the Judiciary
“A Post-Roe America: The Legal Consequences of the Dobbs Decision”

July 12, 2022

My name is Dr. Colleen McNicholas. I am a board certified OBGYN trained to provide the full spectrum of sexual and reproductive health care including abortion care. I practice in Missouri and Illinois — two states where people are living such vastly different realities that it should be considered by each one of you to be un-American. On June 24, when the Supreme Court overturned Roe v. Wade, they effectively created two nations — one where those whose reproductive freedom belongs to themselves and those whose reproductive freedom belongs to a small group of politicians who have effectively appointed themselves as decision-makers over our bodies, lives, and futures.

Today, I am here to speak for the patients I serve everyday — people from across the midwest and south who navigate a ridiculous obstacle course just to access care.

While it may take us years to understand how the Supreme Court decision in the Dobbs v. Jackson case will have impacted public health outcomes, we already know — just 18 days into this post-Roe reality — how it's already disastrously complicating people's lives and putting doctors in impossible situations.

Since ceasing abortion care at our health center in St. Louis, which was the last remaining abortion clinic in Missouri, our health center in Illinois just across the Mississippi River has cared for patients who have traveled as far as 1,000 miles *one-way*. Each one of these patients has told me they had no choice but to travel hours for care. Almost overnight, our Illinois clinic has seen appointments triple — and that's already on top of a double booked schedule we were sustaining in the wake of Texas and Oklahoma's abortion bans.

As we've long said, overturning Roe won't stop the need for abortion. The Supreme Court's decision has already pushed people — the people each one of you represent — into extreme, and sometimes, dangerous circumstances in order to access one of the safest and most common health care procedures.

In Missouri and several other states abortion is banned except in medical emergencies. In other words, in order for doctors to avoid prison time: Instead of treating a patient before their health becomes life threatening, doctors now must contemplate how sick is sick enough before

providing life-saving abortion care. People will suffer unnecessary harm as doctors wait for permission from hospital lawyers to tell them they can proceed. In some circumstances, the abortion care will come too late.

Not only is this agenda unpopular, it is deeply anti-life. We already know that abortion care is inextricably linked to maternal health outcomes. And in Missouri, Black maternal mortality is 4 times higher than for white women. Forcing people to continue pregnancies they either don't want or can't bear will cost lives. Forcing people into parenting without passing policies that address child care costs, paid family leave, or the formula shortage will cost lives.

The anti-abortion agenda is anti-life and hypocrisy at its worst.

I have a plea for our allies too, those of you here who have long stood with us and committed to protecting reproductive freedom: work together, with your colleagues at all levels of power. Do something.

On June 24, one hour before the Supreme Court dismantled abortion rights, I was sitting next to HHS Secretary Xavier Becerra along with partners and allies in Missouri including the Congresswoman from the first district, Representative Cori Bush. In that meeting, we asked the Biden administration to declare a public health emergency to help support the patients who will have to flee their home states for abortion care - as 36 million people of reproductive age now — or soon — may live in a state where abortion is banned. This is the very least in a long list of solutions providers like me need your help on securing so that we can continue to care for the millions of patients who will soon be in a time-sensitive health care emergency of their own. Senators, I come before you tired, frustrated, and angry. Those of us on the front lines don't need more empty gestures. We need action and we need it now. We are out of time.

Thank you for inviting me to share about this time, which I am certain will be a stain on our history as a country. Abortion is normal. Abortion is an act of love. Abortion is health care.

Thank you.

**July 12, 2022—Post-Roe V Wade America Hearing Panel
Witness Testimony**

(Timed at 5 minutes)

Good morning and thank you, Chairman Durbin, Ranking Member Grassley, and the distinguished members of the Senate Judiciary Committee, for the opportunity to testify today.

I'm Juliana Stratton, Lieutenant Governor of the great state of Illinois, and I use she/her pronouns.

Since coming into office, Governor JB Pritzker and I have been focused on the health, safety, and access to opportunities for all women of Illinois, of all backgrounds and ages.

And one way that we worked to make that a reality, is by preserving and protecting legal abortion in Illinois.

In 2019, Governor Pritzker signed the Reproductive Health Act, which:

- enshrined reproductive rights into state law
- repealed outdated laws criminalizing abortion
- and requires private health insurance plans to cover abortion, as the vital reproductive health procedure that it is.

We made a vow that our state will be a beacon of hope for all.

This was a promise we made to the people of Illinois, and I come before you today because people throughout the entire Midwest are relying on our commitment to protect and preserve women's rights—namely the right to an abortion.

It is no secret that Illinois stands out as one of the only states in the U.S. heartland where our laws on legal abortion have not been impacted by the Supreme Court's overturning of Roe V Wade.

We are not just an oasis of reproductive care, but an island.

Here's what that looks like:

It looks like disenfranchised yet determined patients coming from every surrounding state, but also from as far away as Tennessee, Texas, Louisiana, Alabama, and Florida.

It looks like the entire staff in our state's abortion clinics fielding phone calls for appointments because the number of out-of-state patients has doubled since Roe V Wade was overturned—and that is on top of the nearly 10,000 women who already came to Illinois seeking abortion care, according to 2020 data by the Illinois Department of Public Health.

In the coming months and years, these numbers will inevitably increase. And sadly, so too will the preventable suffering and pain of women and families across the nation facing the negative ramifications of a post-Roe America.

Because of the history of systemic racism, we know that inequities are amplified within the Black and Latinx communities. A post-Roe America will be devastating for Black women, whose maternal mortality rate is already two to three times higher than that of white women because of structural racism and misogyny.

One [study](#) (published in 2021 by the population research journal *Demography*) projects that without access to safe and legal abortions, that number will increase by over 30 percent among Black women and nearly 20 percent for Hispanic women.

Let's take a moment to let that sink in... We are facing a future rife with needless death, despite 61% of Americans believing abortion should be legal in most—or all cases—according to a Pew Research Center survey conducted in March 2022. It is hard to overestimate just how devastating the outcome of this ruling is, and will be, despite our years of preparation.

Before the threats to Roe V Wade were fully realized, Illinois was proactive, upholding bodily autonomy, and protecting the right to an abortion. And still, the overturning of Roe V Wade has sent us down a dark, agonizing path.

The Supreme Court's decision does not, quote, "leave abortion up to the states" when every state will be impacted. To be clear, that means every city, town, county—urban, suburban, and rural. And our rural and unincorporated areas already experience inequities when it comes to accessing healthcare overall. The weight of this ruling will surely be felt across state borders.

In Illinois, and in states like ours, we are bracing for what is to come as these diverse communities across the nation, turn to us.

Governor Pritzker called on the President to move forward on key items that will address how states like ours will be affected, like:

- Creating a centralized hub for providers and patients to ease the burden on facility capacity amid higher demand;
- And most of all, Illinois and other states with legal abortion, need more access to federal money to support demand.

I commend President Biden for the steps he has taken to safeguard access to reproductive care through executive order on Friday, which included actions to expand access to contraceptives. This is a great start.

In Illinois, all hands are on deck as we brace for what is coming, because we know we are the only lifeline for so many after so much has been taken away from women... from the American people.

I say this, not just as the Lt. Governor of Illinois, but as the mother of four daughters. My daughters, who now have fewer rights than I had.

And based on Justice Clarence Thomas' concurring opinion, it is likely this may not be the last rights that will be stripped from future generations; as access to contraceptives; and the right to love and marry who you choose; have already come under threat with the overturning of Roe V Wade.

In Illinois, we will not go back; we will not be silent or stand on the sidelines. I thank Governor Pritzker, Illinois' legislative leaders and the state's General Assembly, and all the community advocates who have joined forces with us to ensure that.

We already know how dangerous it is to turn back the clock of progress, and I ask of each of you leaders: Help us push forward, before it is too late.

Thank you.

XXX

Questions for the Record from Senator Charles E. Grassley
Hearing on “A Post-Roe America: The Legal Consequences of the Dobbs Decision”
July 12, 2022

Khiara M. Bridges
 Professor of Law
 U.C. Berkeley School of Law
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1a. I believe that the Constitution must be interpreted in light of the society that it seeks to organize.

With respect to substantive due process regarding matters involving the family, the dissent in *Dobbs v. Jackson Women’s Health Organization* competently captures my approach to constitutional interpretation. It reads in relevant part:

Indeed, the ratifiers—both in 1868 and when the original Constitution was approved in 1788—did not understand women as full members of the community embraced by the phrase “We the People.” In 1868, the first wave of American feminists were explicitly told—of course by men—that it was not their time to seek constitutional protections. (Women would not get even the vote for another half-century.) To be sure, most women in 1868 also had a foreshortened view of their rights: If most men could not then imagine giving women control over their bodies, most women could not imagine having that kind of autonomy. But that takes away nothing from the core point. Those responsible for the original Constitution, including the Fourteenth Amendment, did not perceive women as equals, and did not recognize women’s rights. When the majority says that we must read our foundational charter as viewed at the time of ratification (except that we may also check it against the Dark Ages), it consigns women to second-class citizenship.

Casey itself understood this point, as will become clear. See *infra*, at 23–24. It recollected with dismay a decision this Court issued just five years after the Fourteenth Amendment’s ratification, approving a State’s decision to deny a law license to a woman and suggesting as well that a woman had no legal status apart from her husband. See 505 U. S., at 896–897 (majority opinion) (citing *Bradwell v. State*, 16 Wall. 130 (1873)). “There was a time,” Casey explained, when the Constitution did not protect “men and women alike.” 505 U. S., at 896. But times had changed. A woman’s place in society had changed, and constitutional law had changed along with it. The relegation of women to inferior status in either the public sphere or the family was “no longer consistent with our understanding” of the Constitution. *Id.*, at 897. Now, “[t]he Constitution protects all individuals, male or female,” from “the abuse of governmental power” or “unjustified state interference.” *Id.*, at 896, 898.

So how is it that, as Casey said, our Constitution, read now, grants rights to women, though it did not in 1868? How is it that our Constitution subjects discrimination against them to heightened judicial scrutiny? How is it that our Constitution, through the Fourteenth Amendment's liberty clause, guarantees access to contraception (also not legally protected in 1868) so that women can decide for themselves whether and when to bear a child? How is it that until today, that same constitutional clause protected a woman's right, in the event contraception failed, to end a pregnancy in its earlier stages?

The answer is that this Court has rejected the majority's pinched view of how to read our Constitution. "The Founders," we recently wrote, "knew they were writing a document designed to apply to ever-changing circumstances over centuries." *NLRB v. Noel Canning*, 573 U. S. 513, 533–534 (2014). Or in the words of the great Chief Justice John Marshall, our Constitution is "intended to endure for ages to come," and must adapt itself to a future "seen dimly," if at all. *McCulloch v. Maryland*, 4 Wheat. 316, 415 (1819). That is indeed why our Constitution is written as it is. The Framers (both in 1788 and 1868) understood that the world changes. So they did not define rights by reference to the specific practices existing at the time. Instead, the Framers defined rights in general terms, to permit future evolution in their scope and meaning. And over the course of our history, this Court has taken up the Framers' invitation. It has kept true to the Framers' principles by applying them in new ways, responsive to new societal understandings and conditions.

Nowhere has that approach been more prevalent than in construing the majestic but open-ended words of the Fourteenth Amendment—the guarantees of "liberty" and "equality" for all. And nowhere has that approach produced prouder moments, for this country and the Court. Consider an example *Obergefell* used a few years ago. The Court there confronted a claim, based on *Washington v. Glucksberg*, 521 U. S. 702 (1997), that the Fourteenth Amendment "must be defined in a most circumscribed manner, with central reference to specific historical practices"—exactly the view today's majority follows. *Obergefell*, 576 U. S., at 671. And the Court specifically rejected that view.⁴ In doing so, the Court reflected on what the proposed, historically circumscribed approach would have meant for interracial marriage. See *ibid.* The Fourteenth Amendment's ratifiers did not think it gave black and white people a right to marry each other. To the contrary, contemporaneous practice deemed that act quite as unprotected as abortion. Yet the Court in *Loving v. Virginia*, 388 U. S. 1 (1967), read the Fourteenth Amendment to embrace the Lovings' union. If, *Obergefell* explained, "rights were defined by who exercised them in the past, then received practices could serve as their own continued justification"—even when they conflict with "liberty" and "equality" as later and more broadly understood. 576 U. S., at 671. The Constitution does not freeze for all time the original view of what those rights guarantee, or how they apply.

That does not mean anything goes. The majority wishes people to think there are but two alternatives: (1) accept the original applications of the Fourteenth Amendment and no others, or (2) surrender to judges' "own ardent views," ungrounded in law, about the "liberty that Americans should enjoy." Ante, at 14. At least, that idea is what the majority sometimes tries to convey. At other times, the majority (or, rather, most of it) tries to assure the public that it has no designs on rights (for example, to contraception) that arose only in the back half of the 20th century—in other words, that it is happy to pick and choose, in accord with individual preferences. See ante, at 32, 66, 71–72; ante, at 10 (KAVANAUGH, J., concurring); but see ante, at 3 (THOMAS, J., concurring). But that is a matter we discuss later. See *infra*, at 24–29. For now, our point is different: It is that applications of liberty and equality can evolve while remaining grounded in constitutional principles, constitutional history, and constitutional precedents. The second Justice Harlan discussed how to strike the right balance when he explained why he would have invalidated a State's ban on contraceptive use. Judges, he said, are not "free to roam where unguided speculation might take them." *Poe v. Ullman*, 367 U. S. 497, 542 (1961) (dissenting opinion). Yet they also must recognize that the constitutional "tradition" of this country is not captured whole at a single moment. *Ibid.* Rather, its meaning gains content from the long sweep of our history and from successive judicial precedents—each looking to the last and each seeking to apply the Constitution's most fundamental commitments to new conditions. That is why Americans, to go back to *Obergefell*'s example, have a right to marry across racial lines. And it is why, to go back to Justice Harlan's case, Americans have a right to use contraceptives so they can choose for themselves whether to have children.

All that is what *Casey* understood. *Casey* explicitly rejected the present majority's method. "[T]he specific practices of States at the time of the adoption of the Fourteenth Amendment," *Casey* stated, do not "mark[] the outer limits of the substantive sphere of liberty which the Fourteenth Amendment protects." 505 U. S., at 848.5 To hold otherwise—as the majority does today—"would be inconsistent with our law." *Id.*, at 847. Why? Because the Court has "vindicated [the] principle" over and over that (no matter the sentiment in 1868) "there is a realm of personal liberty which the government may not enter"—especially relating to "bodily integrity" and "family life." *Id.*, at 847, 849, 851. *Casey* described in detail the Court's contraception cases. See *id.*, at 848–849, 851–853. It noted decisions protecting the right to marry, including to someone of another race. See *id.*, at 847–848 ("[I]nterracial marriage was illegal in most States in the 19th century, but the Court was no doubt correct in finding it to be an aspect of liberty protected against state interference"). In reviewing decades and decades of constitutional law, *Casey* could draw but one conclusion: Whatever was true in 1868, "[i]t is settled now, as it was when the Court heard arguments in *Roe v. Wade*, that the Constitution places limits on a State's right to interfere with a person's most basic decisions about family and parenthood." *Id.*, at 849.

And that conclusion still held good, until the Court's intervention here. It was settled at the time of *Roe*, settled at the time of *Casey*, and settled yesterday that the Constitution places limits on a State's power to assert control over an individual's body and most personal decisionmaking. A multitude of decisions supporting that principle led to *Roe*'s recognition and *Casey*'s reaffirmation of the right to choose; and *Roe* and *Casey* in turn supported additional protections for intimate and familial relations. The majority has embarrassingly little to say about those precedents. It (literally) rattles them off in a single paragraph; and it implies that they have nothing to do with each other, or with the right to terminate an early pregnancy. See ante, at 31–32 (asserting that recognizing a relationship among them, as addressing aspects of personal autonomy, would ineluctably “license fundamental rights” to illegal “drug use [and] prostitution”). But that is flat wrong. The Court's precedents about bodily autonomy, sexual and familial relations, and procreation are all interwoven—all part of the fabric of our constitutional law, and because that is so, of our lives. Especially women's lives, where they safeguard a right to self-determination.

And eliminating that right, we need to say before further describing our precedents, is not taking a “neutral” position, as JUSTICE KAVANAUGH tries to argue. Ante, at 2–3, 5, 7, 11–12 (concurring opinion). His idea is that neutrality lies in giving the abortion issue to the States, where some can go one way and some another. But would he say that the Court is being “scrupulously neutral” if it allowed New York and California to ban all the guns they want? Ante, at 3. If the Court allowed some States to use unanimous juries and others not? If the Court told the States: Decide for yourselves whether to put restrictions on church attendance? We could go on—and in fact we will. Suppose JUSTICE KAVANAUGH were to say (in line with the majority opinion) that the rights we just listed are more textually or historically grounded than the right to choose. What, then, of the right to contraception or same-sex marriage? Would it be “scrupulously neutral” for the Court to eliminate those rights too? The point of all these examples is that when it comes to rights, the Court does not act “neutrally” when it leaves everything up to the States. Rather, the Court acts neutrally when it protects the right against all comers. And to apply that point to the case here: When the Court decimates a right women have held for 50 years, the Court is not being “scrupulously neutral.” It is instead taking sides: against women who wish to exercise the right, and for States (like Mississippi) that want to bar them from doing so. JUSTICE KAVANAUGH cannot obscure that point by appropriating the rhetoric of even-handedness. His position just is what it is: A brook-no-compromise refusal to recognize a woman's right to choose, from the first day of a pregnancy. And that position, as we will now show, cannot be squared with this Court's longstanding view that women indeed have rights (whatever the state of the world in 1868) to make the most personal and consequential decisions about their bodies and their lives.

Consider first, then, the line of this Court's cases protecting “bodily integrity.” *Casey*, 505 U. S., at 849. “No right,” in this Court's time-honored view, “is held

more sacred, or is more carefully guarded,” than “the right of every individual to the possession and control of his own person.” *Union Pacific R. Co. v. Botsford*, 141 U. S. 250, 251 (1891); see *Cruzan v. Director, Mo. Dept. of Health*, 497 U. S. 261, 269 (1990) (Every adult “has a right to determine what shall be done with his own body”). Or to put it more simply: Everyone, including women, owns their own bodies. So the Court has restricted the power of government to interfere with a person’s medical decisions or compel her to undergo medical procedures or treatments. See, e.g., *Winston v. Lee*, 470 U. S. 753, 766–767 (1985) (forced surgery); *Rochin v. California*, 342 U. S. 165, 166, 173–174 (1952) (forced stomach pumping); *Washington v. Harper*, 494 U. S. 210, 229, 236 (1990) (forced administration of antipsychotic drugs).

