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Hearing of the House Committee on the Judiciary  
“Revoking Your Rights: The Ongoing Crisis in Abortion Care Access”

May 18, 2022, 10:00 AM  
Rayburn House Office Building, Room 2141

Dear Chair Nadler, Ranking Member Jordan, and Members of the Committee:

I am privileged to testify before this Committee on the leaked draft *Dobbs* opinion and the state of constitutional law as it relates to abortion. I serve as President & CEO of Americans United for Life (AUL), America's original and most active pro-life legal advocacy organization. Founded in 1971, two years before the Supreme Court's decision in *Roe v. Wade*, AUL has dedicated over 50 years to advocating for comprehensive legal protections for human life from fertilization to natural death. AUL attorneys are highly regarded experts on the Constitution and legal issues touching on abortion and are often consulted on various bills, amendments, and ongoing litigation across the country. For five decades, Americans United for Life's staff, supporters, and partners have worked tirelessly to advance the human right to life in culture, law, and policy.

Thank you for the opportunity to refute the assumptions made in the title of this hearing. The U.S. Constitution never included a "right to abortion," nor has such a right operated without limits in the five decades since seven Justices willed it into existence. Demand for abortions has steadily fallen over the past three decades, and many doctors do not wish to use their medical training for life-ending, violent procedures.

At the same time, this conversation seems premature. We do not yet have a decision in the *Dobbs* case, nor do we know how the Court will rule. This Committee risks the appearance of exerting improper influence over our judiciary by critiquing an unfinished draft the public was not meant to see. Some of the response to the leaked opinion, such as calls for a "summer of rage," appear to even threaten certain judges if they do not decide this case in a way that aligns with some Members' political views.<sup>1</sup>

**In 1973, the Supreme Court overrode the will of the American people when unelected justices imposed a uniform pro-abortion policy.**

Upon hearing of the leaked *Dobbs* opinion, President Biden remarked: "I mean, so the idea that we're going to make a judgment that is going to say that no one can make the judgment to choose to abort a child based on a decision by the Supreme Court, I think, goes way overboard."<sup>2</sup> He apparently took issue with the idea that the

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<sup>1</sup> Members of this Committee attended "Bans off our Bodies" rallies this past weekend, organized by activists calling for a "summer of rage" if *Roe* and *Casey* are overturned. News 12 Staff, '*Bans off our Bodies*' are preparing for 'summer of rage,' news 12 THE BRONX (May 14, 2022), <https://bronx.news12.com/bans-off-our-bodies-rally-taking-place-today-in-prospect-park-in-tarrytown;> @RepJerryNadler, TWITTER (May 14, 2022, 1:36 PM), <https://twitter.com/RepJerryNadler/status/1525530471039393793?s=20&t=-7-X8dxB8R8j83CFwPqaZg>

<sup>2</sup> Speeches and Remarks, The White House (May 3, 2022), <https://www.whitehouse.gov/briefing-room/speeches-remarks/2022/05/03/remarks-by-president-biden-before-air-force-one-departure-15/>

Supreme Court would upend people’s expectations of the law in this decision. But as Yale Law School Professor Akhil Amar wrote in the Wall Street Journal, that’s exactly what the Court did in *Roe*.<sup>3</sup> With the stroke of a pen, the Supreme Court “invalidated the laws of at least 49—perhaps all 50—states.”<sup>4</sup> According to Justice Alito, “Until the latter part of the 20th century, there was no support in American law for a constitutional right to obtain an abortion. Zero. None. No state constitutional provision had recognized such a right...Not only was there no support for such a constitutional right until shortly before *Roe*, but abortion had long been a *crime* in every single State.”<sup>5</sup>

In his draft opinion, Justice Alito includes thirty-one pages of appendices<sup>6</sup> listing every state (and the District of Columbia) criminal abortion law, all of which were undone to some degree by the *Roe* decision because none of them went as far as the Court in 1973. These laws were enacted through the legislative process and amended when needed. They were drafted and enforced to focus on the abortionist, not the woman seeking the abortion, as lawmakers “recognized that male coercion, abandonment or indifference has been at the center of most abortions.”<sup>7</sup>

Many of the laws referenced in Justice Alito’s draft have been repealed or amended in the intervening years, meaning that even if *Roe* and *Casey* are overturned in *Dobbs*, just Arizona, Michigan, and Wisconsin might be solely governed by a “pre-*Roe* law.”<sup>8</sup> For the remaining states seeking to protect life before viability, the legislature has enacted additional protections or the people have voted them in by ballot initiative.<sup>9</sup> In this sense, we would not “go back” as activists suggest, since half the states will continue to permit abortions as they currently do—ranging from 20 weeks’ gestation plus limited exceptions to elective abortion throughout pregnancy.

The democratic process of determining which policies would govern was well under way in the 1960s and 70s. The Court’s sweeping intervention, which was never rooted in any actual provision of the Constitution, was later critiqued by Justice Ruth

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<sup>3</sup> Akhil Reed Amar, *The End of Roe v. Wade*, Wall Street Journal (online) (May 14, 2022), <https://www.wsj.com/articles/the-end-of-roe-v-wade-11652453609>

<sup>4</sup> *Id.*

<sup>5</sup> Draft Opinion at 15, *Dobbs v. Jackson Women’s Health Org.*, No. 19-1392 (Feb. 10, 2022), available at <https://s3.documentcloud.org/documents/21835435/scotus-initial-draft.pdf> (emphasis in original).

<sup>6</sup> *Id.* at 68–98.

<sup>7</sup> Clarke Forsythe, *Op-Ed: Trump doesn’t get it; Abortionists are criminals, not women*, LA TIMES (online) (Mar. 31, 2016), <https://www.latimes.com/opinion/op-ed/la-oe-0401-forsythe-pro-life-abortion-prosecution-20160331-story.html>

<sup>8</sup> Natalie M. Hejran, J.D., *Is Your State Ready for Roe to Go?*, Ams. United for Life (Mar. 16, 2022), <https://aul.org/2022/03/16/is-your-state-ready-for-roe-to-go/>

<sup>9</sup> *Id.*

Bader Ginsburg, who said: “Doctrinal limbs too swiftly shaped, experience teaches, may prove unstable. The most prominent example in recent decades is *Roe v. Wade*.”<sup>10</sup>

**Justice Alito’s leaked draft confirms what we have long known—that *Roe* and its progeny never created an unfettered “right to abortion.”**

From its inception in *Roe v. Wade*, the abortion “right” has been explicitly qualified. While the Court established a constitutional “right” to abortion, it simultaneously expressed that “[t]he State has a legitimate interest in seeing to it that abortion, like any other medical procedure, is performed under circumstances that [e]nsure maximum safety for the patient.”<sup>11</sup> Affirming what is considered the essential holding of *Roe*, the Supreme Court in *Planned Parenthood of Southeastern Pennsylvania v. Casey* asserted that “it is a constitutional liberty of the woman to have some freedom to terminate her pregnancy . . . . The woman’s liberty is not so unlimited, however, that from the outset [of pregnancy], the State cannot show its concern.”<sup>12</sup>

Over the past five decades, the Supreme Court has, at various points, yielded back authority to the States, recognizing their many important interests surrounding abortion. As recently as 2020, the Supreme Court reverted to the *Casey* standard, a test that permits more government regulation, after several years of *Hellerstedt*’s cost-benefit analysis that favored abortion providers.<sup>13</sup>

In the leaked draft opinion, Justice Alito writes:

*Roe* was egregiously wrong from the start. Its reasoning was exceptionally weak, and the decision has had damaging consequences. And far from bringing about a national settlement of the abortion issue, *Roe* and *Casey* have enflamed debate and deepened division. It is time to heed the Constitution and return the issue of abortion to the people’s elected representatives.<sup>14</sup>

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<sup>10</sup> Frederic J. Frommer, *Justice Ginsburg thought Roe was the wrong case to settle abortion issue*, THE WASHINGTON POST (online) (May 6, 2022), <https://www.washingtonpost.com/history/2022/05/06/ruth-bader-ginsburg-roe-wade/>

<sup>11</sup> *Roe v. Wade*, 410 U.S. 113, 150 (1973).

<sup>12</sup> 505 U.S. 833, 869 (1992).

<sup>13</sup> *June Med. Servs. L.L.C. v. Russo*, 140 S. Ct. 2103, 2182 (2020) (Kavanaugh, J., dissenting) (“Today, five Members of the Court reject the *Whole Woman’s Health* cost-benefit standard”); see *Whole Woman’s Health v. Hellerstedt*, 136 S. Ct. 2292 (2016).

<sup>14</sup> Draft Opinion, *supra* note 5, at 6 (citing *Casey*, 505 U.S. at 979 (Scalia, J., concurring in the judgment in part and dissenting in part) (“The permissibility of abortion, and the limitations, upon it, are to be resolved like most important questions in our democracy: by citizens trying to persuade one another and then voting.”))

While evaluating *Roe* under the factors of stare decisis, Justice Alito finds:

*Roe* was on a collision course with the Constitution from the day it was decided, and *Casey* perpetuated its errors, and the errors do not concern some arcane corner of the law of little importance to the American people. Rather, wielding nothing but “raw judicial power,” the Court usurped the power to address a question of profound moral and social importance that the Constitution unequivocally leaves for the people.<sup>15</sup>

The “right” to abortion in this country has never been unqualified or unregulated. It was never grounded in our constitution’s text, history, or understanding of ordered liberty. Many millions of Americans hope that the Court modifies abortion jurisprudence once again, this time to return the issue to the American people.