Casey recognized the “doctrinal affinity” between those precedents and *Roe*. 505 U. S., at 857. And that doctrinal affinity is born of a factual likeness. There are few greater incursions on a body than forcing a woman to complete a pregnancy and give birth. For every woman, those experiences involve all manner of physical changes, medical treatments (including the possibility of a cesarean section), and medical risk. Just as one example, an American woman is 14 times more likely to die by carrying a pregnancy to term than by having an abortion. See *Whole Woman’s Health v. Hellerstedt*, 579 U. S. 582, 618 (2016). That women happily undergo those burdens and hazards of their own accord does not lessen how far a State impinges on a woman’s body when it compels her to bring a pregnancy to term. And for some women, as *Roe* recognized, abortions are medically necessary to prevent harm. See 410 U. S., at 153. The majority does not say—which is itself ominous—whether a State may prevent a woman from obtaining an abortion when she and her doctor have determined it is a needed medical treatment.

So too, *Roe* and *Casey* fit neatly into a long line of decisions protecting from government intrusion a wealth of private choices about family matters, child rearing, intimate relationships, and procreation. See *Casey*, 505 U. S., at 851, 857; *Roe*, 410 U. S., at 152–153; see also ante, at 31–32 (listing the myriad decisions of this kind that *Casey* relied on). Those cases safeguard particular choices about whom to marry; whom to have sex with; what family members to live with; how to raise children—and crucially, whether and when to have children. In varied cases, the Court explained that those choices—“the most intimate and personal” a person can make—reflect fundamental aspects of personal identity; they define the very “attributes of personhood.” *Casey*, 505 U. S., at 851. And they inevitably shape the nature and future course of a person’s life (and often the lives of those closest to her). So, the Court held, those choices belong to the individual, and not the government. That is the essence of what liberty requires.

And liberty may require it, this Court has repeatedly said, even when those living in 1868 would not have recognized the claim—because they would not have seen the person making it as a full-fledged member of the community. Throughout our history, the sphere of protected liberty has expanded, bringing in individuals formerly excluded. In that way, the constitutional values of liberty and equality go

hand in hand; they do not inhabit the hermetically sealed containers the majority portrays. Compare *Obergefell*, 576 U. S., at 672–675, with *ante*, at 10–11. So before *Roe* and *Casey*, the Court expanded in successive cases those who could claim the right to marry—though their relationships would have been outside the law’s protection in the mid-19th century. See, e.g., *Loving*, 388 U. S. 1 (interracial couples); *Turner v. Safley*, 482 U. S. 78 (1987) (prisoners); see also, e.g., *Stanley v. Illinois*, 405 U. S. 645, 651–652 (1972) (offering constitutional protection to untraditional “family unit[s]”). And after *Roe* and *Casey*, of course, the Court continued in that vein. With a critical stop to hold that the Fourteenth Amendment protected same-sex intimacy, the Court resolved that the Amendment also conferred on same-sex couples the right to marry. See *Lawrence*, 539 U. S. 558; *Obergefell*, 576 U. S. 644. In considering that question, the Court held, “[h]istory and tradition,” especially as reflected in the course of our precedent, “guide and discipline [the] inquiry.” *Id.*, at 664. But the sentiments of 1868 alone do not and cannot “rule the present.” *Ibid.*

Casey similarly recognized the need to extend the constitutional sphere of liberty to a previously excluded group. The Court then understood, as the majority today does not, that the men who ratified the Fourteenth Amendment and wrote the state laws of the time did not view women as full and equal citizens. See *supra*, at 15. A woman then, *Casey* wrote, “had no legal existence separate from her husband.” 505 U. S., at 897. Women were seen only “as the center of home and family life,” without “full and independent legal status under the Constitution.” *Ibid.* But that could not be true any longer: The State could not now insist on the historically dominant “vision of the woman’s role.” *Id.*, at 852. And equal citizenship, *Casey* realized, was inescapably connected to reproductive rights. “The ability of women to participate equally” in the “life of the Nation”—in all its economic, social, political, and legal aspects—“has been facilitated by their ability to control their reproductive lives.” *Id.*, at 856. Without the ability to decide whether and when to have children, women could not—in the way men took for granted—determine how they would live their lives, and how they would contribute to the society around them.

For much that reason, *Casey* made clear that the precedents *Roe* most closely tracked were those involving contraception. Over the course of three cases, the Court had held that a right to use and gain access to contraception was part of the Fourteenth Amendment’s guarantee of liberty. See *Griswold*, 381 U. S. 479; *Eisenstadt*, 405 U. S. 438; *Carey v. Population Services Int’l*, 431 U. S. 678 (1977). That clause, we explained, necessarily conferred a right “to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.” *Eisenstadt*, 405 U. S., at 453; see *Carey*, 431 U. S., at 684–685. *Casey* saw *Roe* as of a piece: In “critical respects the abortion decision is of the same character.” 505 U. S., at 852. “[R]easonable people,” the Court noted, could also oppose contraception; and indeed, they could believe that “some forms of contraception” similarly implicate a concern with “potential life.” *Id.*, at 853, 859. Yet the views of others could not

automatically prevail against a woman's right to control her own body and make her own choice about whether to bear, and probably to raise, a child. When an unplanned pregnancy is involved—because either contraception or abortion is outlawed—the liberty of the woman is at stake in a sense unique to the human condition.” *Id.*, at 852. No State could undertake to resolve the moral questions raised “in such a definitive way” as to deprive a woman of all choice. *Id.*, at 850.

Faced with all these connections between *Roe/Casey* and judicial decisions recognizing other constitutional rights, the majority tells everyone not to worry. It can (so it says) neatly extract the right to choose from the constitutional edifice without affecting any associated rights. (Think of someone telling you that the Jenga tower simply will not collapse.) Today's decision, the majority first says, “does not undermine” the decisions cited by *Roe* and *Casey*—the ones involving “marriage, procreation, contraception, [and] family relationships”—“in any way.” *Ante*, at 32; *Casey*, 505 U. S., at 851. Note that this first assurance does not extend to rights recognized after *Roe* and *Casey*, and partly based on them—in particular, rights to same-sex intimacy and marriage. See *supra*, at 23.6 On its later tries, though, the majority includes those too: “Nothing in this opinion should be understood to cast doubt on precedents that do not concern abortion.” *Ante*, at 66; see *ante*, at 71–72. That right is unique, the majority asserts, “because [abortion] terminates life or potential life.” *Ante*, at 66 (internal quotation marks omitted); see *ante*, at 32, 71–72. So the majority depicts today's decision as “a restricted railroad ticket, good for this day and train only.” *Smith v. Allwright*, 321 U. S. 649, 669 (1944) (Roberts, J., dissenting). Should the audience for these too-much-repeated protestations be duly satisfied? We think not.

1b. I have been asked to author the Foreword for Volume 136 of the *Harvard Law Review*. It will be published in November 2022. I engage with originalism in that piece.

2. I think you may be referring to fetuses that people of color gestate. I believe that the value of the pregnant person's bodily autonomy and ability to make decisions in the best interests of their families and themselves exceeds the value of the fetus that they gestate. Systems that perpetuate poverty, the hyper-carceral state, maternal mortality and morbidity, infant mortality and morbidity, environmental injustice, voter disenfranchisement, the insufficient funding of public schools, and the inadequate funding of programs that provide basic necessities like food, clothing, shelter, and healthcare¹ do not value people of color or their future families. I am skeptical of those who show concern for the fetuses that nonwhite people gestate without showing an equal concern for nonwhite babies, children, and adults. In those cases, the ostensible concern for the fetus strikes me as disingenuous. This explains my response to Sen. Cornyn's question during the hearing.

¹ Please note that this list is not exhaustive.

RESPONSES TO QUESTIONS FOR THE RECORD FROM SENATOR CHARLES E. GRASSLEY
HEARING ON "A POST-*ROE* AMERICA: THE LEGAL CONSEQUENCES OF THE
DOBBS DECISION"

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Alliance Defending Freedom
August 3, 2022

Question 1: During the hearing, Senator Booker asked you: "If Congress were to pass a national abortion ban, would that be something you would support?" You answered and later clarified your answer. Can you elaborate your views on this issue?

Response: Congress should protect unborn life to the fullest extent permissible under its constitutionally delegated authority. Using its enumerated powers, Congress has done so on several occasions. For instance, Congress exercised its Spending Clause power to prohibit the use of federal funds for abortions and to protect medical providers who defend life.¹ And Congress utilized its Commerce Clause power to prohibit the barbaric practice of partial-birth abortion.²

Congress may use its Commerce Clause power to regulate or even prohibit the interstate shipment of abortion-inducing drugs. Some legal scholars assert that the Fourteenth Amendment additionally empowers Congress to protect human life should States fail to do so.³ Of course, any bill must be carefully tailored to ensure it does not exceed Congress's constitutional authority.

Federal legislation seeking to codify the abortion regime established in *Roe* and *Carey*, for instance, would fall outside Congress's enumerated powers because, under the Commerce Clause, Congress does not have the power to regulate in the absence of commerce.⁴ Congress lacks authority under the Fourteenth Amendment to impose such a regime because the Constitution does not confer a right to abortion. And the Commerce Clause does not empower Congress to *mandate* commerce in a way that intrudes into States' traditional authority to regulate health, welfare, and safety, by overriding state laws aimed at protecting the lives of unborn children.

Question 2: What do state abortion regulations look like after *Dobbs*, and what should state legislatures be considering as they craft these laws?

¹ See, e.g., Hyde Amendment, Pub. L. 116-94, §506(a) *et. seq.*, 133 Stat. 2534, 2606, (2019); Church Amendments, 42 U.S.C. §300a-7 *et. seq.* (2012).

² Partial-Birth Abortion Ban Act of 2003, 18 U.S.C. § 1531 ("Any physician who, **in or affecting interstate or foreign commerce**, knowingly performs a partial-birth abortion and thereby kills a human fetus shall be fined under this title or imprisoned not more than 2 years, or both.") (emphasis added).

³ See, e.g., Brief for Scholars of Jurisprudence John M. Finnis and Robert P. George as *Amici Curiae* in Support of Petitioners at 4, *Dobbs v. Jackson Women's Health Org.*, No. 19-1392 (July 29, 2021) (arguing that "unborn children are constitutional persons" guaranteed equal protection and due process by the Fourteenth Amendment).

⁴ See, e.g., *Nat'l Fed. of Independent Business v. Sebelius*, 567 U.S. 519, 550 (2012) ("The power to *regulate* commerce presupposes the existence of commercial activity to be regulated.") (emphasis in original).

Response: After *Dobbs*, some States will pursue laws and policies that protect women and their children from the negative and life-altering consequences of abortion. Many will focus on new initiatives that uplift and empower pregnant women facing a variety of challenges, through funding to pregnancy care centers, maternity homes, adoption agencies, and other social-service organizations that walk with a mother and her child during pregnancy and after. Other States, tragically, will adopt laws and policies that harm women and permit unregulated abortion up until the moment of birth for any reason.

With the grave errors of *Roe* and *Carey* reversed, States can also enforce existing life-affirming laws that had been wrongly blocked under these egregious precedents. These laws include longstanding complete protections for unborn life, protections when the unborn child has a heartbeat, protections against discriminatory abortions based on a child's race, sex, or genetic makeup, and laws ensuring that unborn children are not subjected to pain through dismemberment abortions. These laws are generally permissible under *Dobbs* and reflect the chosen policy of the people of many States through their elected lawmakers.

In crafting life-affirming measures, States should prioritize the important government interests enumerated by the Supreme Court in *Dobbs*, including showing respect for and preserving unborn human life at all stages of development, protecting maternal health and safety, and preserving the integrity of the medical profession.⁵ Coupled with emerging medical knowledge on the development of unborn children and growing evidence showing abortion's harm to women, these interests strongly support state laws promoting a culture of life where mothers and their babies flourish.

Question 3: What are the disparate impacts of abortion on communities of color? How will this disparate impact be affected by *Dobbs*? How would this disparate impact be affected if pregnancy centers were unavailable or less available to provide services to women and families?

Response: Recent CDC data⁶ reveals that Black and Hispanic women accounted for a disproportionate percentage of abortions in 2019:

	% of the Population	% of Abortions	Difference
Black Americans	12.2%	38.4%	+26.2%
Hispanic Americans	18.5%	21.0%	+2.5%
White Americans	60.1%	33.4%	-26.7%

Communities of color – and Black communities in particular – are disproportionately bearing the well-documented medical and other harms inherent in abortion.

The *Dobbs* decision returns questions of how best to protect and promote life to the American people and their elected representatives. State officials can now be more responsive in addressing these disparities. They can create comprehensive programs that offer life-affirming options to all mothers and their children during and after pregnancy. And they can innovate programs that specifically

⁵ *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2284 (2022).

⁶ Carole Novielli, *New CDC data shows communities of color are disproportionately targeted for abortion*, LIVEACTION.COM (Dec. 21, 2022), <https://www.liveaction.org/news/cdc-communities-color-targeted-abortion/>.

support women in unplanned pregnancies and address the unique needs of communities of color, offering solutions that – unlike abortion – do not result in the widespread deaths of children of color.

Pregnancy centers are a critical part of the existing and future support infrastructure. In 2019 alone, over 2,700 pregnancy centers provided more than 1.85 million people in the United States with free medical services, supplies, and other material resources both during a mother's pregnancy and after the baby is born – estimated at a value of over \$266 million.⁷ Beyond critical supplies like formula, diapers, and clothes, pregnancy centers provide long-term benefits through parenting education, job-skills training, and even post-abortive care. On top of this, tens of thousands of churches, religious organizations, and other non-profits serve vulnerable women and children, as well as those who foster and adopt children.

American women and families greatly benefit from the services provided by pregnancy centers and other faith-based, charitable, and social-service organizations. Ongoing attacks – both physical and political⁸ – on pregnancy centers put the life-affirming and supportive work of these centers in jeopardy and compromise the care and support they provide to all women, including women of color.

⁷ Moira Gaul, *Fact Sheet: Pregnancy Centers – Serving Women and Saving Lives (2020 Study)*, CHARLOTTE LOZIER INSTITUTE (July 19, 2021), <https://lozierinstitute.org/fact-sheet-pregnancy-centers-serving-women-and-saving-lives-2020/>.

⁸ See, e.g., Stop Anti-Abortion Disinformation Act, S.4469, 117th Congress (2022) (denigrating pregnancy centers and falsely accusing them of disseminating “disinformation”).

Questions for the Record from Senator Charles E. Grassley
Hearing on “A Post-Roe America: The Legal Consequences of the Dobbs Decision”
July 12, 2022

Heidi Matzke
Executive Director
Alternatives Pregnancy Center
Sacramento, CA

1. Based on your clinic’s experience, what are the disparate impacts of abortion on communities of color? How would this disparate impact be affected if crisis pregnancy centers, like yours, were unavailable or less available to provide services to women and families?

Alternatives Pregnancy Center serves all women, and we offer resources that are valuable and needed by lower-income women and communities of color. We provide comprehensive support, so that the women who come to us can truly make free and informed choices even in the midst of unexpected or crisis pregnancies.

Based on conversations we’ve had with women who come to our clinic, many women who had abortions wanted to choose life but felt like caring for a baby was impossible. Our clinic exists to serve women facing exactly those circumstances. We walk with expectant mothers by giving them the practical, financial, and emotional support they need and want to raise their children.

For instance, one young Black woman who came to us after visiting an abortion clinic said she was not sure what she wanted to do. She had planned to get an abortion, but when she learned that she could receive a free ultrasound from our clinic without making a commitment either way, she came to us. In the course of her ultrasound, she was able to talk with our staff about what an abortion procedure really involves, and once she learned the facts about abortion, she realized that deep down inside she couldn’t imagine doing that to her baby.

This young woman wanted to be a mom, but she was scared and overwhelmed by the prospect of caring for a newborn alone. When we offered her medical care, practical support, and a loving community, she chose to keep her baby. Today, she is a thriving young mother with a good job, a robust community, and a beautiful baby.

The truth is, Alternatives Pregnancy Center and other similar organizations across the country empower women. We arm these women with the facts because we believe that only when women truly understand the situation – including knowing the innumerable resources and support available to women and their children – can they make real and informed choices. Our clinic alone serves about 2,500 women a year. We give away \$1.2 million in free services to women of color and low-income women. Our mission is to educate, equip, and entrust *every* woman. And we are there for them no matter what.

2. Can you discuss how your clinic has been affected by the rhetoric and actions of politicians, including those in your own state?

Political figures across the United States have made inflammatory and outrageous remarks about pregnancy care centers, and we've regrettably witnessed elected officials pledging to investigate centers rather than prosecute vandalism against non-profits like ours.

We were particularly dismayed to read California Attorney General Rob Bonta's perspective and the refusal to acknowledge that centers like Alternatives Pregnancy Center are fully licensed health care facilities, employing board-certified obstetricians and gynecologists, nurses, and medical staff. In an alarming show of disregard for the safety of our staff and the women we serve, the California Attorney General's office publicized the addresses of all pregnancy care clinics in the state.

The result was predictable: an increase in violence and threats against pregnancy care clinics and the compassionate individuals who serve there.

We've had to shut down our mobile clinic – which serves victims of human sex trafficking, homeless women, and vulnerable immigrant populations – because of safety concerns for our patients and staff. At great expense, our main clinic was forced to increase on-site security, equip staff with defensive pepper spray, install bullet-proofing on the building's exterior and interior, and add security cameras around the perimeter. We've also received an influx of hateful phone calls and false online reviews of our services.

The increased security proved necessary as, one morning, a man armed with a machete came to our clinic. Thankfully, our on-site security stopped him from entering the building.

Despite all of the hostility, Alternatives Pregnancy Center remains committed to the women in our community. We will protect our patients and staff and continue to provide exceptional health care and support services for moms and babies.

3. Some Senate Democrats have introduced legislation "cracking down" on crisis pregnancy centers by combatting "false advertising" by pro-life pregnancy centers. What kind of impact would this legislation have on Alternatives Pregnancy Center?