**If the Supreme Court overturns *Roe* and *Casey* later this year, it will right an egregious wrong and return lawmaking to the people through their elected representatives.**

The Court can—and should—take the opportunity to recognize the unfounded and still-unsettled nature of *Roe*<sup>16</sup> and *Casey*<sup>17</sup> and return lawmaking to legislators. Indeed, as Americans United for Life outlined in one of the two briefs we filed in *Dobbs*:

The standard of review for abortion regulations has bounced around, case by case, from *Roe* to *June Medical [Services L.L.C. v. Russo]*.<sup>18</sup> Aside from the constantly shifting standard of review, *Roe* is radically unsettled for additional reasons. It has not received the acquiescence of Justices or lower court judges. *Roe* was wrongly decided and poorly reasoned. Numerous adjudicative errors during the original deliberations—especially the absence of any evidentiary record—have contributed to making *Roe* unworkable. It has been the subject of persistent judicial and scholarly criticism. There is a constant search for a constitutional rationale for *Roe*, and the Court has yet to give a

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<sup>15</sup> *Id.* at 40 (citation omitted).

<sup>16</sup> 410 U.S. 113.

<sup>17</sup> 505 U.S. 833.

<sup>18</sup> Brief of Americans United for Life as *Amicus Curiae* in Support of Petitioner at 2, *Dobbs v. Jackson Women’s Health Org.*, No. 19-1392 (July 29, 2021) (citing *June Med. Servs.*, 140 S. Ct. at 2182 (Kavanaugh, J., dissenting) (“Today, five Members of the Court reject the *Whole Woman’s Health* cost benefit standard.”); *Hellerstedt*, 136 S. Ct. at 2321 (Thomas, J., dissenting); *Casey*, 505 U.S. at 999 (Scalia, J., concurring in the judgment in part and dissenting in part) (“Has *Roe* succeeded in producing a settled body of law?”); *Akron v. Akron Ctr. for Reprod. Health*, 462 U.S. 416, 461 & n.8 (1983) (O’Connor, J., dissenting); *Carey v. Population Servs. Int’l.*, 431 U.S. 678, 704 (1977) (Powell, J., concurring in part and concurring in the judgment)).

reasoned justification for the viability rule.<sup>19</sup> *Casey* is unsettled by its failure to ground the abortion right in the Constitution, by an ambiguous standard of review that is unworkable, by conflicting precedents that have “defied consistent application” by the lower courts, and by persistent judicial and scholarly criticism.<sup>20</sup> Politics aside, reconsidering *Roe* and *Casey* does not involve uprooting a stable, settled feature of the legal landscape. Because they are radically unsettled, *Roe* and *Casey* contradict the stare decisis values of consistency, dependability, and predictability and are entitled to minimal stare decisis respect.<sup>21</sup>

The viability rule was dictum in *Roe*, since neither Texas’s nor Georgia’s statutes were tied to viability.<sup>22</sup> “Neither Congress nor state legislatures are bound by language unnecessary for a decision, however strong,”<sup>23</sup> yet courts have held firm to a viability rule that does not allow the state to introduce evidence of a compelling interest that might outweigh the viability line.<sup>24</sup>

At present, the government’s ability to prohibit abortion before viability hinges on the litigiousness of those who oppose the law. No amount of scientific evidence or public outcry can move a judge who feels he or she is bound by the viability line of *Casey*. In practice, the viability rule functions more as a “standard, except when it isn’t.” One-third of the states have pain-capable laws (20 weeks’ gestation) currently in effect because they have not been challenged.<sup>25</sup> Perhaps this is because opponents of these laws fear the Court may have revisited *Casey* sooner.

Lower courts are split on whether laws prohibiting discriminatory abortions on the basis of prenatal diagnosis of Down syndrome or other fetal anomalies run afoul of the viability line, meaning that about half of such laws are enjoined and half are in effect.<sup>26</sup> Again, the viability standard creates a messy, unequal outcome and hamstring states from acting upon their well-established compelling interest in preventing discrimination.

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<sup>19</sup> *Id.* (citing Randy Beck, Gonzales, *Casey and the Viability Rule*, 103 Nw. U. L. Rev. 249 (2009)).

<sup>20</sup> *Id.* at 3 (citing *Payne v. Tennessee*, 501 U.S. 808, 828–830 (1991)).

<sup>21</sup> *Id.*

<sup>22</sup> Parts of an opinion are dicta if they are “not essential to [the court’s] disposition of any of the issues contested.” *Cent. Green Co. v. United States*, 531 U.S. 425, 431 (2001).

<sup>23</sup> Henry J. Friendly, *Time and Tide in the Supreme Court*, 2 Conn. L. Rev. 213, 216 (1968).

<sup>24</sup> Brief *Amici Curiae* of 228 Members of Congress in Support of Petitioners at 6–7, *Dobbs v. Jackson Women’s Health Org.*, No. 19-1392 (July 29, 2021).

<sup>25</sup> *Id.* at 25 (citations omitted).

<sup>26</sup> *Compare Preterm-Cleveland v. McCloud*, 994 F.3d 512, 516–18 (6th Cir. 2021) with *Little Rock Fam. Plan. Servs. v. Rutledge*, 984 F.3d 682, 690 (8th Cir. 2021).

Indeed, the fact that both chambers of this body have held votes on the “Women’s Health Protection Acts of 2021 and 2022” (H.R. 3755 and S. 1975/S. 4132) suggests that leadership in both chambers recognizes an appropriate role for lawmakers in determining abortion policy.

**The so-called Women’s Health Protection Act would trample any pretense of federalism, effectively banning all state abortion regulations and forcing every state to have abortion on demand throughout pregnancy.**

During this Congress, the “Women’s Health Protection Act” has been voted on three times. It has failed twice in the Senate because it does everything but protect women’s health. It would impede the States’ legitimate interest in protecting life, attempt to negate currently existing commonsense protections for women’s health, and prohibit any such protections from being enacted in the future.

The Act would significantly limit the States’ ability to enact desperately needed public policy that furthers the Supreme Court-sanctioned goals of protecting the health and safety of women and girls and valuing human life. By banning virtually all state abortion laws before viability, the Act would prevent basic regulation and oversight crucial to keeping women safe.

West Virginia Democrat Joe Manchin opposed the WHPA on May 11, 2022, because it is “not *Roe v. Wade* codification. It is an expansion. It wipes 500 state laws off the books, it expands abortion . . . .”<sup>27</sup>

Here are some of the hundreds of health and safety laws that could be invalidated by WHPA:

- **Gestational age limits:** 44 states<sup>28</sup> have laws that restrict elective abortions at or before “viability” based on women’s health and the interests of the child.<sup>29</sup>
- **Fetal pain:** Currently 18 of those states limit abortion to 20 weeks’ gestation based on scientific evidence that the baby can feel pain.<sup>30</sup>

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<sup>27</sup> Melissa Quinn, *Senate fails to advance bill protecting abortion rights ahead of Supreme Court decision*, CBS News (online) (May 11, 2022), <https://www.cbsnews.com/news/senate-abortion-bill-vote-womens-health-protection-act-supreme-court-draft-opinion-roe-v-wade/>

<sup>28</sup> Most recently, Montana and New Hampshire enacted laws in 2021 limiting abortion based on the child’s ability to feel pain (H.B. 136, 67th Leg., Reg. Sess. (Mont. 2021)) and viability outside the womb (H.B. 2, 167th Gen. Ct., Reg. Sess. (N.H. 2021)).

<sup>29</sup> Michelle Ye Hee Lee, *Is the United States One of Seven Countries That “Allow Elective Abortions After 20 Weeks of Pregnancy?”*, THE WASHINGTON POST (Oct. 9, 2017) <https://www.washingtonpost.com/news/fact-checker/wp/2017/10/09/is-the-united-states-one-of-seven-countries-that-allow-elective-abortions-after-20-weeks-of-pregnancy/>.

<sup>30</sup> Brief *Amici Curiae* of 228 Members of Congress in Support of Petitioners, *supra* note 25.

- **Discrimination:** Every state would be prohibited from preventing discriminatory abortions on the basis of race, sex, or genetic anomaly such as Down syndrome.
- **Informed consent:** Most states have enforceable informed consent and reflection period laws.
  - 28 states require written materials be either given or offered.<sup>31</sup>
  - 25 states require specific information be given on the abortion procedure.<sup>32</sup>
  - 31 states require the woman be informed of the probable gestational age of her fetus.<sup>33</sup>
- **Reflection periods:** 27 states have a reflection period<sup>34</sup> like Pennsylvania’s 24-hour law upheld by the Supreme Court in *Casey*.<sup>35</sup>
- **Prohibiting telemedicine abortion:** 11 states explicitly prohibit abortions via telemedicine.<sup>36</sup> And around twenty states have laws requiring that abortion-inducing drugs be prescribed and supplied directly from the physician in a clinical setting because of the increased risk of hemorrhage and sepsis.<sup>37</sup>

According to Section 2(a)(9) of the WHPA, nearly 500 state laws regulating abortion have been passed since 2011. In 2021, at least 22 states enacted restrictions on abortion.<sup>38</sup> The WHPA would invalidate most of them. The argument that abortion is a “right” and therefore must be enshrined in federal law means states would have

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<sup>31</sup> These states are Alabama, Alaska, Arizona, Arkansas, Florida, Georgia, Idaho, Indiana, Iowa, Kansas, Kentucky, Louisiana, Michigan, Minnesota, Mississippi, Missouri, Nebraska, North Carolina, North Dakota, Ohio, Oklahoma, Pennsylvania, South Carolina, South Dakota, Texas, Utah, West Virginia, and Wisconsin.