Alternatives Pregnancy Center is deeply concerned that these legislative efforts unjustly target pregnancy care centers with the goal of silencing open and honest conversations with women about reproductive decisions. This, however, is not the first time our work has been threatened by legislation intended to intimidate and censor us. A few years ago, California passed a law forcing pregnancy care centers to provide free advertising for abortions. Thankfully, that law was struck down by the U.S. Supreme Court in 2018.¹

We are proud of the quality health care we provide and are concerned about hostile legislative efforts that censor how we speak about women's health, health care services, and alternatives to

¹ *Nat'l Inst. of Fam. & Life Advoc. v. Becerra*, 138 S. Ct. 2361, 2376 (2018) (holding that "California cannot co-opt the licensed [pregnancy care centers] to deliver its message" directing women to where they can obtain abortions).

abortion such as adoption and parenting. We equip women with the knowledge they need to make informed choices but remain concerned that pregnancy care centers will be limited in what we can say about ourselves and the services we offer expectant moms.

4. Over 70% of women who have an abortion state that one of their reasons for getting the abortion is their financial situation. How does your center respond when a woman expresses those concerns to your staff? How do crisis pregnancy centers like yours alleviate this burden for expecting parents?

Our clinic is keenly aware that finances are often a concern when a woman is expecting a child. When serving women with financial challenges, we acknowledge this reality while also, and more importantly, letting each woman know that she is not walking this path alone.

We work to eliminate financial anxieties and fears about motherhood, so that women are free to choose what is best for them and their babies. We provide the resources a woman needs to care for her child. This includes free-of-charge prenatal, maternity, and post-delivery medical care. We also equip women with free parenting classes and provide them unlimited supplies of diapers, wipes, baby food, clothing, and other baby gear at no cost.

In addition, we connect women with communities that provide long-term assistance and support. Often a local church “adopts” a woman and her baby, helping the new mom secure transportation, housing, jobs, and childcare. These caring communities host baby showers and birthday parties; they provide resources when her car breaks down; they offer help when an unexpected financial strain comes up. Through this community network – from Alternatives Pregnancy Center to local faith communities – women are empowered to be successful moms and professionals.

**Questions for the Record from Senator Charles E. Grassley
To The Honorable Juliana Stratton
Lieutenant Governor of the State of Illinois
Hearing on “A Post-Roe America: The Legal Consequences of the Dobbs
Decision”
July 12, 2022**

Question 1:

Please provide examples of how you, in your role as Lieutenant Governor, have increased Illinois citizens’ access to a broad range of pregnancy-related services, including post-abortion care, parenting classes, and financial support for at-need mothers.

Response from Lt. Governor Stratton:

In Illinois, we are laser-focused on putting resources in place to ensure that families have access to what they need for their health and wellbeing.

Under the leadership of Governor JB Pritzker, state agencies have expanded Medicaid to cover screenings for depression before and after birth. Provisions in state law also require private insurers to provide up to a year of postpartum treatment for mental and emotional health. This builds on Illinois’ commitment to addressing postpartum health disparities, as we were the first state in the nation to provide Medicaid postpartum coverage for a year after birth.

By restoring access to Title X funding and doubling the amount of the federal grant received with state general revenue funds, Illinois is investing a record-breaking \$11.2 million in family planning services for low-income, uninsured, and under-insured people across the state. This funding expands access to critical reproductive health care to thousands of Illinois residents and families.

Additionally, the Health & Healthcare Committee of the Illinois Council on Women and Girls, which I chair, provided several recommendations to improve the health and wellbeing of pregnant and postpartum individuals. The Improving Health Care for Pregnant and Postpartum Individuals Act passed in Illinois addressed each of the Council’s recommendations to ensure high-risk pregnancies receive the care and attention they need.

Question 2:

Please provide examples of how you, in your role as Lieutenant Governor, have worked to improve the adoption system so that families which desperately want children can give a loving home and bright future to children whose birth parents do not want or feel that they cannot support them.

Response from Lt. Governor Stratton:

Illinois recognizes how critical it is to ensure every child is safe, loved, and supported. Our administration remains committed to addressing the needs of all children in Illinois, as well as providing individuals the resources and services to start a family, when and if they choose to.

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**Statement of NARAL Pro-Choice America
U.S. Senate Committee on the Judiciary
"A Post-*Roe* America: The Legal Consequences of the *Dobbs* Decision"
July 12, 2022**

Thank you for the opportunity to submit a statement to the Committee on this critical issue. NARAL Pro-Choice America is a national advocacy organization dedicated to protecting and advancing reproductive freedom. For over 50 years, NARAL has fought to protect and advance reproductive freedom at the federal and state levels—including access to abortion care, birth control, pregnancy and post-partum care, and paid family leave. Through education, organizing, and influencing public policy, NARAL and our 4 million members from every corner of the country work to guarantee every individual the freedom to make personal decisions about their lives, bodies, and futures, free from political interference. For this reason, we are submitting this statement to highlight the far-reaching impact of the U.S. Supreme Court decision to end the constitutional right to abortion and to call on Congress to use its authority to remedy the abortion rights and access crisis and reinstate and safeguard access to abortion nationwide.

Abortion rights and access are facing a crisis in the United States. Despite overwhelming public support for the legal right to abortion, we're in the midst of an all-out assault on reproductive freedom. The U.S. Supreme Court's decision in *Dobbs v. Jackson Women's Health Organization* overturned *Roe v. Wade*, ending the constitutional right to abortion as we know it and signaling an ominous sign for the future of abortion rights in this country. The Court's ruling has empowered extremist state lawmakers to enforce total bans on abortion—several of which are now in place—and over half of the states in our country are at risk of doing so.

The negative impact this cruel Supreme Court decision is inflicting cannot be overstated. This horrifying rollback of our fundamental rights is causing immediate and devastating harm to millions of people across the country who can no longer access the care they need in their own communities. Bans on abortion most harm those already marginalized at every turn by our systems and institutions, and losing *Roe* only compounds this. Women; Black, Indigenous, and other people of color; those working to make ends meet; the LGBTQ+ community; immigrants; young people; those living in rural communities; and people with disabilities are disproportionately impacted by these attacks on reproductive freedom.

This decision is set against a backdrop of increasingly cruel and draconian restrictions and bans as extremist anti-choice politicians have escalated their quest to end legal abortion. It is part of a decades-long campaign waged by the anti-choice movement and the politicians that did its bidding to end *Roe* and decimate reproductive freedom. Even before *Roe* was overturned by the Court, though it has long not been a reality for millions of people across the country, the further evisceration of abortion access had ramped up. State lawmakers seeking to advance their agenda of power and control have passed hundreds of state-level attacks on abortion access over the last decade that have made care extremely difficult, if not impossible, to

access for many people across the country. According to the Guttmacher Institute, over 500 restrictions on abortion access have been introduced at the state level this year,¹ and now that *Roe* has fallen, we can expect to see even more. These systematic attacks on reproductive freedom and abortion access intentionally push access out of reach, and some go as far as criminalizing pregnant people and doctors who provide abortion care. Now, more than ever, the anti-choice movement is advancing its extremist agenda in plain sight.

The interrogation and punishment of people who are pregnant is not far-fetched—it is already happening. People across the country are already being charged or prosecuted for pregnancy outcomes including pregnancy loss, self-managing abortion care, or even the suspicion of it.² Criminalizing people for having an abortion, experiencing a miscarriage or stillbirth, or any other pregnancy outcome only exacerbates racial inequities and is just one of the many ways that Black, Indigenous, and other people of color have been criminalized.

What we're seeing take place in the aftermath of the *Jackson Women's Health* decision is only the beginning. We know that those hostile to abortion never intended to stop with ending *Roe*—all of our most cherished rights and freedoms are also at risk. Anti-choice politicians have only been emboldened by watching the Supreme Court disregard the health and well-being of millions of Americans. Already, Republican lawmakers in Congress have floated the idea of enacting a nationwide abortion ban. Never in our country's history has such a ban existed, and the consequences on our lives and our freedoms would be catastrophic.

The threat to our fundamental rights does not stop there. The same anti-choice, anti-freedom extremists working harder than ever to roll back abortion rights and access are also targeting our other fundamental freedoms, including birth control access, our freedom to vote, LGBTQ+ rights, civil rights, and more. There's simply no low they won't sink to in order to advance their quest for control and political gain.

We did not get here by accident. The threats that our most cherished rights and freedoms face is the result of a decades-long far-right strategy to advance a radical and out-of-touch ideological agenda. In the late 1970s, radical conservatives weaponized the formerly non-political, back-burner issue of abortion rights as political cover for their efforts to maintain white patriarchal control amidst diminishing support for racist policies like school segregation, which had previously been the backbone of their movement. In the years immediately preceding and following *Roe v. Wade*, Evangelical Christians, who now form the backbone of the GOP, were overwhelmingly indifferent on the issue of abortion. But through the carefully crafted messages of Paul Weyrich, Jerry Falwell, and other architects of the Radical Right, abortion became the political tool of choice for a movement determined to maintain control in a changing world, and the trojan horse for a far-reaching array of ideologies meant to thwart social progress.³

In the intervening years, opposition to abortion has become a litmus test in far-right circles for a host of political and judicial positions. In order to advance their agenda—one that has

always stood in direct opposition to the values of the majority of Americans—they developed and implemented a strategy for capturing and maintaining minority rule. This strategy included pushing regressive boilerplate legislation chipping away at access to abortion through state legislatures and Congress, as well as stacking the federal judiciary with anti-choice ideologues.

Anti-choice activists have spent decades building their influence over the federal judiciary through well-funded, secretive networks like the Federalist Society. Conservative activists have never been shy about the fact that their takeover of the federal judiciary is part of a broad strategy to quell the majority and cement minority rule, but the election of Donald Trump took this tactic to new heights.

In May 2016, Trump pledged to only nominate anti-choice judges, a promise he doubled down on in 2020.^{4,5} And with the help of Mitch McConnell, Trump installed anti-choice federal judges with lifetime appointments at a breakneck pace. More than a quarter of currently active federal judges are now Trump appointees, including Supreme Court justices Neil Gorsuch, Brett Kavanaugh, and Amy Coney Barrett—tipping the balance of the Court to a supermajority unmistakably hostile to reproductive freedom.⁶ Now, the work of these extremists has culminated in the end of *Roe v. Wade* and an anti-choice majority on the Court that poses a threat to all of our most fundamental freedoms.

All people—no matter who they are or where they live—should have the freedom to make their own decisions about whether to start or grow a family, free from political interference. While the Court's egregious decision in the *Jackson Women's Health* case is nothing short of devastating, the fight for reproductive freedom is far from over. The vast majority of Americans are with us. Polling shows that 8 in 10 Americans support the legal right to abortion.⁷ Lawmakers who interfere with our reproductive freedom do not represent the values of the overwhelming majority of people in this country.

¹Elizabeth Nash, Lauren Cross, and Joerg Dreweke, *2022 State Legislative Sessions: Abortion Bans and Restrictions on Medication Abortion Dominate*, GUTTMACHER INSTITUTE, (Mar. 2022), <https://www.guttmacher.org/article/2022/03/2022-state-legislative-sessions-abortion-bans-and-restrictions-medication-abortion>

²*Texas Prosecutor Drops Murder Charge Against Woman Arrested for Self-Induced Abortion*, CBS NEWS, (Apr. 10, 2022), <https://www.cbsnews.com/news/lizelle-herrera-abortion-texas-murder-charge-dropped/>

³Randall Balmer, *The Real Origins of the Religious Right*, POLITICO MAGAZINE (May 27, 2014), <https://www.politico.com/magazine/story/2014/05/religious-right-real-origins-107133>.

⁴*Trump Letter on Pro-Life Coalition*, Sept. 2016, <https://www.sba-list.org/wp-content/uploads/2016/09/Trump-Letter-on-ProLife-Coalition.pdf>.

⁵*Pro-Life Voices for Trump 2020*, Sept. 3, 2020, https://cdn.donaldjtrump.com/public-files/press_assets/pro-life-letter-potus.pdf.

⁶John Gramlich, *How Trump compares with other recent presidents in appointing federal judges*, PEW RESEARCH CENTER (Jan. 13, 2021), <https://www.pewresearch.org/fact-tank/2021/01/13/how-trump-compares-with-other-recent-presidents-in-appointing-federal-judges/>.

⁷Megan Brenan, *Record-High 47% in U.S. Think Abortion Is Morally Acceptable*, GALLUP, (Jun. 19, 2021), <https://news.gallup.com/poll/350756/record-high-think-abortion-morally-acceptable.aspx>



July 12, 2022

The Honorable Dick Durban
Chair
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

The Honorable Chuck Grassley
Ranking Member
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Chairman Durban and Ranking Member Grassley:

On behalf of the American Academy of Family Physicians (AAFP) and the 127,600 family physicians and medical students we represent, I write in response to the hearing "[A Post-Roe America](#)" to share the family physician perspective on how the Supreme Court's decision on *Dobbs v. Jackson Women's Health* is impacting patient care and the practice of medicine.

Primary care physicians are often a patient's first point of contact with the health care system, with more than half of all office visits made to primary care physicians.¹ Family physicians are integral to the reproductive health of adolescents, teens, and adults, providing preventive health, chronic disease management, family planning, preconception counseling, pregnancy, postpartum, and menopausal care for patients across the gender spectrum throughout their reproductive years. While some patients seek care from pediatricians or obstetrician-gynecologists (OB/GYNs), in rural and underserved areas, family physicians are often the primary or sole providers of reproductive health care.² The AAFP believes that pregnancy and reproductive health services are essential to general health care.³

The AAFP is concerned by the Supreme Court's ruling on *Dobbs v. Jackson Women's Health*. This consequential ruling struck down the longstanding protections afforded by *Roe v. Wade* and *Planned Parenthood v. Casey*, jeopardizing the health and reproductive autonomy of patients across the country. The decision limits the ability of physicians in many states to provide safe, evidence-based medical care and erodes the patient-physician relationship. In response to the *Dobbs* ruling, the AAFP joined with the American College of Obstetricians (ACOG), the American Medical Association (AMA), and 75 other health care organizations in releasing a [statement](#) unequivocally opposing legislative interference in the patient-physician relationship.⁴

The AAFP's policy on reproductive and maternity health services states, "The AAFP supports access to comprehensive pregnancy and reproductive services, including but not limited to abortion, pregnancy termination, contraception, and surgical and non-surgical management of ectopic pregnancy, and opposes nonevidence-based restrictions on medical care and the provision of such services."⁵ In the case of *Dobbs v. Jackson Women's Health Organization*, the AAFP joined the AMA and other leading medical societies in filing an [amicus brief](#) articulating our position that "laws regulating abortion should be evidence-based, supported by valid medical or scientific justification, and designed to improve – not harm – women's health," and we maintain that position.⁶

STRONG MEDICINE FOR AMERICA

Without the federal protections afforded by *Roe*, numerous states have already enacted laws banning or unduly restricting access to abortion, and more are considering similar measures. These laws

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jeopardize the health of our nation and will surely worsen health disparities. In addition to undermining patients' bodily autonomy and potentially endangering their health and wellbeing by precluding or delaying access to induced abortions, the *Dobbs* decision may also jeopardize access to certain forms of contraception and negatively affect medically necessary maternity care.

Violating the Patient-Physician Relationship and Interfering with the Practice of Medicine

Family physicians are trained to care for their patients throughout the life cycle and appreciate the challenges that adolescence, sexuality, family planning, balance of family life and career, and aging have on their patients; in addition to socioeconomic and community factors such as environmental quality, income and education level, housing availability, neighborhood safety, and social-connectedness health. Because of this, family physicians are able to provide evidence-based medical care personalized to meet each patient's unique health needs. The AAFP maintains that physicians should be free to have open and honest communication with patients about all aspects of health and safety. **The AAFP staunchly opposes legislation that [infringes on the content or breadth of information exchanged within the patient-physician relationship](#) and legislation that [interferes with the provision of evidence-based medical care](#), either of which can harm the health of the patient, the family, and the community.**⁷⁸

While only a minority of physicians — roughly 3% of family physicians and 24% of OB/GYNs — perform abortions, **nearly every clinician who cares for patients of reproductive age and practices in a state where abortion is banned is affected by the *Dobbs* decision.**⁹¹⁰ Since June 24, the AAFP and its state affiliates have received inquiries from members who are unclear about the definitions and requirements of their new or pending state laws. Below are some common topics of confusion and concern.

- **Treatment of ectopic pregnancies, pregnancies of unknown location, and complicated spontaneous abortions (i.e., miscarriages).** Many state laws create ambiguity about whether treatment for ectopic pregnancy is considered abortion, creating physician or hospital fears of violating laws and setting the stage for disagreements in clinical judgment, which can lead to delays in critical and medically necessary care.
- **Molar pregnancy.** This type of genetically abnormal pregnancy cannot end in fetal viability, but in some rare instances the abnormal fetus can have detectable cardiac activity, leading to confusion over whether "heartbeat laws" allow physicians to treat with a dilation and curettage (D&C).
- **Preterm premature rupture of membranes.** When membranes rupture prematurely prior to viability, the standard of care is to deliver the fetus with surgery or induce labor, which may be considered illegal in some states, even though the fetus cannot possibly survive. Failure to do so could lead to dire consequences for the patient such as intrauterine infections which could become life-threatening.
- **Cancer treatment for patient with pre-viable pregnancies.** Some cancer treatments require pregnancy termination before beginning, and others carry an increased risk of morbidity and mortality without immediate termination and surgical removal. Disagreements in clinical judgment or fears of violating laws can lead to delays in cancer care or incomplete counseling on treatment options. Abortion-ban laws and proposed bills in some states allow abortions only in severe, life-threatening emergencies. It is unclear if, under such laws, termination of a pregnancy is legal in these cases, delaying the pregnant patient's access to lifesaving treatment until after a pregnancy is carried to term.
- **Use of emergency contraception and IUDs.** Confusion over whether statutory definitions of "personhood" outlaw the use of emergency contraception, and if contraception methods which interrupt the implantation of a fertilized egg will be considered an abortion under certain state laws, is fueling misinformation and fear and limiting access to contraception. Issues so far

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- include pharmacists refusing to dispense prescriptions for ulipristal or stock/sell over-the-counter oral emergency contraception, hospitals discontinuing provision of emergency contraception to rape victims, and physicians being unsure about or unwilling to place copper IUDs as emergency contraception.
- **Dispensing of medications to manage miscarriages or treat other conditions unrelated to pregnancy.** Pharmacists refusing to dispense or delaying filling misoprostol prescriptions can lead to additional burden for the prescribing physician and delays in needed care for patients. In addition to inducing abortion, this drug is commonly used in the treatment of ulcers, miscarriages, and post-delivery bleeding. There have also been reports of pharmacists refusing to fill or physicians stopping prescribing methotrexate, which is commonly used to treat rheumatoid arthritis and psoriasis.¹¹
- **Treatment of infertility.** Patients and physicians alike are confused over whether statutory definitions of "personhood" will impact infertility treatments and assisted reproductive technology such as in vitro fertilization (IVF). Regardless of whether state laws intend to interfere with infertility care, the lack of clarity is already hindering patients' reproductive decisions. In this instance, abortion bans may have the unintended consequence of preventing patients who want to become pregnant from being able to grow their families.