<sup>32</sup> These states are Alabama, Alaska, Arizona, Arkansas, Florida, Idaho, Indiana, Iowa, Kansas, Kentucky, Louisiana, Michigan, Mississippi, Missouri, North Carolina, Ohio, Oklahoma, Pennsylvania, South Carolina, Utah, and Wisconsin.

<sup>33</sup> These states are Alabama, Alaska, Arizona, Arkansas, Connecticut, Florida, Georgia, Indiana, Kansas, Kentucky, Louisiana, Maine, Michigan, Minnesota, Mississippi, Missouri, Nebraska, Nevada, North Carolina, North Dakota, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, West Virginia, and Wisconsin.

<sup>34</sup> These states are Alabama, Arizona, Arkansas, Florida, Georgia, Idaho, Indiana, Kansas, Kentucky, Louisiana, Michigan, Minnesota, Mississippi, Missouri, Nebraska, North Carolina, North Dakota, Ohio, Oklahoma, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, West Virginia, and Wisconsin.

<sup>35</sup> *Casey*, 505 U.S. at 844.

<sup>36</sup> These states are Arizona, Idaho, Kentucky, Montana, Ohio, Oklahoma, South Dakota, Tennessee, Texas, West Virginia, and Wisconsin.

<sup>37</sup> Amanda Stirone, *State Regulation of Telemedicine Abortion and Court Challenges to Those Regulations*, 24 On Point (July 2018), <https://s27589.pcdn.co/wp-content/uploads/2018/07/State-Regulation-of-Telemedicine-Abortion-and-Court-Challenges-to-Those-Regulations.pdf>.

<sup>38</sup> Ams. United for Life, *State Legislative Sessions Report (2021)* <https://aul.org/2021/10/27/auls-2021-state-legislative-sessions-report/>.



virtually no say in enacting abortion laws, even though health and safety standards are generally set and regulated at the state level. This bill pushes federal power over the power given to the states.

As if stripping many robust protections from existing state law is not enough, the WHPA also prohibits regulations of abortion providers that could be considered, in the loosest possible terms, a restriction on an individual from having an abortion. The Act thereby engenders a regulatory regime that is akin to the one in Pennsylvania that allowed the infamous abortion provider Kermit Gosnell to operate his “House of Horrors” for many years. Gosnell, who was ultimately convicted of involuntary manslaughter, was able to provide unsafe, unsanitary, and deadly abortions for many years because, according to the Grand Jury report, the Pennsylvania Department of Health thought it could not inspect or regulate abortion clinics because that would interfere with access to abortion.<sup>39</sup> That same Grand Jury Report revealed a pattern of racism and disparate treatment against BIPOC patients, intentionally treating them in “dirty rooms” and medicating them far more dangerously.<sup>40</sup> Ulrich Klopfer performed tens of thousands of abortions in northern Indiana before finally losing his medical license for violating multiple state laws including not reporting suspected abuse of a minor after performing an abortion on a 13 year old girl.<sup>41</sup> By lowering professional accountability, abortion providers will be free to operate without regulation and oversight, to the detriment of women and young girls.<sup>42</sup>

The outcome of enacting this radical regime of abortion on demand across the country would be truly devastating. Communities would be unable to act if a Gosnell or a Klopfer set up shop. States would be unable to protect women from bad doctors and unsanitary clinics. Emergency protections and basic informed consent would be stripped away. Women suffering complications would be abandoned, reliant only on emergency rooms with no continuity of care. And complications would increase as the procedure is de-medicalized by doctors who now say they don’t even need to see a patient in person or independently verify pregnancy before prescribing chemical abortion pills.<sup>43</sup>

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<sup>39</sup> See, e.g., Conor Friedersdorf, *Why Dr. Kermit Gosnell’s Trial Should Be a Front-Page Story*, ATLANTIC (Apr. 12, 2013), <https://www.theatlantic.com/national/archive/2013/04/why-dr-kermit-gosnells-trial-should-be-a-front-page-story/274944/> (discussing the case of Kermit Gosnell).

<sup>40</sup> R. Seth Williams, Report of the Grand Jury (Jan. 14, 2011), [https://www.supremecourt.gov/opinions/URLs\\_Cited/OT2015/15-274/15-274-1.pdf](https://www.supremecourt.gov/opinions/URLs_Cited/OT2015/15-274/15-274-1.pdf).

<sup>41</sup> Curtis T. Hill, Jr., Attorney General, Final Report on the Investigation of Dr. Ulrich Klopfer (Dec. 28, 2020), <https://www.in.gov/attorneygeneral/files/KLOPFER-Final-Report-12-28.pdf>.

<sup>42</sup> See, e.g., Ams. United for Life, UNSAFE (3d ed. 2021), (documenting unsafe practices of abortion providers and harm to women’s health and safety).

<sup>43</sup> Elizabeth G. Raymond et al., *No-Test Medication Abortion: A Sample Protocol for Increasing Access During a Pandemic and Beyond*, 101 Contraception 361 (June 2020).