In 2018, the AAFP, the American Academy of Pediatrics (AAP), ACOG, and the American College of Physicians (ACP) adopted [joint principles for protecting the patient-physician relationship](#) in response to the growing number of policy proposals that inappropriately interfered in the practice of medicine.¹² **Our organizations and the more than 400,000 physicians and medical students we represent call on policymakers to put patients first by taking these actions.**

1. **Support participation of any qualified provider in federally and state-funded programs.** Medicaid's "any willing provider" and "freedom of choice" protections are enshrined into law to ensure that an adequate number of clinicians participate in the Medicaid program to care for beneficiaries. Evidence has demonstrated that restricting participation of qualified providers results in loss of access to critical care for our most vulnerable patients.^{13,14}
2. **Maintain coverage of evidence-based essential health benefits such as maternity coverage and women's preventive services without cost-sharing, including contraception.** Preserving access to this existing coverage is critical to ensuring that American women and families have access to the care they need.
3. **Ensure that evidence-based federal programs, including Title X and the Teen Pregnancy Prevention Program (TPPP), receive continued federal funding and preserve evidence-based program requirements.** Title X is the only federal program exclusively dedicated to providing low-income and adolescent patients with essential family planning and preventive health services and information. Evidence-based sexuality education programs help young patients achieve their educational and professional goals by educating them about sexual health, including preventing unintended pregnancy and family planning. These and other federal programs must continue to provide non-directive, comprehensive, medically accurate information.
4. **Reject government restrictions on the information our patients can receive from their doctors.** Patients expect medically accurate, comprehensive information from their physicians. This dialogue is critical to ensuring the integrity of the patient-physician relationship. When outside entities restrict the information that can be given to patients of reproductive age or force physicians to provide them with medically inaccurate information, it can result in increased rates of unplanned pregnancy, pregnancy complications, and undiagnosed medical conditions.

Patient Safety Concerns

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Family physicians are concerned about how overturning *Roe* will impact their practices. First and foremost, however, they are concerned about the health and safety of their patients and their patients' families. The AAFP [believes](#) that high-quality health care in family medicine is the achievement of optimal physical, mental, and behavioral health outcomes through accessible, safe, cost-effective, equitable care that is based on the best evidence; responsive to the needs and preferences of patients and populations; and respectful of patients' families, personal values, and beliefs.¹⁵ **Laws that unduly restrict, criminalize, or penalize the provision of safe, confidential, evidence-based medical care are a threat to patient safety.** Such laws not only interfere with the prevention, diagnosis, and treatment of health conditions but also prevent family physicians and their staff from [adapting their care](#) to meet the unique needs of their patients and communities.

Anecdotes and research on the impacts of institutional abortion restrictions offer evidence for how such restrictions put patients' health and lives at risk.^{16,17} Physicians in these settings recount cases in which abortion was medically indicated according to their clinical judgment but, because of an ethics committee's ruling, care was delayed until fetal cardiac activity was no longer detectable or in some cases the patient had to be transported to another facility. **What is clear is that the patient-physician relationship, patient safety, and patient comfort are compromised by arbitrary restrictions that force clinicians to act contrary to the medical standard of care.**

As confusion over new state abortion laws and anxiety about legal liability grow, cases such as these, in which patients experience delay or denial as they seek critical and in some cases lifesaving care, will multiply. The result will be worse health outcomes and greater health disparities nationwide.

The AAFP [advocates](#) for the development and use of patient-centered, evidence-based clinical practice guidelines that adhere to principles based on the National Academy of Medicine Standards for Trustworthy Guidelines.¹⁸ **The AAFP opposes enshrining non-evidence based medical guidelines into federal or state law.**

Criminalization and Penalization of Medical Care

The AAFP takes all reasonable and necessary steps to [ensure that evidence-based medical decision-making and treatment, exercised in accordance with evidence-based standards of care, does not become a violation of criminal law.](#)¹⁹

Recently, the AAFP, AAP, ACOG, ACP, the American Osteopathic Association (AOA), and the American Psychiatric Association (APA) issued a [statement opposing the criminalization of health care](#): "We are deeply concerned that legislation and legal opinions across the country will endanger patients and clinicians by allowing private citizens and policymakers to interfere in health care decision-making. The patient-physician relationship, not politics, is the backbone of medicine."²⁰

In the wake of the Supreme Court's *Dobbs* ruling, physicians in states that restrict abortion face a perilous new legal reality. Physicians who perform abortions risk violating the law, being sued, losing their medical license, and going to jail. In some extreme instances, even counseling patients who want an abortion, including those facing pregnancy complications, could expose the physician to criminal charges.

The AAFP has heard from family physicians in states that have banned or restricted abortion, and in states that have not, that they are worried about their own legal safety. **It is clear that the criminalization and penalization of patients and clinicians disrupts and detracts from medical care.**

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Physicians and hospital administrators worried about the threat of lawsuits or criminal charges for violating a state's abortion ban may be inclined to practice "defensive medicine," ordering unnecessary or excessive tests or procedures in order to thoroughly demonstrate that a patient meets the narrow definition for an allowable exception to an abortion ban. Evidence suggests that defensive medicine does not make patients any healthier but can lead to increased health care costs.²¹ **Family physicians have also shared concerns that having to wait on extraneous tests and second opinions can delay critical care in urgent and life-threatening situations.**

Family physicians report that they have received mixed or incomplete legal guidance from their employers in the past several weeks, leading to confusion or even confrontation among clinicians who are unsure of their standing or disagree about the best way to treat a patient while complying with new legal requirements. Small and solo physician practices do not have the luxury of in-house or contracted legal support to help them navigate rapidly changing state laws. Many of them are turning to their state and national medical societies, such as the AAFP, which typically lack state-specific legal expertise or are prohibited from offering individual legal advice.

Legal threats to the practice of medicine are also increasing physicians' administrative burden and practice expenses. As a means of proactive legal defense, many hospitals, clinics, and health systems are advising or mandating that their clinicians enhance their medical documentation for reproductive health care and related services.²² This can mean changes to electronic medical records (EMR) systems and processes, which are costly, time-consuming, and add to physicians' administrative burden. Smaller practices rely on off-the-shelf EMR systems and cannot readily automate new documentation requirements, meaning they must spend additional time conducting manual data entry.

Additionally, physicians and hospital administrators are worried that if they opt not to provide specific care based on their understanding of state abortion restrictions, they could face liability and/or violate federal requirements under the Emergency Medical Treatment and Labor Act (EMTALA). State laws that allow only narrow abortion exceptions when the mother is at risk of dying are at odds with the EMTALA standard, which focuses on conditions that seriously jeopardize health, bodily, or organ function.²³

The AAFP is [concerned](#) about high rates of professional burnout among physicians in the U.S., which negatively affects the quality of patient care and can result in physicians leaving practice.²⁴ **The costs and anxiety associated with abortion-related legal issues are negatively impacting the well-being of family physicians and will only compound physician burnout.**²⁵ If not addressed, this will ultimately lead to more physicians leaving the profession or moving into non-patient-facing roles, worsening health care workforce shortages and patients' access to care.

Disrupting Medical Education and Exacerbating Health Care Workforce Shortages

The AAFP recommends that all medical students and family medicine residents receive comprehensive training in reproductive decision-making.²⁶ Family medicine residency programs teach clinical skills to provide counseling, screening and diagnostic testing, treatment, and appropriate referrals provided to patients during menarche, contraception, pregnancy, lactation, and menopause. This includes performing routine gynecologic procedures, patient-centered contraceptive counseling, placement of long-acting reversible contraception (LARC), preconception counseling, diagnosis of pregnancy, counseling for unintended pregnancy, assessment and management of complications and symptoms in the first trimester, pregnancy risk-factor screening, miscarriage management and referral for surgical intervention when indicated for complicated miscarriages, D&C

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procedures, and assessment and management of obstetrical and other medical complications during pregnancy including consultation with obstetricians/medical subspecialists.²⁷²⁸

Because family physicians are trained to provide such a wide range of reproductive health services, they are well positioned to provide early abortion care to their patients in the primary care setting, which can enhance continuity of care, offer increased access for patients, and reduce stigma. **The AAFP recommends that family medicine residents have access to opt-out abortion training, to support widespread access to comprehensive training in reproductive decision-making while ensuring that no physician or health care professional is required to perform actions that violate personal beliefs.**²⁹ In addition to providing physicians with the critical procedural and counseling skills to care for patients who have induced abortions, abortion training also helps prepare physicians to meet patients' other obstetric needs, such as direct counseling, uterine evacuation and miscarriage management.³⁰³¹

The Society of Teachers of Family Medicine strongly **opposes** restrictions on educating family medicine trainees on the full scope of clinical care and advocates that Congress and federal agencies should not legislate or mandate restrictions on the educational content of training programs.³² Such restrictions limit and adversely affect medical education. In a [statement](#) following the Supreme Court's decision to overturn *Roe*, the Association of American Medical Colleges asserts "It is crucial that physicians have comprehensive training in the full spectrum of reproductive health care, since similar medical procedures address many health conditions."³³

As states enact or contemplate laws banning or restricting abortion, medical schools, residency training programs, and educators are grappling with how to reconcile these laws with medical accreditation requirements. The Accreditation Council for Graduate Medical Education (ACGME) requires access to abortion training for all OB/GYN programs. While access to training is not required for Family Medicine programs, some offer integrated abortion training or local elective options, and ACGME does clearly require comprehensive reproductive health and contraception education as part of Family Medicine training.³⁴³⁵³⁶ A recent paper analyzing current OB/GYN residency programs found that around 45% are in states that have banned or are likely to ban abortion, and at least three family medicine residency programs offering integrated abortion training are in states that have banned the procedure in the wake of the Supreme Court's *Dobbs* decision.³⁷³⁸

In response, residency programs facing new state restrictions are considering providing their residents with access to clinical training in other jurisdictions without legal restrictions on abortion. However, **requiring or facilitating travel rotations to receive abortion training is unlikely to be feasible on a widespread scale, given the resources required and the disruptions to clinical care that resident absences cause.** Additionally, family planning clinics that often precept medical residents on rotation from other areas are already beginning to cut back on training because they are grappling with huge influxes of patients and lack the staff capacity to provide both patient care and medical education.³⁹⁴⁰

In addition to disrupting training for current medical students and residents, **state abortion restrictions are likely to have a significant impact on future trainees.** Students intending to provide family planning as part of their medical practice who are applying to medical school and residency programs will have to decide whether they are willing to risk being trained in a state that does not provide abortion care.⁴¹ Experts predict that medical schools and residency programs in those states will see fewer applicants, whereas programs located in states that still allow abortion care will be inundated.⁴² **In the short term, this will worsen the problem of unmatched medical**

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students. Over time this will exacerbate maternity care shortages and intensify the maldistribution of physicians.

Experts also predict that physicians in states with abortion bans will begin to leave because they do not wish to practice in a place where they are not able to provide comprehensive, patient-centered care without government intrusion. Given the current geo-political divide in the U.S., this will worsen access to care for rural communities and increase rural health disparities.

Jeopardizing Contraception Access

Health promotion – including screening, counseling, and vaccination – is a foundation of family medicine, and for much of their reproductive lives most women try to prevent pregnancy, which is why the AAFP believes physicians should counsel their patients to decrease the number of unwanted pregnancies, and why the AAFP advocates for public and private health plans to provide coverage and not impose cost-sharing for all Food and Drug Administration- (FDA) approved contraceptive methods, sterilization procedures, and patient education and counseling for all patients with reproductive capacity, including contraceptive methods for sale over the counter.⁴³

Confusion over whether statutory definitions of “personhood” outlaw the use of emergency contraception, and if contraception methods that interrupt the implantation of a fertilized egg will be considered an abortion under certain state laws, is fueling misinformation and fear and limiting access to contraception. In one example, the AAFP heard from a family physician who, after their state enacted its trigger law banning abortion without exception for rape or incest, saw hospitals in their city temporarily stop offering emergency contraception to rape victims, despite the fact that clinical guidelines for treating sexual assault victims call for it to be provided.

The AAFP applauds recent actions by the Administration, including the July 8 Executive Order reaffirming the Affordable Care Act’s guarantee of insurance coverage for women’s preventive services, including birth control and contraceptive counseling, and directing the Centers for Medicare and Medicaid Services (CMS) to ensure patient access to family planning care and protect clinicians providing family planning services.⁴⁴

We urge Congress to pass legislation to protect and expand patients’ access to FDA-approved contraception methods and comprehensive, evidence-based contraception counseling. The AAFP has endorsed the Affordability Is Access Act ([S. 4347/H.R. 7394](#)) and the Access to Birth Control Act ([S. 3223/H.R. 6005](#)). The AAFP also urges Congress to ensure robust and sustained federal funding for Title X family planning programs.

Potential for Abuse of Patient Data and Violation of Patient Confidentiality

A confidential relationship between patient and physician is essential for the free exchange of information necessary for sound medical care. Only in a setting of trust can a patient share the private feelings and medical, social, and family histories that enable the physician to properly counsel, prevent, diagnose, and treat. **The AAFP believes that patient confidentiality must be protected.**⁴⁵

The AAFP’s [policy on data stewardship](#), which addresses how de-identified clinical and administrative data derived from physicians’ EMRs are collected and used by third parties, states that submission of data from physician practice to third parties must be voluntary, third parties must provide written policies detailing the intended uses of such data, and data storage must adhere to industry and regulatory standards for confidentiality.⁴⁶

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The Supreme Court's *Dobbs* decision has raised questions about whether and how technology companies should protect their users' data, particularly when the user is seeking reproductive health care. Experts believe that the United States' lack of strong digital privacy protections is likely to have profound implications on how state laws that ban or restrict abortion are enforced.⁴⁷ While clinicians and health care organizations must follow the Health Insurance Portability and Accountability Act (HIPAA)'s Privacy Rule, which protects against disclosures of protected health information (PHI), other entities and data that do not qualify as PHI are not bound by the same rules. Police and prosecutors could potentially obtain extremely detailed information about individuals from technology companies, including internet search histories, communications, finances, and location information and use that information to surveil or charge them for violating state abortion law. In the case of laws such as Texas' S.B. 8, which allow private citizens to sue suspected abortion patients and providers, such data could also be used to enable vigilante interference.

The AAFP applauds HHS for issuing guidance clarifying how federal laws and regulations protect patients' PHI and the circumstances under which the HIPAA Privacy Rule permits disclosure of PHI without the patient's authorization. However, because HIPAA does not generally protect the privacy and security of individuals' personal information stored on cell phones or gathered by search engines and third-party applications, **the AAFP calls on Congress to further examine the implications of overturning *Roe* on patient privacy and to enact laws to protect patients from inappropriate exploitation of their data, including criminal or civil punishments for seeking medically appropriate health care.**

The AAFP has endorsed the Health and Location Data Protection Act ([S. 4408](#)), which prohibits data brokers from selling and transferring customers' health and location data and requires the Federal Trade Commission to promulgate rules to implement and enforce these protections.

Exacerbating Health Disparities Experienced by Marginalized Patients

The Supreme Court's decision to overturn *Roe* will make it even more difficult for patients to access high-quality health care in the U.S. The risks will be felt most acutely by people of color, from low-income backgrounds, and who live in rural areas.^{48,49}

According to analysis by the Guttmacher Institute, nearly one in four women in the U.S. has an abortion by age 45.⁵⁰ **While the abortion rate has been declining over the past four decades, it remains a common procedure; however, abortion rates vary considerably by patient income and race and ethnicity.**⁵¹

Nearly half of all patients who have an abortion have incomes below the federal poverty level, and Black and Hispanic patients have abortions at considerably higher rates than non-Hispanic white patients.⁵² There are many reasons for these disparities, but studies show that Black and Hispanic patients are less likely to have access to health care – including access to high-quality contraceptive services – and are more likely to face racism and report negative experiences when they do seek health care.⁵³ People of color are also more likely to live in high-poverty neighborhoods and less likely to move out of poverty in adulthood than their white counterparts, due in large part to systemic racism and generational barriers.⁵⁴ Black women are three times as likely as white women to experience and unintended pregnancy, and Hispanic women are twice as likely.⁵⁵ Research has also found that low-income Black children are less likely to receive formal sex education,⁵⁶ and Black women also experience the highest rates of intimate partner and sexual violence, which can contribute to reproductive coercion.⁵⁷

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Restricting abortion without addressing geographic, economic, and cultural barriers to comprehensive health care and family planning will worsen racial health disparities and perpetuate cycles of disadvantage for women of color.^{58,59}

The United States' maternal mortality rate is alarmingly high and reveals faults that exist within the current health care system. Approximately 700 women die from pregnancy-related complications annually in the United States.⁶⁰ There are numerous factors influencing pregnancy-related mortality and morbidities, such as advanced maternal age, education attainment, and underlying health status.⁶¹ **Large disparities in maternal health outcomes exist between women who belong to racial and ethnic minority groups and white women.** The U.S. Centers for Disease Control and Prevention's (CDC) 2019 *Morbidity and Mortality Weekly Report* stated that non-Hispanic Black (Black) and non-Hispanic American Indian/Alaska Native (AI/AN) women experienced higher pregnancy-related morbidity ratios (40.8 and 29.7, respectively) than all other racial/ethnic populations. (White PRMR was 12.7, Asian/ Pacific Islander PRMR was 13.5, and Hispanic PRMR was 11.5.)⁶² **Disparities for pregnancy outcomes also exist when comparing women living in rural areas with those living in urban areas.⁶³**

Black and low-income patients and patients from rural communities are more likely to live in states that have banned or are likely to ban abortion since the Supreme Court overturned *Roe*. **A recent study estimating the mortality impact of a total abortion ban, due to increased deaths from untermiated pregnancies, would increase pregnancy-related deaths, most acutely for Black women.⁶⁴**

According to the AAP, **laws that restrict access to reproductive health care also have a disproportionate impact on adolescents and teenagers, who typically do not have the resources or freedom to travel to another state to receive safe, legal health care.⁶⁵** Family physicians are optimally trained, qualified, and experienced in evaluating and addressing the complex medical and behavioral health care needs of adolescents. The AAFP **values** the sexual health of adolescents and **advocates** for access to comprehensive medical and behavioral health care, evidence-based sex education, and increasing awareness of risks and signs of sexual abuse and trafficking, and **supports** a trauma-informed approach to health care.^{66,68} **That is why the AAFP joins the AAP in affirming strong support for adolescents and teens to receive comprehensive evidence-based reproductive health care services, including abortion.**

The AAFP **recognizes** sexual assault as a serious public health issue and **supports** the rights of survivors of sexual assault, sexual violence, and all sexual crimes.^{69,70} The AAFP **calls for** prioritization of the survivor's wellbeing, emphasizing the need for compassionate treatment, and supports a legal framework that codifies the rights of, and protections for, survivors of sexual assault.⁷¹ Rape is a cause of many unwanted pregnancies, with an estimated one in 20 women between the ages of 12 and 45 becoming pregnant due to rape.⁷² Rape is traumatic and often has long-lasting physical and psychological health consequences. **Laws that ban abortions without exception for rape and incest contradict the AAFP's policy on trauma-informed care and place rape victims at higher risk for future medical, psychological, and socioeconomic challenges.⁷³**

Family physicians report that, in states with abortion bans that allow exceptions in cases of rape or incest, eligible patients still face barriers to timely access to care. In order to qualify for an exception, patients and/or their clinician usually must provide a police report documenting the offense. Surveys indicate that fewer than a quarter of rape survivors report assault, and experts estimate the percentage is much lower for children, adolescents, and youth in foster care and juvenile systems.⁷⁴ Family physicians who care for victims of rape cite family and domestic violence and economic insecurity as possible response for non-reporting. **Requiring victims of rape and incest and their**

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treating clinicians to jump through legal and administrative hurdles to document eligibility for a legal exception delays access to time-sensitive abortion care.

The AAFP acknowledges that LGBTQ+ individuals, youth in foster care or the juvenile justice system, and incarcerated individuals face exceptional hardships when attempting to access health care and are at greater risk for adverse medical and mental health outcomes and recognizes that state laws banning and restricting access to abortion will undoubtedly exacerbate the health disparities experienced by these vulnerable populations. We urge policymakers to study the implications of federal and state policy changes on these unique populations in order to develop appropriate solutions to mitigate the serious challenges they encounter.

Underscoring the Need for Universal Access to Health Care and Addressing Social Determinants of Health

The AAFP [recognizes health as a basic human right](#) for every person, regardless of social, economic or political status, race, religion, gender, or sexual orientation. The right to health includes universal access to timely, high-quality, and affordable health care services.⁷⁵ We continue to [call on Congress](#) to pass legislation to expand access to comprehensive, affordable health care, including by expanding Medicaid and CHIP coverage to 12 months postpartum, ensuring 12 months of continuous eligibility for children enrolled in Medicaid and CHIP, closing the Medicaid expansion coverage gap, and making the American Rescue Plan's enhanced marketplace subsidies permanent. Family physicians understand that the health of their individual patients and communities is affected by social determinants of health, which is why the AAFP urges lawmakers to adopt a "health in all policies" approach that considers the broad health implications of policies not traditionally discussed as health care-related (such as housing and urban development, transportation, education, etc.). Expanding health coverage and addressing social determinants of health will undoubtedly reduce unintended pregnancies, improve maternal and child health outcomes, and ultimately improve the health and productivity of our nation.

The AAFP has [called on](#) HHS and other federal agencies to use every available lever to protect patient safety, support family physicians and other clinicians, and strengthen timely access to reproductive health care, including medication abortion and contraception, in accordance with federal law.⁷⁶

We now urge Congress to take swift legislative action and utilize its federal oversight authority to restore, protect, and improve patients' access to timely, comprehensive reproductive health care and clinicians' ability to provide evidence-based medical care.

The AAFP has [endorsed](#) the House-passed Women's Health Protection Act ([S. 4132](#)), and we continue to [urge](#) the Senate to pass this critical legislation to codify federal protections for reproductive health care.⁷⁷ The AAFP also supports the Ensuring Access to Abortion Act ([H.R. 8297](#)) which protects patients' rights to travel across state lines to seek abortion services. **Absent federal law guaranteeing all patients have the right to abortion, it is imperative that patients be able to travel to seek safe, quality medical care without threat of penalty of persecution.**

The AAFP stands ready to partner with the Committee to protect the patient-physician relationship and reproductive health care. Should you have any questions, please contact Erica Cischke, Director of Legislative and Regulatory Affairs at ecischke@aafp.org.

Sincerely,

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August 14, 1989

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Mr. Frank A. Tureskis
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Dear Frank: [REDACTED]

Thank you very much for taking the time to express your opposition to abortion.

I believe we should end abortion on demand, and at every opportunity I have translated this belief into votes in the House of Representatives. I am opposed to the use of federal funds to pay for elective abortions, and will continue to support amendments to prohibit the funding of elective abortions for federal employees and Medicaid recipients. Also, notwithstanding the result in Webster, I continue to believe the Supreme Court's decision in Roe v. Wade should be reversed.

Again, thank you for taking the time to share your views with me.

Sincerely

Richard J. Durbin
Member of Congress

RJD:jjk



Testimony of Dana Sussman
Acting Executive Director, National Advocates for Pregnant Women
before the United States Senate Judiciary Committee
July 12, 2022

Thank you for the opportunity to submit this testimony to the Senate Judiciary Committee and for convening today's hearing to explore the devastating impact of the Supreme Court's decision in *Dobbs v. Jackson Women's Health Organization*. National Advocates for Pregnant Women is a non-partisan legal advocacy organization dedicated to the health and welfare of pregnant people and their families. Our testimony draws on over 20 years of experience defending the rights of pregnant and parenting people who have faced criminalization and other deprivations of liberty because of pregnancy.

While not every woman will become pregnant or give birth, the overwhelming majority of women will.¹ By the time they are in their 40s, approximately 85% of American women will have become pregnant and experienced at least one birth, 33% will have experienced a pregnancy loss, and approximately 25% will have had an abortion. These experiences are overlapping and not exclusive.² For example, 59% of the women under age 35—and 89% of the women over 35—who have abortions are already mothers.³

The protections established by the Supreme Court's decisions in *Roe* and *Casey* were central to the dignity, personhood, and well-being of all six million people who become pregnant annually in the United States, including the four million who continue their pregnancies to term and the one million who have the dishearteningly common experience of pregnancy loss.⁴ Nonetheless, since 1973, National Advocates for Pregnant Women has documented more than 1,700 instances of women being arrested, prosecuted, convicted, detained, or forced to undergo medical interventions that would not have occurred but for their status as pregnant people whose rights state actors assumed could be subordinated in the interest of fetal protection.⁵ Across every State, state actors, including police and prosecutors, health-care and child-welfare workers, and judges have, relying on interests in "unborn life," deprived pregnant women of virtually every constitutional right, including the right to life.

¹ Although the term "women" is used here and elsewhere, people of all gender identities may become pregnant and seek abortion care. See *Reprod. Health Servs. v. Strange*, 3 F.4th 1240, 1246 n.2 (11th Cir. 2021).

² See NAPW, *Pregnancies and Pregnancy Outcomes in the United States* (Sept. 2021), [bit.ly/pregnancyoutcomes2](https://www.nationaladvocatesforpregnantwomen.org/wp-content/uploads/2021/09/FINAL_1600cases-Factsheet.docx.pdf).

³ *Id.*

⁴ *Id.*

⁵ NAPW, *Arrests and Deprivations of Liberty of Pregnant Women, 1973-2020* (Sept. 2021), https://www.nationaladvocatesforpregnantwomen.org/wp-content/uploads/2021/09/FINAL_1600cases-Factsheet.docx.pdf.

Women have been arrested, prosecuted, and detained on the theory that, by becoming pregnant, otherwise legal acts or omissions, health conditions, and decisions permissible to non-pregnant people may be treated as crimes. Similarly, pregnancy has provided the basis for compelled medical procedures and treatments that cannot be imposed on parents, siblings, and cousins to save their relative's life. As in all systems that police and punish people in this country, those who have faced pregnancy-related rights deprivations are overwhelmingly poor, and disproportionately people of color,⁶ who also face significantly higher rates of maternal mortality and morbidity. Such government actions have relied on interpretations of criminal statutes that make no mention of pregnancy or pregnant women. Prosecutors in numerous states have also used laws designed to reach attackers of pregnant women as a basis for proceeding against the woman herself.⁷ Those laws have been relied upon to justify arresting and prosecuting pregnant women who experienced miscarriages and stillbirths, although most arrests involved births of healthy babies with no adverse pregnancy outcome reported.

In Iowa, a pregnant woman who fell down a flight of stairs was reported to the police after seeking help at a hospital. She was arrested for "attempted fetal homicide."⁸ A Tennessee woman who sought to avoid a sheriff's pursuit was charged with evading arrest and felony reckless endangerment because she was pregnant.⁹ An Alabama woman who lost a pregnancy as a result of being shot in the stomach during an altercation, was charged with manslaughter, in an indictment alleging she "did intentionally cause the death of [her unborn baby] by initiating a fight knowing she was five months pregnant."¹⁰ In South Carolina, a woman who was eight months pregnant attempted suicide by jumping out of a window. Despite suffering severe injuries, she survived, but was arrested and jailed for homicide by child abuse.¹¹ An Oklahoma judge took "custody" of a pregnant woman's fetus to prevent her release from jail, and set a bail amount eight times that for the putative father arrested on an identical charge.¹² Alabama prosecutors have charged nearly 600 women under the State's "chemical endangerment" law—on the theory that the unborn, from the moment of fertilization, are children; and being pregnant and using any amount of any controlled substance is the same as bringing a child to a

⁶ Paltrow & Flavin, *Arrests of and Forced Interventions on Pregnant Women in the United States, 1973–2005: Implications for Women's Legal Status and Public Health*, 38 J. HEALTH POLITICS, POL. & L. 299 (2013).

⁷ Michelle Goldberg, *When Miscarriage is Manslaughter*, N.Y. TIMES, Oct. 18, 2021.

<https://www.nytimes.com/2021/10/18/opinion/poolaw-miscarriage.html>

⁸ Michelle Goodwin, *POLICING THE WOMB: INVISIBLE WOMEN AND THE CRIMINALIZATION OF MOTHERHOOD*, 86-87 (2020).

⁹ Affidavit of Complaint, *State v. Kohn*, No. 14W5022 (General Sessions Ct. Nov. 12, 2014).

¹⁰ Crossley, *Reproducing Dignity: Race, Disability, and Reproductive Controls*, 54 U.C. DAVIS L. REV. 195, 198-203 (2020).

¹¹ Foster, *Woman faces charge of killing unborn child during August suicide attempt*, THE HERALD (Feb. 21, 2009), <https://www.heraldonline.com/news/local/article12250463.html>.

¹² *In re Unborn Child of Starks*, 18 P.3d 342 (2001).

methamphetamine lab. Among those prosecuted were women who took a controlled substance pursuant to a valid prescription; who used marijuana to address severe epilepsy (as an alternative to prescribed medications known to cause fetal damage); and who ingested half a valium tablet when panicked by threatened violence from an ex-boyfriend.¹³ In Mississippi, a woman was charged with second-degree murder for experiencing a stillbirth.¹⁴ Prosecutors have charged other women in the state who experienced stillbirths with depraved-heart homicide and culpable-negligence manslaughter.¹⁵ In Wisconsin, a pregnant woman's alcohol consumption and cigarette smoking were cited as grounds for a charge of attempted first-degree intentional homicide.¹⁶ In Utah, a woman who delivered twins, one of whom was stillborn, was charged with fetal homicide, based on health care providers' belief that the stillbirth might have been avoided had she accepted their recommendation and not delayed undergoing cesarean surgery.¹⁷ In Indiana, a woman who was approximately 33 weeks pregnant attempted suicide. She survived and did everything she could to ensure that her baby did; the baby was born alive but did not survive. She was charged with murder and feticide and incarcerated without bail for more than a year.¹⁸ Not just pregnant women's physical liberty is at stake, but their right to life: a Washington, D.C. judge ordered a pregnant woman to undergo cesarean surgery without her consent knowing that the operation might kill the woman. Neither she nor her baby survived.¹⁹

Even when state laws explicitly prohibit its use against a pregnant woman herself, prosecutors persist. For example, a Missouri "personhood" provision directs that it may not be applied "against a woman for indirectly harming her unborn child by failing to properly care for herself," Mo. Rev. Stat. § 1.205.4, has not prevented prosecutors from repeatedly using it to justify charging scores of pregnant women, including one who admitted to using marijuana once while pregnant and another who drank alcohol.²⁰ And in California, despite court rulings over many decades rejecting the use of the State's criminal code to prosecute women in relationship to pregnancy outcomes, a prosecutor recently charged two women who experienced pregnancy losses—blamed, without scientific basis, on the use of methamphetamine—with violating the State's feticide law. To be clear, there is simply no medical or scientific evidence that

¹³ Martin, *Take a Valium, Lose Your Kid, Go to Jail*, PROPUBLICA (Sept. 23, 2015), <https://www.propublica.org/article/when-the-womb-is-a-crimescene>.

¹⁴ See Philips, *Infant Death Case Heading Back to Grand Jury*, STARKVILLE DAILY NEWS, May 8, 2019, https://www.starkvilledailynews.com/infant-death-case-heading-back-to-grand-jury/article_cf99bcb0-71cc-11e9-963aeb5dc5052c92.html; GOODWIN at 34-45.

¹⁵ *State v. Buckhalter*, 119 So. 3d 1015 (2013).

¹⁶ Complaint, Nos. 96-F-368, 96-CF-525 (Wis. Cir. Ct. Racine County, Sept. 18, 1996).

¹⁷ *State v. Rowland*, No. 041901649 (Dist. Ct. 3d Apr. 7, 2004).

¹⁸ GOODWIN at 32-34.

¹⁹ *Id.* at 92-96.

²⁰ See *State v. K.L.*, No. 03CR113048 (Cir. Ct. Chariton County Dec. 13, 2004); *State v. Lohnstein*, No. 0611-CR08757, Opp. to Mot. to Dismiss (Cir. Ct. St. Charles County Oct. 17, 2007); *State v. Wade*, 232 S.W.3d 663, 665 (Mo. App. 2007) (rejecting State's reliance on Section 1205 for prosecution of a woman based on pregnancy).

methamphetamine causes fetal demise. It simply does not. But, nonetheless, women have been prosecuted notwithstanding statutory text which expressly forbids the prosecution of a formerly pregnant woman for any “act [that] was ... consented to by the mother of the fetus.” Cal. Pen. Code § 187(b). One woman poorly advised by her lawyer, pled guilty to manslaughter of her fetus, even though that law explicitly precludes a manslaughter charge for the loss of a fetus and in any event does not apply to pregnancy or fetuses, even for third-party assailants. She was sentenced to eleven years in prison for experiencing a pregnancy loss. After serving four years, her plea was held to be unconstitutional and the prosecutor finally dismissed the underlying murder charge in May of this year.²¹ A second, Chelsea Becker, spent 16 months in jail before the feticide charge was dismissed.²² Ms. Becker, our client, has shared the following about her experience facing a murder charge for pregnancy loss:

My name is Chelsea Becker. I was incarcerated in Kings County jail in California for more than a year, from November 6, 2019 until March 10, 2021, while I was awaiting trial for first degree murder, after experiencing a stillbirth while addicted to methamphetamine. Experiencing the loss of my baby alone caused a lot of trauma for me and while I was in custody I was unable to receive the proper counseling to help me with the grief process. Even with the counselors at the jail, I was afraid anything I might have said to any of them would be used against me in court, so I suffered alone. While I was in jail, my youngest living son, whom I had custody of up until this time, had been taken into CPS and was later adopted. If the hospital had never involved law enforcement due to this stillbirth happening, I would still have custody of my son. I later learned that methamphetamine had nothing to do with my stillbirth and that existing California law never permitted my prosecution in the first place. The charge wasn't dismissed until May, 2021, and by then the adoption had been finalized months prior. My experience with the justice system was detrimental to my mental health, and I feel that both I and my living child were failed deeply. I hope that in the future, no woman will ever be prosecuted for losing a pregnancy.

Despite these horrific prosecutions and rights deprivations, when challenged, courts nationwide, up until this point, have often recognized the unlawfulness of these state actions—but not before extraordinary and irreparable harm is inflicted on individuals, families, and the well-being of other women threatened with prosecution. This body of experience demonstrates that the protections established in *Roe* and *Casey* were critical to not just the rights of people who seek

²¹ Attorney General Bonta Issues Statement on Dismissal of Murder Charge Against Adora Perez for Loss of Pregnancy, May 9, 2022, <https://oag.ca.gov/news/press-releases/attorney-general-bonta-issues-statement-dismissal-murder-charge-against-adora>

²² Wigglesworth, Judge dismisses murder charge against Central Valley woman whose baby was stillborn, L.A. TIMES, May 20, 2021, <https://www.latimes.com/california/story/2021-05-20/murder-charge-dropped-against-woman-who-sufferedstillbirth>.

abortions, but to all pregnant people. Until now, courts in all but three States have rebuffed coercive measures, often on grounds that closely track *Casey*'s condemnation of exercising "dominion" over pregnant women's lives.

Roe and *Casey* rested fundamentally on an understanding of pregnant women's personhood under the Fourteenth Amendment. The *Dobbs* decision overturning them repudiates that principle. Each State now has as a matter of constitutional law, carte blanche to announce, and enforce, fetal interests "competitive with the constitutional rights of pregnant women." *Planned Parenthood S.E. Pa. v. Casey*, 505 U.S. 833, 914 n.2 (Stevens, J. concurring). Pregnant people can now be subordinated to a special class of persons entitled to "full and independent legal status under the Constitution." 505 U.S. at 897. Criminal punishments and civil detentions imposed on pregnant people because of their pregnancies need only be "reviewed"—i.e., rubber stamped—for "rational basis." Very little is holding prosecutors back from considering each of the roughly five million annual pregnancies that are not terminated by abortion—and every new day of those pregnancies—as a potential crime or justification for state intervention.