Removing every medical component of the abortion procedure in the name of unfettered “access” is not women’s health—it’s just abortion.

**The abortion rate has been falling for three decades. Americans want options, not abortions.**

In the past three decades, the abortion rate has steadily fallen, dropping below its pre-*Roe* rate.<sup>44</sup> The current abortion rate is nearly half what it was at the high point in the late 1980s.<sup>45</sup> Increasingly women reject abortion, recognizing the humanity of their unborn child and taking advantage of the resources available to help them parent or adopt.

Pregnancy resource centers play a central role in empowering women to choose life. Many secular and faith-based nonprofits across this country stand ready to assist women, providing free resources, counseling, and material support.

According to CareNet and the Charlotte Lozier Institute, over 2,700 pregnancy centers served 1,848,376 people in the United States in 2019.<sup>46</sup> This included:

- 486,213 free ultrasounds and counseling
- 731,884 free pregnancy tests
- 160,201 free STI/STD tests and counseling
- 1,290,079 free packs of diapers

When women and families are offered other options, they take them. The industry is failing because demand has dropped.

In *Planned Parenthood v. Casey*, a plurality of the Court relied on the mistaken belief that people have made choices about their intimate lives with the understanding that abortion exists as a fallback if contraception fails, and that to remove that option would cause grave harm.<sup>47</sup> But five decades of Court-sanctioned

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<sup>44</sup> Katherine Kortsmitt et al., *Abortion Surveillance—United States, 2018*, 69 *Surveillance Summaries* 1 (Nov. 27, 2020), <https://www.cdc.gov/mmwr/volumes/69/ss/ss6907a1.htm>.

<sup>45</sup> *Id.*

<sup>46</sup> Charlotte Lozier Institute, *Pregnancy Centers Stand the Test of Time* (2020), [https://lozierinstitute.org/wp-content/uploads/2020/10/Pregnancy-Center-Report-2020\\_FINAL.pdf](https://lozierinstitute.org/wp-content/uploads/2020/10/Pregnancy-Center-Report-2020_FINAL.pdf)

<sup>47</sup> 505 U.S. at 856 (1992) (“To eliminate the issue of reliance that easily, however, one would need to limit cognizable reliance to specific instances of sexual activity. But to do this would be simply to refuse to face the fact that, for two decades of economic and social developments, people have organized intimate relationships and made choices that define their views of themselves and their places in society, in reliance on the availability of abortion in the event that contraception should fail. The ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives. The Constitution serves human values, and while the effect of reliance on *Roe* cannot be exactly measured, neither can the certain cost of overruling *Roe* for people who have ordered their thinking and living around that case be dismissed.” (citation omitted)).

abortion merely show that “choice” encourages employers, sexual partners, and even women themselves to serve a business-oriented, profit-driven market over their families or their own self-interest.<sup>48</sup> In her new book, pro-life feminist Erika Bachiochi quotes pro-choice law professor Deborah Dinner’s condemnation of so-called “choice” as she points out, “The discourse of reproductive choice continues to legitimate workplace structures modeled on the masculine ideal [with no caregiving responsibilities] as well as social policies that provide inadequate public support for families.”<sup>49</sup>

How often do pro-choice politicians prioritize abortion over authentic choices? If abortion is a “choice,” employers and the government<sup>50</sup> can offer to pay for the cheaper, easier option—the one that most benefits them—while claiming the mantle of “women’s equity.”<sup>51</sup> The Biden Administration’s “National Strategy on Gender Equity and Equality” includes warnings about the “grave threats to reproductive rights”<sup>52</sup> and the president himself said he is “not prepared to leave that to the whims . . . of the public”<sup>53</sup> when asked about the leaked draft decision sending the issue of abortion back to lawmakers. With abortion promoted as one party’s solution to all women’s problems, how can we possibly come together to agree upon policies that support working moms and families?

### **Most doctors, including OB-Gyns, do not want to perform abortions, and most Americans don’t want to pay for them.**

Legalizing something does not mean that doctors or the public must participate. Although abortion is legal in all 50 states, very few doctors perform them. A national study found that although 97% of obstetrician-gynecologists have encountered a patient seeking abortion at some point in their practice, just 14% do abortions.<sup>54</sup> A different study found that just 7% of OB-Gyns in private practice had

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<sup>48</sup> Erika Bachiochi, *The Feminist Revolution Has Stalled. Blame Roe v. Wade*, AMERICA: THE JESUIT REVIEW (Nov. 1, 2021) <https://www.americamagazine.org/politics-society/2021/11/01/roe-wade-casey-texas-heartbeat-law-241725>.

<sup>49</sup> *Id.*

<sup>50</sup> Steve Daines & James Lankford, *Radical Expansions of Taxpayer-funded Abortions in Democrats’ Multi-Trillion Dollar Tax & Spend Reconciliation Bill* (Nov. 1, 2021) <https://www.daines.senate.gov/imo/media/doc/Radical%20Expansions%20of%20Taxpayer-funded%20Abortions%20in%20Democrats'%20Multi-Trillion%20Dollar%20Reconciliation%20Bill.pdf>.