Without the protections of *Roe* and *Casey*, prosecutors—who have sought punishment on theories that giving birth to a healthy baby who had been subject to a perceived risk of harm in utero is felony "child abuse" or that experiencing a pregnancy loss is murder—will not hesitate to bring the full weight of their power to bear against women who seek abortions or are suspected of doing so. When pregnancy and all its potential outcomes may be treated as crimes, when activities that pose potential or even perceived risks of fetal harm are subject to prosecution or other punitive state action, and when candid communication with health-care providers is treated as inculpatory evidence, pregnant people and their families will suffer irreparably.

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Physicians for Reproductive Health
 Testimony for the Record
 A Post Roe America: The Legal Consequences of the Dobbs Decision
 Senate Committee on the Judiciary
 July 12, 2022

Physicians for Reproductive Health (PRH) is a physician-led national organization that mobilizes and organizes medical providers to advance sexual and reproductive health, rights, and justice. Our network includes physicians of all specialties from across the country committed to ensuring access to equitable, comprehensive health care, that will always include abortion care. We believe this work is necessary to ensure all people are able to live freely with dignity, safety, and security. We work towards collective liberation and believe that health care is a fundamental human right.

We write to express our gratitude for this hearing on the impact of the Supreme Court's decision in *Jackson Women's Health Organization v. Dobbs*, which gutted the constitutional right to abortion by overturning *Roe v. Wade* and *Planned Parenthood v. Casey*. This decision has made what was already a dire moment for abortion access in our country far worse. There is no doubt this decision will impact all of us. We write to make clear this harm and to highlight for the Committee the importance of doing everything possible to protect access to abortion care in this moment and for generations to come.

Whether our patients are ready to build or create their family, already parenting, or have decided not to continue a pregnancy, all of them share one thing in common – they are making thoughtful decisions about their health and well-being. Each person we care for deserves access to high quality health care that includes abortion care, regardless of who they are, their income levels, or where they live. They do not deserve the uneven and inequitable patchwork of protections the Supreme Court has imposed. They do not deserve the harm and threats to their health that will result as states continue to pass extreme abortion bans on top of the litany of medically unnecessary restrictions already in place.

We know that many people are already being negatively impacted. People who live in states hostile to abortion are facing limited options. Some, who are able to gather the support and resources necessary, are forced to travel hundreds and hundreds of miles to a state where they can access the care they need. Providers in other states that are able to continue providing care are doing the best they can to accommodate the influx of people travelling, but the wait times are long and the ripple effects are devastating. And the truth is, many people – people without resources, people unable to take time from work, unable to get child care, unable to get past immigration check-points – will be unable to get the care they need and deserve. And for those that choose to self-manage their abortions, they face heightened legal risk.

Equitable access to abortion care is essential for the health, well-being, security, and dignity of all people. As providers, we see firsthand the harm restrictions on abortion care have on the people we care for. We know that denial of abortion care can have serious long-lasting consequences on a person's health and well-being. For example, women who have been denied an abortion are more likely to experience high blood pressure and other serious medical conditions



during the end of pregnancy, more likely to remain in relationships where interpersonal violence is present, and more likely to experience poverty.

The American College of Obstetricians and Gynecologists (ACOG), along with other medical societies identifies abortion as an essential health care service that require timely access to care. ACOG also recommends the repeal of legislation that imposes barriers on access and interferes with the patient-provider relationship, including abortion bans, mandatory waiting periods, biased counseling requirements, unnecessary ultrasounds, and unjustified facility and staffing requirements.

Abortion is health care and it should not be singled out for exclusion or have additional burdens placed upon it. Abortion is extremely safe and arbitrary barriers on abortion care do not make it any safer. In 2018, the National Academies of Science, Engineering, and Medicine (NASEM) published a comprehensive study affirming the safety record of abortion and pointed out that the biggest threat to patient safety is the litany of medically unnecessary regulations that raise costs and delay procedures, ultimately putting patients' health at risk.

Restrictions on abortion care have far reaching consequences. Abortion restrictions both deepen existing inequities and threaten health outcomes for pregnant people and people giving birth. We know that while most people will have healthy pregnancies, some will experience illness or conditions where pregnancy can cause serious problems. When abortion is difficult or impossible to access, complicated health conditions can worsen and even result in death. In order to address our nations' ongoing maternal health crises, a named priority for Members of this Committee, abortion care must be accessible. The communities that are facing the most barriers to accessing abortion care are the same communities that are unable to access high quality, community grounded, culturally responsive prenatal, maternity, and postpartum care.

The Supreme Court's decision and its far-reaching consequences are unacceptable. Providers are being put in untenable positions: risk criminalization, wait for our patients' health to worsen so we can provide necessary abortion care, or ask our patients to travel out of state hours away from home to obtain needed care. This is not how medicine should work or be practiced. In any place. We must be able to take care of our patients without fear.

The United States has long had a two-tiered system for reproductive health care and it is only going to get worse. This was undeniable before the Supreme Court's decision when six Justices snatched away the fundamental right to abortion care. Our nation continues to grapple with multiple, ongoing public health emergencies that have disproportionately harmed communities of color and we continue to reckon with the legacy of systemic racial injustice and its role in contributing to health inequities. It is critical we place this moment, the taking away of the fundamental right to abortion, and the imminent threat to reproductive and sexual health care within this larger context. The removal of the fragile protections of *Roe* is absolutely devastating for Black people, Indigenous people, communities of color, immigrants, young people, people with low incomes, and LGBTQ+ people.

It doesn't have to be this way. All people should be able to get care in their own communities, in a manner that is best for them, with the people they trust. Whether they are accessing abortion



care via in clinic care, through telehealth services, or self-managing their abortion on their own terms. All people deserve dignity, personal autonomy, and security. They deserve liberation. Should you have any questions please reach out to MiQuel Davies, Assistant Director of Public Policy at mdavies@prh.org.

Sincerely,

Dr. Jamila Perritt

Dr. Jamila Perritt, MD, MPH, FACOG
President & CEO
Physicians for Reproductive Health



DONNA HOWARD
STATE REPRESENTATIVE
DISTRICT 48

Hearing before the Senate Committee on the Judiciary
Tuesday, July 12, 2022

Written Testimony of State Representative Donna Howard,
Chairwoman of the Texas Women's Health Caucus, on the Post-Roe Legislative
Landscape in Texas

Dear Chairman Durbin, Ranking Member Grassley, and distinguished members of the Committee:

On behalf of the Texas Women's Health Caucus, I would like to thank you for the opportunity to share updates from Texas. I have been a member of the Texas House of Representatives since 2006 and represent House District 48 in Austin. In addition, I have had the honor to serve as the Chairwoman of the Texas House Women's Health Caucus (Caucus) since 2020. Throughout my time in the Texas Legislature, I have witnessed the immense good we can accomplish when we build bipartisan consensus. Over the last decade, we have increased our investment in scientific research at our institutes of higher education and are now ranked third among the states in total research expenditures¹. In 2017, a bipartisan coalition of legislators blocked anti-trans legislation that swept the nation. In 2019, we became one of the first states to implement survivor-centered approach to sexual assault policy reform. When our Legislature comes together, we have the potential to enact powerful change in the lives of Texans.

Unfortunately, we are not immune to the heightened national political divide of the last decade. The influence of the far-right movement is most evident in the laws passed during our previous legislative session. The 87th Legislative Session was the most conservative in our state's history. Republican leadership used their majority to pass politically motivated legislation that undermines the rule of law and the United States Constitution. Such laws include Senate Bill 1 from the second special session which prevents disabled voters and those with limited English proficiency from receiving needed assistance, expands criminal penalties in the election code, and emboldens partisan poll watchers². Senate Bill 6 from the second special session forces low income Texans to remain in jail by restricting access to bail³. House Bill 9 violates a Texan's first

¹ Texas Higher Education Coordinating. (2022). *Research Funding in Texas Overview Fiscal Year 2022* [PDF]. <http://reportcenter.highered.texas.gov/reports/fiscal/research-funding-in-texas-overview-fiscal-year-2022/>

² Senate Bill 1, TXSC § Election Code (2021)

<https://capitol.texas.gov/BillLookup/Text.aspx?LegSess=871&Bill=SB1>

³ Senate Bill 6, TXSC § Code of Criminal Procedure (2021)

<https://capitol.texas.gov/BillLookup/Text.aspx?LegSess=872&Bill=SB6>



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STATE REPRESENTATIVE

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amendment right by imposing harsh criminal penalties for certain kinds of protest activity⁴. And finally, Senate Bill 8 (SB8) was passed in open defiance of the Constitution and upended decades of judicial and legislative precedent. Unlike the other laws mentioned above, the passage of SB8 has had an unprecedented impact nationwide. The bill's devious legislative scheme is now being used to restrict a person's right to access abortion in other states. Furthermore, the civil enforcement mechanism devised in SB8 threatens the bedrock of our country by allowing legislators to pass unconstitutional laws designed to evade judicial scrutiny. In the months following the passage of SB8, Texans were denied the same Constitutional rights and protections Americans in other states enjoyed. Between September 2021 and December 2021, over 1,400 pregnant Texans were forced to travel hundreds of miles to seek care⁵. Texas abortion clinics have faced constant harassment from anti-choice citizens looking to take advantage of the civil enforcement mechanism outlined in SB8. And abortion funds in Texas have faced increased scrutiny from vigilantes threatening to sue them for "aiding and abetting" a person seeking abortion care. Since September 1, 2021, Texans have effectively lived in a post-Roe world, so when the Supreme Court overturned *Roe vs Wade* on June 24, 2022 we understood the devastating impact this ruling would have across the country.

Last session, Texas also passed House Bill 1280 (HB1280) and became one of the thirteen states in the country with a trigger law on the books⁶. Within 30 days of the Supreme Court judgment officially overturning *Roe vs. Wade*, abortion will not only be illegal in Texas, but physicians will face steep criminal penalties if they violate the law. HB1280 does not include any exceptions for Texans who became pregnant as a result of rape or incest. The only exception in the law is in the event of life-threatening circumstance that places the pregnant person at risk of death or poses a serious risk of substantial impairment of major bodily functions. In practice, this will mean Texas physicians will be forced to wait until a person is on their deathbed before they can provide care. Even then, there remains a substantial risk that they may find themselves having to defend their decision in court, so physicians will wait to perform an abortion until it is absolutely critical which places the pregnant person at increased risk. According to a representative from the Texas chapter of the American College of Obstetricians and Gynecologists, Texas physicians are also weary of serving on the hospital committees in charge of approving such procedures because they fear being involved in subsequent litigation should

⁴ House Bill 9, TXSC § Code of Criminal Procedure and Penal Code (2021).

<https://capitol.texas.gov/BillLookup/Text.aspx?LegSess=87R&Bill=HB9>

⁵ White, K. Dane'el, A. (2022). *Out-of-State Travel for Abortion Following Implementation of Texas Senate Bill 8* [PDF]. <https://sites.utexas.edu/txpcp/files/2022/03/TxPEP-out-of-state-SB8.pdf>

⁶ Nash, E. Guarnieri, I. (2022, June 6). *13 States Have Abortion Trigger Bans—Here's What Happens When Roe Is Overturned*. Guttmacher Institute.

<https://www.guttmacher.org/article/2022/06/13-states-have-abortion-trigger-bans-heres-what-happens-when-roe-overturned>



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the decision to perform an abortion be challenged in court. Dr. Charles Brown, a leading expert in maternal fetal medicine and professor at the University of Texas Southwestern School of Medicine, recounted that many physicians in this kind of situation are left without treatment options and feel as though they are “waiting for women to die.”

On the day the *Dobbs vs. Jackson Women's Health* ruling was released, our Attorney General released guidance allowing prosecutors to immediately pursue criminal prosecutions based on Texas abortion prohibitions predating *Roe* that were never repealed by the Texas Legislature⁷. In an attempt to keep the pre-*Roe* statutes from going into effect, the ACLU of Texas filed *Whole Woman's Health vs. Paxton* on June 27. They argued that these antiquated statutes were long ago repealed by implication according to the Fifth Circuit Court's ruling in *McCorvey vs. Hill* and should therefore not be allowed to be enforced. On June 28th, 2022, a Harris County district court granted a Temporary Restraining Order (TRO) enjoining enforcement of the state's pre-*Roe* abortion ban. In response, the State immediately filed a Petition for Writ of Mandamus and an Emergency Motion for Temporary Relief in the Supreme Court of Texas, asking it to block the lower court's order. During the time it took the Texas Supreme Court to issue a ruling, certain clinics were allowed to resume providing abortion services. On July 1, the Texas Supreme Court ruled in favor of the Attorney General and granted him the right to enforce the ban. Under these pre-*Roe* statutes, abortion providers could be criminally liable for providing abortions. The Texas Supreme Court's decision to allow these statutes to go into effect has emboldened certain members of the Texas Legislature to harass and threaten business owners, abortion providers, abortion funds, and lawyers who are helping pregnant people seek care outside of the state. A member of the Texas House publicly threatened physicians who performed abortions during the TRO period, claiming that reliance on the Order would not be considered a defense and asserting that the doctors in question would face murder charges for performing abortions during this period⁸.

On July 7, the Texas Freedom Caucus sent a letter (Attachment 1) to Sidley Austin LLP, a Dallas-based law firm who purportedly offered to reimburse their employees' travel expenses should they need to leave Texas for an abortion. In the letter, the Freedom Caucus not only threatens felony criminal prosecutions and disbarment of anyone who has helped an employee of Sidley Austin to obtain an out-of-state abortion, but the authors also outlined legislation they plan to file in our upcoming legislative session. The first law they intend to introduce would

⁷ Paxton, K. Attorney General of Texas. 2022. *ADVISORY ON TEXAS LAW UPON REVERSAL OF ROE V. WADE*. <https://www.texasattorneygeneral.gov/sites/default/files/images/executive-management/Post-Roe%20Advisory.pdf>

⁸ Cain, B. [@BriscoeCain]. (2022, June 29). *Andrea Gallegos, Alan Braid, @AmyHM, & Southwestern Women's Surgery Center will all face murder charges. #txdege will enact legislation early next year to ensure that they are prosecuted for these crimes. Reliance on the TRO is no defense. #ProsecuteTexasAbortionFunds.* [Tweet]. Twitter. <https://twitter.com/BriscoeCain/status/1542172382491721728?s=20&t=bVu3xRtHe2KDwT8AptR2NQ>



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STATE REPRESENTATIVE
DISTRICT 45

prohibit any employer in Texas from paying for elective abortions or reimbursing abortion-related expenses—regardless of where the abortion occurs, and regardless of the law in the jurisdiction where the abortion occurs. The proposed law would impose felony criminal sanctions on anyone who pays for these abortions to ensure that it remains enforceable against self-insured plans as a generally applicable criminal law. The second law would allow private citizens to sue anyone who pays for an elective abortion performed on a Texas resident, or who pays for or reimburses the costs associated with these abortions—regardless of where the abortion occurs, and regardless of the law in the jurisdiction where the abortion occurs. The authors intend to model this provision after SB8 and its private civil-enforcement mechanism. The third proposed law would require the State Bar of Texas to disbar any lawyer who has violated article 4512.2 of Revised Civil Statutes by “furnishing the means for procuring an abortion knowing the purpose intended,” or who violates any other abortion statute enacted by the Texas Legislature. In the event that the State Bar fails to disbar an attorney who has violated these laws, then the bill would allow any member of the public to sue the officers of the State Bar and obtain a writ of mandamus compelling them to impose the required disciplinary sanctions. The final bill the authors intend to introduce would empower district attorneys to go outside the bounds of their jurisdiction in order to prosecute abortion-related crimes—including violations of article 4512.2 of the Revised Civil Statutes—when the local district attorney fails or refuses to do so. It would also eliminate the three-year statute of limitations that currently applies to violations of this article.

Prior to our last Legislative session, these extreme proposals would have seemed outlandish and impossible to pass. Though the Republican party has had control of Texas government since the late 1990’s, there was still balance in what was politically viable. However, last session, emboldened by electoral victories in 2020, the conservative majority took things to a level never before envisioned. We experienced firsthand what this majority is willing to do in order to appease their base. In the past, legislation like this would be outside the realm of legislative possibilities, but now that is not the case. Unfortunately, those of us who would oppose such extremist legislation are not in the majority and have few tools at our disposal to stop this from becoming law. I fear that without federal intervention or protection, these four proposals could be law by September 1, 2023. Furthermore, as we have seen with SB 8, should these proposals become law then there is a very real possibility that other states will follow suit.

I am proud to be a member of the Texas Legislature. Because of the resources in our great state, we have the privilege to lead the nation in many regards. However, I worry that Texas is now leading the nation in establishing dangerous precedent. Republicans are allowing neighbors to turn on neighbors for the sake of a far-right agenda, violating the privacy of Texans, infringing upon the rights of businesses to make decisions, and, by restricting travel, are claiming

**DONNA HOWARD**

STATE REPRESENTATIVE

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ownership over pregnant peoples' bodies. While a state may be within its right to prevent an activity within its borders, prohibiting such activities elsewhere interferes with the rights of other states and implies ownership of a person. Every American deserves to live in a country where one's inherent rights are protected regardless of the state in which you live. As elected officials, it is our duty to protect individual freedom, fight for justice, and ensure the safety of our constituents. We cannot allow these draconian laws to take root in our country. If we do, the repercussions to women's health and freedom over one's own body and destiny, as well as to constitutional protections, will have far-reaching impacts. The Senate must do what is within its power to protect access to abortion healthcare, inclusive of traveling to states where such necessary healthcare is available. These rights, as others, should not be subject to state boundaries but, rather, should be guaranteed for all Americans.



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(512) 228-6862 | www.FreedomForTexas.com

Rep. Mayes Middleton
District 23 – Wallisville
Chairman

Rep. Matt Schaefer
District 6 – Tyler
Vice-Chairman

Rep. Matt Krause
District 93 – Fort Worth
Treasurer/Secretary

Rep. Briscoe Cain
District 128 – Deer Park

Rep. Gary Gates
District 28 – Fulshear

Rep. Brian Harrison
District 10 – Waxahachie

Rep. Matt Shaheen
District 66 – Plano

Rep. Valoree Swanson
District 150 – Spring

Rep. Steve Toth
District 15 – The Woodlands

Rep. Cody Vasut
District 25 – Angleton

Rep. James White
District 19 – Woodville

July 7, 2022

Yvette Ostolaza
Chair of the Management Committee
Sidley Austin LLP
2021 McKinney Ave #2000
Dallas, Texas 75201
yvette.ostolaza@sidley.com

Dear Ms. Ostolaza:

It has come to our attention that Sidley Austin has decided to reimburse the travel costs of employees who leave Texas to murder their unborn children. It also appears that Sidley has been complicit in illegal abortions that were performed in Texas before and after the Supreme Court's ruling in *Dobbs v. Jackson Women's Health Organization*, No. 19-1392. We are writing to inform you of the consequences that you and your colleagues will face for these actions.

Abortion is a felony criminal offense in Texas unless the mother's life is in danger. *See* West's Texas Civil Statutes, article 4512.1 (1974) (attached). The law of Texas also imposes felony criminal liability on any person who "furnishes the means for procuring an abortion knowing the purpose intended." West's Texas Civil Statutes, article 4512.2 (1974). This has been the law of Texas since 1925, and Texas did not repeal these criminal prohibitions in response to *Roe v. Wade*, 410 U.S. 113 (1973). These criminal prohibitions extend to drug-induced abortions if any part of the drug regimen is ingested in Texas, even if the drugs were dispensed by an out-of-state abortionist. To the extent that Sidley is facilitating abortions performed in violation of article 4512.1, it is exposing itself and each of its partners to felony criminal prosecution and disbarment.

We will also be introducing legislation next session that will impose additional civil and criminal sanctions on law firms that pay for abortions or abortion travel. The legislation that we will introduce will include each of the following provisions.

First. It will prohibit any employer in Texas from paying for elective abortions or reimbursing abortion-related expenses—regardless of where the abortion occurs, and regardless of the law in the jurisdiction where the abortion occurs. This provision will impose felony criminal sanctions on anyone who pays for these abortions to ensure that it remains enforceable against self-insured plans as a generally applicable criminal law.

Second. It will allow private citizens to sue anyone who pays for an elective abortion performed on a Texas resident, or who pays for or reimburses the costs associated with these abortions—regardless of where the abortion occurs, and regardless of the law in the jurisdiction where the abortion occurs. This provision will be modeled after the Texas Heartbeat Act and its private civil-enforcement mechanism.

Third. It will require the State Bar of Texas to disbar any lawyer who has violated article 4512.2 by “furnishing the means for procuring an abortion knowing the purpose intended,” or who violates any other abortion statute enacted by the Texas legislature. If the State Bar fails to disbar an attorney who has violated these laws, then any member of the public may sue the officers of the State Bar and obtain a writ of mandamus compelling them to impose the required disciplinary sanctions.

Fourth. The legislation that we will introduce next session will empower district attorneys from throughout the state to prosecute abortion-related crimes—including violations of article 4512.2 of the Revised Civil Statutes—when the local district attorney fails or refuses to do so. It will also eliminate the three-year statute of limitations that currently applies to violations of article 4512.2. The state of Texas will ensure that you and colleagues are held accountable for every abortion that you illegally assisted.

It also appears that Sidley may have aided or abetted drug-induced abortions in violation of the Texas Heartbeat Act, by paying for abortions (or abortion-related travel) in which the patient ingested the second drug in Texas after receiving the drugs from an out-of-state provider. Litigation is already underway to uncover the identity of those who aided or abetted these and other illegal abortions. In light of this pending litigation, as well as any anticipated litigation that might ensue, you and your colleagues at Sidley must preserve and retain all documents, data, and electronically stored information relating in any way to: (1) Any abortions performed or induced in Texas on or after September 1, 2021, in which a fetal heartbeat was detectable (or likely to be detectable if tested), including any such abortions that occurred while Judge Pitman’s injunction was in effect from October 6–8, 2021; (2) Any abortions performed or induced in Texas on or after June 24, 2022, including abortions performed while Judge Weems’s TRO was in effect from June 28, 2022, through July 1, 2022; (3) Any abortion that occurred on or after September 1, 2021, if there is any possibility that the patient might have opted for a drug-induced abortion and ingested either of the abortion drugs in Texas, even if the drugs were dispensed by a provider outside the state of Texas; and (4) The identity of any person or entity who has aided or abetted the abortions described in (1)–(3), including anyone at your firm, and anyone who paid for or in any way reimbursed the costs of those abortions.

You and your colleagues must preserve these items regardless of the medium, format, or device on which they are stored or hosted, and regardless of whether they appear in documents, drafts, notes, calendar entries, emails, text messages, voicemails, social-media posts, or any other form. Failure to preserve these documents could subject you and your colleagues to significant penalties.

Conduct yourselves accordingly.

Sincerely,

A handwritten signature in black ink, appearing to read "Mayes Middleton", with a stylized flourish at the end.

Rep. Mayes Middleton
Chairman, Texas Freedom Caucus

Enclosure: West's Texas Civil Statutes, articles 4512.1 – 4512.6 (1974)

cc: All attorneys at Sidley Austin LLP
Ken Paxton, Attorney General of Texas

Art. 4510a

TITLE 71

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deformity or injury, by any system or method, or to effect cures thereof.

2. Who shall diagnose, treat or offer to treat any disease or disorder, mental or physical, or any physical deformity or injury, by any system or method, or to effect cures thereof and charge therefor, directly or indirectly, money or other compensation; provided, however, that the provisions of this Article shall be construed with and in view of Article 740, Penal Code of Texas¹ and Article 4504, Revised Civil Statutes of Texas as contained in this Act.

[1925 P.C.; Acts 1949, 51st Leg., p. 160, ch. 94, § 20(b); Acts 1953, 53rd Leg., p. 1029, ch. 426, § 11.]

¹ See, now, article 4504a.

Art. 4510b. Unlawfully Practicing Medicine; Penalty

Any person practicing medicine in this State in violation of the preceding Articles of this Chapter shall be guilty of a misdemeanor, and upon conviction shall be punished by a fine of not less than Fifty Dollars (\$50), nor more than Five Hundred Dollars (\$500), and by imprisonment in the county jail for not more than thirty (30) days. Each day of such violation shall be a separate offense.

[1925 P.C.; Acts 1939, 46th Leg., p. 352, § 10.]

Art. 4511. Definitions

The terms, "physician," and "surgeon," as used in this law, shall be construed as synonymous, and the terms, "practitioners," "practitioners of medicine," and, "practice of medicine," as used in this law, shall be construed to refer to and include physicians and surgeons.

[Acts 1925, S.B. 84.]

Art. 4512. Malpractice Cause for Revoking License

Any physician or person who is engaged in the practice of medicine, surgery, osteopathy, or who belongs to any other school of medicine, whether they used the medicines in their practice or not, who shall be guilty of any fraudulent or dishonorable conduct, or of any malpractice, or shall, by any untrue or fraudulent statement or representations made as such physician or person to a patient or other person being treated by such physician or person, procure and withhold, or cause to be withheld, from another any money, negotiable note, or thing of value, may be suspended in his right to practice medicine or his license may be revoked by the district court of the county in which such physician or person resides, or of the county where such conduct or malpractice or false representations occurred, in the manner and form provided for revoking or suspending license of attorneys at law in this State.

[Acts 1925, S.B. 84.]

CHAPTER SIX ½. ABORTION

Article

- 4512.1 Abortion.
- 4512.2 Furnishing the Means.
- 4512.3 Attempt at Abortion.
- 4512.4 Murder in Producing Abortion.
- 4512.5 Destroying Unborn Child.
- 4512.6 By Medical Advice.

Art. 4512.1 Abortion

If any person shall designedly administer to a pregnant woman or knowingly procure to be administered with her consent any drug or medicine, or shall use towards her any violence or means whatever externally or internally applied, and thereby procure an abortion, he shall be confined in the penitentiary not less than two nor more than five years; if it be done without her consent, the punishment shall be doubled. By "abortion" is meant that the life of the fetus or embryo shall be destroyed in the woman's womb or that a premature birth thereof be caused.

[1925 P.C.]

Art. 4512.2 Furnishing the Means

Whoever furnishes the means for procuring an abortion knowing the purpose intended is guilty as an accomplice.

[1925 P.C.]

Art. 4512.3 Attempt at Abortion

If the means used shall fail to produce an abortion, the offender is nevertheless guilty of an attempt to produce abortion, provided it be shown that such means were calculated to produce that result, and shall be fined not less than one hundred nor more than one thousand dollars.

[1925 P.C.]

Art. 4512.4 Murder in Producing Abortion

If the death of the mother is occasioned by an abortion so produced or by an attempt to effect the same it is murder.

[1925 P.C.]

Art. 4512.5 Destroying Unborn Child

Whoever shall during parturition of the mother destroy the vitality or life in a child in a state of being born and before actual birth, which child would otherwise have been born alive, shall be confined in the penitentiary for life or for not less than five years.

[1925 P.C.]

Art. 4512.6 By Medical Advice

Nothing in this chapter applies to an abortion procured or attempted by medical advice for the purpose of saving the life of the mother.

[1925 P.C.]

Chairman Durbin, Ranking Member Grassley, and distinguished members of the Committee:

Thank you for the invitation to submit written testimony. I am a law professor at the University of California Davis and a visiting professor at Harvard Law School, where my research and writing focus on the intersection of constitutional law, legal history, and health law. I've written five books on the history of debates about abortion, contraception, party politics, and polarization in the United States. It's a pleasure and honor to contribute to this hearing.

The Supreme Court's decision in *Dobbs v. Jackson Women's Health Organization*, like its holding in *New York State Rifle v. Bruen*, claims to interpret our Constitution based on history and tradition. This approach, the Court tells us, constrains judges who might otherwise be tempted to impose their own policy preferences. In this testimony, I will outline the historical arguments central to *Dobbs* and the grave problems that they raise for me.

History in the *Dobbs* Court

History and tradition are central to the reasoning of *Dobbs*. The Court emphasizes that prior to the 1960s, "there was no support in American law for a constitutional right to obtain an abortion."¹

The *Dobbs* Court bolsters its historical analysis by suggesting that "abortion had long been a crime in every single State."² The Court tells us a simple story: from the thirteenth century onward, the common law clearly defined abortion and treated it as a crime. The Court acknowledges a debate about the quickening as a dividing line. Quickening refers to the point in pregnancy at which a pregnant person can detect fetal movement. Justice Alito concedes that historians dispute whether pre-quickening abortions were punished before the nineteenth century.³

But no matter, the Court explains: by the late nineteenth century, most states were criminalizing abortion throughout pregnancy. The majority writes that the motives of the lawmakers who criminalized abortion are not important but tells us a great deal about that subject anyway. In the majority's analysis, the spread of abortion laws was not about sex stereotypes or anti-immigrant sentiment. Justice Alito writes that lawmakers criminalizing abortion acted because of "a sincere belief that abortion kills a human being."⁴

The Meaning of "We the People"

The Court emphasizes that there can be no right to abortion since no one in power defended one before the 1960s. The historical record seems to support this

¹ *Dobbs v. Jackson Women's Health Organization*, __ 597 U.S. __, op cit. at 15 (2022).

² *Dobbs*, op. cit. at 16.

³ *Dobbs*, op. cit. at 17-28.

⁴ *Ibid.*, 29.

claim. Even birth controllers, who favored access to legal contraception, did not defend a right to abortion in the early twentieth century. The history seems simple, at least to the *Dobbs* Court. If abortion was not recognized as a right, *Dobbs* should be an open-and-shut case.⁵

But as the dissenting justices point in *Dobbs* point out, this claim proves too much—and casts doubt on a wide variety of constitutional rights. There was no support in the nineteenth century for a right to individual intimacy, same-sex or interracial marriage.⁶ States had long criminalized sodomy, or non-procreative sex, and started in the late nineteenth century to identify it with gay and lesbian Americans. States had long criminalized interracial marriage too, and at least twenty-six continued to do so in the later nineteenth century.⁷

Broadly speaking, the Constitution did not fully reflect the views of the disenfranchised: at the time the Fourteenth Amendment was ratified, women could not vote; married women could not own property or contract.⁸ In 1868, not a single woman practiced law in the United States.⁹ Poll taxes limited access to the franchise for poor white men in a handful of states in the 1860s, and Black men, who gained the right to vote through the Fifteenth Amendment in 1870, were functionally prevented from voting until the late twentieth century.¹⁰ To define rights solely based on the views of a small part of “we the people”—and at a time when so many were excluded from the practice of constitution-making—raises serious questions about the kind of constitutional order we wish to have.

This Court’s answer is that any approach to the interpretation of the Constitution not based on tradition or history would be activist. This debate about judicial activism is likely familiar to you. Supreme Court nominees who define themselves as originalists defend their approach by praising judicial restraint.

⁵ On the history of arguments about abortion and birth control in the late nineteenth and early twentieth century, see Linda Gordon, *The Moral Property of Women: The History of Birth Control Politics in America* (Champaign: University of Illinois Press, 2002).

⁶ Indeed, thirty-eight states and commonwealths criminalized interracial marriage at some point. See Michael Grossberg, *Governing the Hearth: Law and the Family in Nineteenth-Century America* (Chapel Hill: University of North Carolina Press, 2004), 125. In the late nineteenth century, states in the West and South extended their bans and more vigorously enforced them, and at least twenty-six states outlawed interracial marriage at the end of the nineteenth century.

⁷ See William N. Eskridge, *Dishonorable Passions: Sodomy Laws in America, 1861-1973* (New York: Penguin, 2008). The association between sodomy and homosexuality was cemented in the early twentieth century when states added oral sex to sodomy laws and focused more on the prosecution of gay Americans. See *ibid.*

⁸ See Linda K. Kerber, *No Constitutional Right to Be Ladies: Women and the Obligations of Citizenship* (New York: Farrar, Straus, and Giroux, 1999).

⁹ See Kate Berger Morello, *The Invisible Bar: The Woman Lawyer in America: 1638 to the Present* (New York: Random House, 2008), 127-144.

¹⁰ On limits on the franchise in the nineteenth century, see Alexander Keyssar, *The Right to Vote: The Contested History of Democracy in the United States* (New York: Basic Books, 2009), 1-16.

Set aside for the moment the question of whether as a general matter originalism promotes judicial restraint. *How* the Court uses history matters—and tells us a great deal about whether the Court is looking to the past to rein itself in or to justify the outcomes it prefers.

History of Abortion Before and During the Nineteenth Century

Start with the history of abortion before the nineteenth century. In evaluating the early history of abortion law, the Court relies heavily on a single historian, Joseph Dellapenna, along with a law review written by Professor Joseph Witherspoon, a key figure in the early National Right to Life Committee, one of the largest and most sophisticated pro-life groups.¹¹ Dellapenna, a respected expert on the law of water management and international and comparative law, rarely writes historical scholarship. In his most significant work on abortion history, he argues at length that medieval and common law authorities always treated abortion as a serious crime.¹² The Court also looks at the work of John Keown, a prominent authority on Christian ethics who writes mainly at the intersection of law and bioethics.¹³ Keown, Dellapenna, and Witherspoon suggest that Americans viewed abortion as immoral—and that from the Middle Ages on, the law treated the procedure as a serious crime.

Other historians disagree, suggesting that Dellapenna and Keown are misreading the evidence. These historians stress that contrary to what Dellapenna and Keown contend, the line between performing an abortion and restoring a woman's menstrual period was not well understood for centuries. These historians stress that authorities in early modern England were worried more about punishing illicit sex or the accidental killing of pregnant women than about fetal life.¹⁴ That the Court dismisses these scholars—who seem to make up a majority in the academy—is not the point. The point is that the *Dobbs* Court is discounting any literature that undercuts the story it wants to tell.

Consider next the Court's conclusions about the nineteenth century. Justice Alito suggests that the campaign to criminalize pre-quickening abortion in the late nineteenth century enjoyed almost universal support and reflected nothing more

¹¹ See *Dobbs*, op. cit. at 17-18, 23-27.

¹² See Joseph Dellapenna, *Dispelling the Myths of Abortion History* (Carolina Academic Press, 2006).

¹³ See *Dobbs*, op. cit. at 18, 23.

¹⁴ See Simon Caron, *Who Chooses? American Reproductive History Since 1830* (Gainesville: University Press of Florida, 2008), 20-27; James C. Mohr, *Abortion and the Law: The Origins and Evolution of a National Policy, 1800-1900* (Cambridge, MA: Harvard University Press, 1978); Wolfgang P. Muller, *The Criminalization of Abortion in the West: Its Origins in Medieval Law* (Ithaca: Cornell University Press, 2012); Leslie Reagan, *When Abortion Was a Crime: Women, Medicine, and the Law in the United States, 1867-1973* (Berkeley: University of California Press, 1997), 21-30; Carla Spivack, "To Bring Down the Flowers: The Cultural Context of Abortion Law in Early Modern England," *William and Mary Journal of Women and the Law* 14 (2007): 107-132.

than a sincere desire to protect the unborn. The spread of pre-quickenings bans was more complicated than the Court acknowledges. And setting aside the number of pre-quickenings bans, it is not clear why the *Dobbs* majority dwells so much on the motives of lawmakers or reformers after proclaiming its disdain for “for arguments based on alleged legislative motives.”¹⁵

I have no special insight into what each legislator who voted for an abortion ban in the late nineteenth century was thinking, but the Court is quick to dismiss the powerful and effective social movement that inspired legislatures to criminalize abortion in the nineteenth century. Led by the recently formed American Medical Association, this reform movement did make arguments about protecting life in the womb. Its leaders also suggested that abortion represented a choice by women to shirk their natural responsibilities as wives and mothers—a denial of the fact that “woman . . . shines and thrives best in the home.”¹⁶ Leaders of the AMA, like many in the period, were hostile to immigrants, who, they believed, were swamping the nation with inferior children who guaranteed a “deterioration of the race.” The AMA suggested that criminalizing abortion would lead non-immigrant white women to have more babies and improve the quality of the country’s stock. The AMA wrote model legislation, influenced local medical societies, and forged arguments that resonated with legislators across the country.¹⁷

Justice Alito dismisses the relevance of this social movement. How are we to believe, he asks, that a popular movement could influence legislators? But of course, there is nothing remarkable about social movements influencing legislatures. The civil rights movement has helped to remake American law. The women’s movement has changed our views of sex equality. Religious Americans, and more recently conservative Christians, have fought for an expansion of religious liberties. The American pro-life movement has transformed law and politics.