<sup>51</sup> Fact Sheet: National Strategy on Gender Equity and Equality, The White House (Oct. 22, 2021) <https://www.whitehouse.gov/briefing-room/statements-releases/2021/10/22/fact-sheet-national-strategy-on-gender-equity-and-equality/>.

<sup>52</sup> National Strategy on Gender Equity and Equality, The White House, <https://www.whitehouse.gov/wp-content/uploads/2021/10/National-Strategy-on-Gender-Equity-and-Equality.pdf>.

<sup>53</sup> Speeches and Remarks, The White House (May 3, 2022), <https://www.whitehouse.gov/briefing-room/speeches-remarks/2022/05/03/remarks-by-president-biden-before-air-force-one-departure-15/>

<sup>54</sup> Debra B. Stulberg, et al. “Abortion Provision Among Practicing Obstetrician–Gynecologists.” *Obstetrics & Gynecology*, vol. 118, no. 3, Sept. 2011, p. 609, doi:10.1097/aog.0b013e31822ad973.

done an abortion within a two-year period.<sup>55</sup> The study cited several reasons given by those who do not perform abortions—because they provide indirect referrals instead, because their office or they personally have a moral or ethical objection<sup>56</sup> to abortion, or because they lack patients seeking abortion.<sup>57</sup>

Whatever the reason, business or personal, the imposition of a “right” to something does not mean that individual doctors must do it or that the government must pay for it. Federal conscience laws and their analogs in nearly every state protect the rights of doctors and other healthcare professionals to not be forced to participate in a procedure that violates their moral, ethical, or religious beliefs. These laws were enacted immediately after *Roe* and have been added to as needed in the decades since.<sup>58</sup>

The Hyde Amendment, named for Illinois Congressman Henry Hyde, is a recurring budget amendment that prohibits federal funds from paying for abortion, including through Medicaid, in most circumstances. It was originally adopted in 1976 as part of the Department of Health, Education, and Welfare<sup>59</sup> appropriations bill and has been included in federal law in various forms every year since.

In 1980, the Supreme Court upheld the constitutionality of limiting federal funding for elective abortions in *Harris v. McCrae*.<sup>60</sup> It was then—and continues to be now—a necessary protection for the conscience rights of the many millions of Americans who oppose taxpayer money being spent on abortions. It also reaffirmed the government’s legitimate interest in protecting life, even in a post-*Roe* world.

Until recently, the Hyde Amendment was popular in Congress; in fact, 107 Democrats voted in favor of the original Hyde Amendment in the U.S. House of Representatives.<sup>61</sup> After the *Harris* decision, it was seen as prudent public policy and found support among many politicians who also supported a right to abortion. For nearly four decades, the Hyde Amendment was considered a noncontroversial,

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<sup>55</sup> News Release: *Most U.S. Obstetrician-Gynecologists in Private Practice Do Not Provide Abortions and Many Also Fail to Provide Referrals*, Guttmacher Institute (Nov. 27, 2017), <https://www.guttmacher.org/news-release/2017/most-us-obstetrician-gynecologists-private-practice-do-not-provide-abortions-and>

<sup>56</sup> Perhaps because the Hippocratic Oath forbids it. *Greek Medicine--The Hippocratic Oath*, NIH (2002), [https://www.nlm.nih.gov/hmd/greek/greek\\_oath.html](https://www.nlm.nih.gov/hmd/greek/greek_oath.html).

<sup>57</sup> Guttmacher (2017)

<sup>58</sup> Federal conscience protections include: The Church Amendments, 42 U.S.C. § 300a-7; The Coats-Snowe Amendment, 42 U.S.C. § 238n; The Weldon Amendment (incorporated annually in appropriations legislation since 2005); The Affordable Care Act, 42 U.S.C. § 18023(b)(4).

<sup>59</sup> Since then, these Departments have split into separate agencies. The Hyde Amendment currently is applied to appropriations for the Department of Health and Human Services (HHS).

<sup>60</sup> 448 U.S. 297 (1980).