Why is it hard to believe that the nineteenth century antiabortion movement influenced our law when so many historians have documented its influence? There is no reason for Alito to suggest that lawmakers lobbied by the American Medical Association, steeped in its arguments, and often willing to repeat them somehow had an entirely different agenda from the movement that rocked American abortion law in the nineteenth century.

And why whitewash this history? If the Court is serious about being constrained by history, why tell us only part of the story? Why pretend that history

¹⁵ *Dobbs*, op. cit. at 28.

¹⁶ G.L. Austin, M.D., *Perils of American Women* (Boston: Lee and Shepherd, 1883).

¹⁷ Henry Gibbons, Sr., “On Feticide,” *Transactions of the California Medical Society* (pamphlet, 1878).

is clean and heroic when it can be dark and messy? It is because this Court is not attempting to grapple with our past. It is seeing in the past what it wants to see.

History and *Stare Decisis*

The Court's willingness to see what it wants to see is perhaps the most plain in the analysis of *Roe*'s aftermath. Rather than evaluating the nature of our history and tradition, the Court here addresses *stare decisis*, the body of rules that guides the Court in deciding when to reverse past precedent. Justice Thomas has suggested that the Court should reject any precedent that is wrongly decided,¹⁸ but the majority in *Dobbs* professes concern for precedent.¹⁹ So does Justice Brett Kavanaugh in his concurrence.²⁰ And historical arguments play a central role in the Court's approach to *stare decisis*.

The Court argues that *Roe* should be overturned not only because it was not wrongly decided but also because it was deeply destructive. "The Court short-circuited the democratic process by closing it to the large number of Americans who dissented in any respect from *Roe*," the Court writes. "*Roe* fanned into life an issue that has inflamed our national politics in general, and has obscured with its smoke the selection of Justices to this Court in particular, ever since."²¹ For a Court that emphasizes the importance of historical analysis, this an extraordinary passage—a key historical claim supported by not a single work of history. For support, the Court cites only Justice Scalia's dissent in *Planned Parenthood v. Casey*.²² A similar argument—that we should fault *Roe* and *Planned Parenthood v. Casey* for failing to settle the abortion debate—figures centrally in Justice Kavanaugh's concurring opinion.²³

That the Court cites no historian for the idea that *Roe* "fanned into life" the abortion issue or transformed our judicial confirmations is no surprise. No historian, whether pro-life, pro-choice, or somewhere in between, offers such a simple account. The abortion debate was intense well before *Roe*: as soon as states began reforming their abortion laws in the 1960s, antiabortion groups formed across the states to champion a right to life and defend criminal laws. A robust movement to legalize abortion attracted doctors, environmentalists, feminists, and even some population controllers. Richard Nixon tried to make abortion a wedge

¹⁸ See *Gamble v. United States*, 139 S. Ct. 1960, 1980–1989 (2019) (Thomas, J., concurring).

¹⁹ *Dobbs*, op. cit. at 43–48.

²⁰ See *ibid.*, 9–11 (Kavanaugh, J., concurring).

²¹ *Dobbs*, op. cit. at 44.

²² See *ibid.* (citing *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 995–996 (1992) (Scalia, J., dissenting)).

²³ See *ibid.* at 19 (Kavanaugh, J., concurring).

issue the year before *Roe* was decided. *Roe* could not fan the abortion issue into life when Americans had already been contesting the issue for years.²⁴

Nor did *Roe* automatically mean more polarization of the abortion issue or the politicization of our Supreme Court nominations. Beginning in the 1980s, the positions of the Republican and Democratic Parties on abortion more clearly diverged, which made abortion into an election issue and deepened divisions around it. White evangelicals Protestants had sometimes been uncomfortable with abortion, but the Southern Baptist Convention (SBC) had staked out a middle ground position. In 1980, the SBC hardened its opposition to abortion, and recently formed organizations in the Religious Right, such as the Moral Majority and Christian Voice, linked opposition to abortion to anger about the women's movement, the LGBTQ movement, and no-fault divorce. *Roe* did not instantly make abortion an election issue; it did not quickly narrow what it meant to be pro-life or pro-choice for people of faith or for voters. These changes happened later. Blaming all of this on *Roe*—and without historical support—is not the sign of a constrained Court. It is the work of a Court that turns to history when it is convenient and ignores complicated narratives that undercut its conclusions.²⁵

Even the transformation of Supreme Court confirmations cannot just be attributed to *Roe*. For years after *Roe*, Supreme Court confirmations were relatively smooth. John Paul Stevens, the first post-*Roe* nominee, was asked no questions about abortion and was confirmed unanimously. Sandra Day O'Connor, Ronald Reagan's first nominee, did answer a few questions on *Roe* but still sailed through the Senate. The confirmation process was visibly different in later years: during the hearings of Robert Bork and Clarence Thomas, for example, or in the past decade. But we know that the politicization of hearings began earlier—at least as early as the 1960s—and we see that more than *Roe* explains the changes to current confirmations.²⁶

²⁴ On the pre-*Roe* abortion struggle, see David J. Garrow, *Liberty and Sexuality: The Right to Privacy and the Making of Roe v. Wade* (Berkeley: University of California Press, 1998); Daniel K. Williams, *Defenders of the Unborn: The Pro-Life Movement Before Roe v. Wade* (New York: Oxford University Press, 2016); Jennifer Holland, *Tiny You: A Western History of the Anti-Abortion Movement* (Berkeley: University of California, 2020); *Before and After Roe v. Wade: Voices That Shaped the Debate Before the Supreme Court Decision*, Reva Siegel and Linda Greenhouse ed. (New Haven: Yale University Press, 2010).

²⁵ On the reasons for the polarization of debate after *Roe*, see Mary Ziegler, *Abortion and the Law in America: A Legal History, Roe v. Wade to the Present* (New York: Cambridge University Press, 2020); Mary Ziegler, *After Roe: The Lost History of the Abortion Debate* (Cambridge, MA: Harvard University Press, 2015); Caron, *Who Chooses?*; Gene Burns, *The Moral Veto: Framing Contraception, Abortion, and Cultural Pluralism in America* (New York: Cambridge University Press, 2005).

²⁶ See Laura Kalman, *The Long Reach of the 1960s: LBJ, Nixon, and the Making of the Contemporary Supreme Court* (New York: Oxford University Press, 2017); Brief for the American Society for Legal History et al., *Dobbs v. Jackson Women's Health Services* (2022) (No. 19-1392).

I am not questioning the sincerity of the justices, and I am sympathetic to the reasons the Court worries about unrestrained judging: the justices are unelected and hold lifetime appointments. But history does nothing to restrain the Court in *Dobbs*. The justices pick and choose when to pay attention to professional historians — and decide whose history does and does not matter. This gives the conservative justices almost unbounded discretion to eliminate the liberties that they don't like while dramatically expanding the rights they favor.

Roe v. Wade had stood as precedent for fifty years. It was controversial, as most Supreme Court decisions on major cultural issues are, and as *Dobbs* has already proven to be. But the destruction of a constitutional right is a momentous thing. If the Court is free to undo other rights based on the kind of evidence and analysis we see in *Dobbs*, we have every reason to ask whether it is the beginning of a revolution in our constitutional law and our democracy, not the end.

A Post-*Dobbs* Debate

The Court suggests that the abortion debate may be more peaceful now that *Roe* is no more. Anyone familiar with the history of the American abortion debate would find this prediction to be at best astonishingly naïve.

While polling on abortion is complicated, most Americans did not want *Roe* overturned, and there is relatively little support for laws criminalizing abortion at fertilization. *Dobbs* will not persuade many Americans that abortion should be a crime or end activism for reproductive rights or justice.²⁷

Nor will *Dobbs* satisfy Americans opposed to abortion. The American pro-life movement certainly wanted *Roe v. Wade* to be overturned, but those opposed to abortion see not as an issue of states' rights but as a profound violation of human rights. Unsurprisingly, then, antiabortion activists are not content to let progressive states protect abortion access while conservative states criminalize it.²⁸

Some in the movement have laid the groundwork for a strategy in the Supreme Court centered on the idea of personhood—the argument that the word “person” in the Fourteenth Amendment applies before and after birth—and that as a result, abortion is unconstitutional. Republican lawmakers and pro-life leaders

²⁷ See Hannah Fingerhut, “Americans Want Government to Prioritize Abortion, Women's Rights, After *Roe v. Wade* Ruling According to Poll,” *Associated Press*, July 1, 2022, <https://www.pbs.org/newshour/nation/americans-want-government-to-prioritize-abortion-womens-rights-after-roe-v-wade-ruling-according-to-poll>, accessed July 5, 2022; “NPR/PBS NewsHour/Marist Poll: The Overturning of *Roe v. Wade*,” June 2022 (June 2022), <https://maristpoll.marist.edu/polls/npr-pbs-newshour-marist-national-poll-the-overturning-of-roe-v-wade-june-2022/>, accessed July 5, 2022.

²⁸ On the vision of the movement, see Williams, *Defenders of the Unborn*, 8–15; Ziegler, *After Roe*, 10–32.

have vowed to pass a federal law criminalizing abortion should the Republican Party gain control of Congress and the White House by 2025. And states are now working on legislation that will intensify conflicts around abortion.²⁹

Several key organizations have proposed laws designed to prevent Americans from traveling to other states to seek abortion. Such laws, as Justice Kavanaugh recognized in his concurring opinion, may violate the constitutional right to travel.³⁰ For this reason, activists in Texas, Arkansas, and other states are considering the use of SB-8-style laws—statutes that would block the state from enforcing a statute and allow citizens to sue out-of-state doctors or those helping people seeking abortion. This strategy may prevent anyone from meaningfully challenging an unconstitutional violation of the right to travel in federal court.³¹

Efforts to affect out-of-state conduct will likely sow legal chaos. States have rarely tried to apply their civil or criminal laws extraterritorially—especially since the nineteenth century. Such a strategy raises difficult questions about choice of law—does the state from which a patient travels get to apply its law, or is it the state where the abortion occurs? Would a law seeking to bar travel or regulate out-of-state conduct violate the Constitution? Americans across the country will grapple with tremendous legal uncertainty, and the polarization that the *Dobbs* Court so bemoans will likely deepen.

A post-*Roe* America may also see an erosion of the freedom of speech. Leading pro-life groups, together with some lawmakers, have proposed expansive definitions of aiding and abetting abortion that sweep in speech about how medication abortion works, abortion referrals, and any speech “encouraging abortion.”³²

Conservative lawmakers have vowed not to punish women or other pregnant people for abortion. Currently, this is a majority position within leading antiabortion groups.³³ But the push to punish women has recently gained

²⁹ For an example of a brief using this strategy, see Brief Amici Curiae of Scholars of Jurisprudence Robert George and John Finnis, *Dobbs v. Jackson Women’s Health Organization* (2022) (No. 19-1392). On a possible statute banning abortion, see Caroline Kitchener, “The Next Frontier for the Antiabortion Movement: A Nationwide Ban,” *Washington Post*, May 2, 2022, <https://www.washingtonpost.com/nation/2022/05/02/abortion-ban-ro-supreme-court-mississippi/>, accessed July 5, 2022.

³⁰ See *Dobbs*, op. cit. at 10 (Kavanaugh, J., concurring).

³¹ See Caroline Kitchener, “Antiabortion Lawmakers Want to Block Patients from Crossing State Lines,” *Washington Post*, June 29, 2022, <https://www.washingtonpost.com/politics/2022/06/29/abortion-state-lines/>, accessed July 5, 2022.

³² James Bopp Jr. to National Right to Life Committee and Whom It May Concern Re: NRLC Post-*Roe* Model Abortion Law (June 15, 2022), <https://www.nrlc.org/wp-content/uploads/NRLC-Post-Roe-Model-Abortion-Law-FINAL-1.pdf>, accessed July 5, 2022.

³³ See Veronica Stracqualursi, “Leading Anti-Abortion Groups Urge Lawmakers Not to Pass Bills Criminalizing Women for Abortions,” *CNN*, May 12, 2022,

momentum. So-called abortion abolitionists have developed model legislation and lobbied lawmakers in conservative states across the country to consider punishing women.³⁴ Even when they are not successful, abolitionists encourage lawmakers to pass more extreme laws to defuse criticism from the right.

And abolitionists are more vocal because of the challenges of regulating abortion medication. A majority of Americans having abortions now use pills: mifepristone and misoprostol.³⁵ Nonprofits in Europe and Canada will mail these pills to patients even in countries where abortion is illegal. To date, lawmakers in conservative states have strategized about how to punish doctors in progressive states (or other nations) that make available abortion pills. But as abortion abolitionists likely recognize, it will be much simpler for states to punish their own residents for having abortions than it will be to target those who reside elsewhere. The pressure to punish those who have abortions will grow.

Even without formal punishment for those seeking abortion, states will have to find ways to enforce punitive laws. They may pursue sweeping strategies of digital surveillance: gathering data on anyone of reproductive age from Google searches, apps, and GPS tracking. They may enact bounty schemes, like Texas's SB8, to encourage neighbors, family, and friends to report one another.

Most centrally, after *Dobbs*, there are real concerns about the safety of all pregnant patients. It is not clear that new abortion laws will significantly change the number of abortions that occur annually in the United States. Nations with harsh abortion laws, like Ecuador³⁶ or Kenya,³⁷ have extremely high rates of abortion. Between 2017 and 2020, the abortion rate in the United States increased for the first time in thirty years—and this notwithstanding a new wave of restrictions on abortion.³⁸

<https://www.cnn.com/2022/05/12/politics/anti-abortion-groups-letter-criminalizing-women/index.html>, accessed July 5, 2022.

³⁴ Elizabeth Dias, "Inside the Extreme Effort to Punish Women for Abortion," *New York Times*, July 1, 2022, <https://www.nytimes.com/2022/07/01/us/abortion-abolitionists.html>, accessed July 5, 2022.

³⁵ Rachel K. Jones et al., "Medication Abortion Now Accounts for More than Half of All U.S. Abortions," *Guttmacher Institute Policy Analysis*, February 2022, <https://www.guttmacher.org/article/2022/02/medication-abortion-now-accounts-more-half-all-us-abortions>, accessed July 5, 2022.

³⁶ See Esteban Ortiz-Prado et al., "Abortion: An Increasing Public Health Concern: A Ten-Year Population Based Analysis," *Pragmatic Obstetric Resolution* 8 (2017): 129-135.

³⁷ Shukri F. Mohamed et al., "The Estimated Incidence of Abortion in Kenya: A Cross-Sectional Study," *BMC Pregnancy and Childbirth* 15 (2015), <https://doi.org/10.1186/s12884-015-0621-1>, accessed July 5, 2022.

³⁸ Rachel K. Jones et al., "Long-Term Abortion Decline in US Abortions Reverses," *Guttmacher Institute Policy Analysis*, June 2022, <https://www.guttmacher.org/article/2022/06/long-term-decline-us-abortion-reverses-showing-rising-need-abortion-supreme-court>, accessed July 5, 2022.

Access to contraception, together with steps to reduce poverty, limit discrimination against pregnant and parenting workers, and address the effects of racism, may encourage some Americans who would otherwise seek abortion to carry pregnancies to term. Additional restrictions on abortion are less likely to dissuade people who have already cleared significant hurdles. There is no reason to think that harsh criminal penalties will have more than a marginal effect without far more dramatic moves to support pregnant patients and new parents.

But new criminal laws will likely come at a steep price in terms of mortality and morbidity. The United States already has a dismal maternal mortality rate, more than twice as high as the one seen in the U.K., Canada, or France. The numbers are especially shocking for people of color: the maternal mortality rate for Black women was three times that of white or Hispanic women in 2020.³⁹ States with the highest rates of maternal mortality tend to have among the harshest laws on abortion.⁴⁰

Before 1973, most criminal abortion laws prescribed relatively minor penalties for those performing abortions (five years was a relatively common sentence), and prosecutors rarely charged anyone for having an abortion.⁴¹ Today, states with trigger laws and other criminal abortion statutes have often mandated much harsher penalties—up to life in prison.⁴² Many abortion laws have no exceptions for rape and incest and allow for access only when a patient's life is at risk.

Even in the case of a life-threatening emergency, we have reason to fear that some doctors will be reluctant to provide care—including when patients have incomplete miscarriages or ectopic pregnancies. In some of these scenarios, doctors may still be able to detect fetal cardiac activity, even if a miscarriage has already occurred. Doctors who are uncertain about the scope of emergency exceptions will be aware of the potential penalties they face for making the wrong guess. In other countries with similar laws, there have been serious problems with maternal mortality and morbidity associated with criminal abortion laws. We should expect the same here.

³⁹ Donna Hoyert, "Maternal Mortality in the United States, 2020," Centers for Disease Control, accessed July 5, 2022, <https://www.cdc.gov/nchs/data/hestat/maternal-mortality/2020/maternal-mortality-rates-2020.htm>, accessed July 5, 2022.

⁴⁰ "Maternal Mortality By State, 2022," *World Population Review*, <https://worldpopulationreview.com/state-rankings/maternal-mortality-rate-by-state>, accessed July 5, 2022.

⁴¹ See Reagan, *When Abortion Was a Crime*; Paul Linton, "Abortion Convictions Before *Roe v. Wade*," *Issues in Law and Medicine* 36 (2021): 77-110.

⁴² Megan Messerly and Alice Miranda Ollstein, "Abortion Bans and Penalties Would Vary Widely by State," *Politico*, May 6, 2022, <https://www.politico.com/news/2022/05/06/potential-abortion-bans-and-penalties-by-state-00030572>, accessed July 5, 2022.

Congress has steps available to address the coming storm on abortion. Some, like passage of the federal Women's Health Protection Act, have failed to progress. There are other issues Congress could tackle—including the threat of digital surveillance or the treatment of pregnant workers. I hope that if nothing else, this hearing leads to a conversation about how to make sure that more Americans who are pregnant survive that pregnancy—and that Americans of reproductive age enjoy control over their digital data.

As an historian, I do not know what the future holds. What is clear to me is that *Dobbs* will lead to more conflict about abortion, not less. The world that *Dobbs* has made will not satisfy pro-lifers, who will be disappointed that so many Americans still manage to access abortion, and who are intent on securing recognition of fetal rights. That world will be a more dangerous place to be pregnant, a place where more people will go to prison at a time when both Republicans and Democrats have worried—and rightly, in my view—about mass incarceration. And it will be one in which the Court commits to judicial restraint while bending history to make rapid, era-defining changes to our constitutional rights.