<sup>61</sup> *On a Separate Vote in the House, to Agree to the Hyde Amendment to H.R. 14232, Which Prohibits the Use of Funds in the Bill to Pay For or To Promote Abortions*, GovTrack.us (last visited May 16, 2022), <https://www.govtrack.us/congress/votes/94-1976/h952>.

bipartisan addition to appropriations bills. As a U.S. Senator, Joe Biden voted in support of the Hyde Amendment every year from 1976–2008.<sup>62</sup> Despite shifting political winds, the Hyde Amendment remains popular with the public. A recent Marist poll found that 54% of Americans oppose taxpayer funding of any kind for abortion.<sup>63</sup>

In contrast, the Hyde Amendment does preserve federal funding for life-affirming assistance. Government programs that provide prenatal, birth, and infant care resources are critically important to prevent economic circumstances at the time of birth from determining whether a child gets a chance at life. At least one researcher estimated that it has saved 2.4 million lives over the past four decades.<sup>64</sup>

One such story was told by former AUL attorney Deanna Wallace, whose single mother received prenatal and postnatal care through Medicaid:

Policy is not made in a vacuum, and the policy choices we make as a nation deliver a very important message about our values. *The Hyde Amendment sends the positive message that one's economic status does not determine one's worth and dignity as a human being.* If we were to abolish the Hyde Amendment, what message would we be sending to poor women — that their unborn children are a problem and abortion is a solution? That the government takes a utilitarian stance on whether the lives of their unborn children have value?

Our nation has sent a strong message through the Hyde Amendment over the past 41 years and has enabled more than two million Americans to pursue our inalienable rights to life, liberty, and the pursuit of happiness.<sup>65</sup>

Maintaining the Hyde Amendment in federal law is crucial to protecting the conscience rights of millions of Americans, and ensuring that government resources are spent enriching families, not harming women and babies through abortion.

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<sup>62</sup> Zachary B. Wolf, *What Is the Hyde Amendment and Why Did Joe Biden Once Support It?*, CNN (June 6, 2019), <https://www.cnn.com/2019/06/05/politics/what-is-hyde-amendment-joe-biden/index.html>.

<sup>63</sup> *A Majority of Americans Support Legal Limits on Abortion, and Oppose Taxpayer Funding*, Knights of Columbus (Jan. 20, 2022), <https://www.kofc.org/en/news-room/polls/americans-support-legal-limits-on-abortion.html>

<sup>64</sup> Michael J. New, *The Hyde Amendment is Life-Saving and Worth Saving*, National Review (July 27, 2020), <https://www.nationalreview.com/corner/the-hyde-amendment-is-life-saving-and-worth-saving/>.

<sup>65</sup> Deanna Wallace, *The Hyde Amendment Saved My Life*, Ams. United for Life (Oct. 5, 2017), <https://aul.org/2017/10/05/the-hyde-amendment-saved-my-life/> (emphasis added).

## **Women and families deserve better than abortion.**

This issue is personal for me. In 2001, when I was a sophomore in college in Georgia, I found myself unexpectedly pregnant. By default, I scheduled an appointment at an abortion facility. At the time, I wasn't aware of any other type of clinic to turn to with an unexpected pregnancy, that might truly help women and girls with life-affirming choices. I knew of nowhere else to go. But I assumed the facility would at least provide me with the information, resources, and answers I was looking for as I decided what my next steps would be.

As clinic staff performed an ultrasound on me, I asked to see the image. I wanted to be able to make a fully informed decision, and I wanted to be able to see my child. But the woman who was maneuvering the wand over my belly said no. She told me it was against clinic policy to allow a mother to see the ultrasound image of her baby. And with that, they moved me on to the next workstation in the assembly-line process towards abortion.

I walked into that clinic because I felt I had no other choice, and nothing that took place there that day restored my agency or my empowerment. I was deeply conflicted, looking for information and resources to give me hope and options, but was given neither. I still regret that I have never been able to see my first child's only photo. That clinic stripped me of my choice. When we as a society do not ensure that abortion facilities provide women and girls with the information they have asked for, it can have devastating consequences. I know that firsthand.

With each passing year, more and more women like me emerge from the silence after abortion. They are wounded and speak out in anguish on the physical, emotional, spiritual, and psychological harm they have suffered and still suffer as a direct result of their abortions. Often, this harm arises as a consequence of women "choosing" abortion without adequate and accurate information concerning the procedure itself and abortion's risks, alternatives, and long-term consequences. Our experiences reflect the fact that abortion facilities often fail to provide adequate and accurate medical information, including access to and the option of viewing ultrasounds, to women considering abortions.

The American people, through their elected officials, recognize the need for basic oversight, for genuine informed consent, and for the interests of the child to factor in at some point in pregnancy, even if we disagree on when that is. It is certain Members of Congress who are out of step with the American people on the biological reality that a preborn child is a member of the human family, not the other way around.

Congress expresses policy preferences in the bills it considers and the hearings it schedules. This hearing says that the leaker and protestors who want to throw our institutions into chaos are winning. The WHPA says that speedy abortions are valued over women and girls' health and safety. That the States, who broadly enact and enforce local healthcare regulations, should not have a say in this one area of medicine. That at no point in pregnancy do the child's interests come into play. After all, the title of this hearing is about "revoking your right to abortion."

What about your child's right to life?

Sincerely,

A handwritten signature in black ink, appearing to read "Catherine". The signature is fluid and cursive, with a large initial "C" and a trailing flourish.

Catherine Glenn Foster  
President and CEO  
Americans United for Life