



Statement of Americans United for Life
Submitted for the Record

Hearing of the House Committee on Oversight and Reform
“Examining the Harm to Patients from Abortion Restrictions”

September 29, 2022, 10:00 AM
Rayburn House Office Building, Room 2154

Dear Chair Maloney, Ranking Member Comer, and Members of the Committee:

Americans United for Life (AUL) is 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.

With respect, the Committee's hearing is a failing attempt to defend the indefensible. As the Supreme Court recognized in *Dobbs*, the United States 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. The House majority has taken up abortion on demand as its *cause celebre*, while refusing to acknowledge that abortion is at an all-time nadir in popular opinion as the public has increasingly turned away from the violence of abortion and realized that women can and do live and succeed without it. Pro-abortion advocates like the witnesses before this Committee today may contend that abortion is a right worthy of federal protection, but in fact, even before the inauguration of *Roe*'s regime of abortion on demand in all fifty states, widespread access to abortion was much more important to activists than women's health and safety. Worse, the majority is propping up a political movement that has engaged in a "summer of rage" against pro-life persons who desire only to care for women and infants in difficult circumstances, and has repeatedly refused to condemn the wave of violence we have seen in recent months against pro-life pregnancy centers, caring sidewalk counselors, and houses of worship. This committee's work should be about protecting all the country's citizens from the violence borne out of political division, not choosing sides in what is now, after *Roe*, an issue for the People to decide according to the will of their respective electorates.

***Dobbs* Rightly Repudiated *Roe*'s Fabricated "Right to Abortion".**

The Supreme Court was clear and thoroughgoing in its repudiation of the false history and presuppositions undergirding *Roe*, rightly declaring, "*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."¹ The Court criticized *Roe* as unmoored to any constitutional text, case law or interpretive principal:

¹ *Dobbs v. Jackson Women's Health Org.*, slip op. at 6.

Roe . . . was remarkably loose in its treatment of the constitutional text. It held that the abortion right, which is not mentioned in the Constitution, is part of a right to privacy, which is also not mentioned . . . And that privacy right, *Roe* observed, had been found to spring from no fewer than five different constitutional provisions—the First, Fourth, Fifth, Ninth, and Fourteenth Amendments.²

Years later, in *Casey*, “[t]he Court did not defend this unfocused analysis and instead grounded its decision solely on the theory that the right to obtain an abortion is part of the ‘liberty’ protected by the Fourteenth Amendment’s Due Process Clause.”³ The Court compared abortion jurisprudence to the shameful precedent of *Plessy v. Ferguson*,⁴ in which the Court instituted the racist “separate but equal” doctrine; like *Plessy*, “*Roe* was also egregiously wrong and deeply damaging. . . . *Roe*’s constitutional analysis was far outside the bounds of any reasonable interpretation of the various constitutional provisions to which it vaguely pointed.”⁵ As for the quality of *Roe*’s reasoning, “[*Roe*]... stood on exceptionally weak grounds:”⁶

Roe found that the Constitution implicitly conferred a right to obtain an abortion, but it failed to ground its decision in text, history, or precedent. It relied on an erroneous historical narrative; it devoted great attention to and presumably relied on matters that have no bearing on the meaning of the Constitution; it disregarded the fundamental difference between the precedents on which it relied and the question before the Court; it concocted an elaborate set of rules, with different restrictions for each trimester of pregnancy, but it did not explain how this veritable code could be teased out of anything in the Constitution, the history of abortion laws, prior precedent, or any other cited source; and its most important rule (that States cannot protect fetal life prior to “viability”) was never raised by any party and has never been plausibly explained. *Roe*’s reasoning quickly drew scathing scholarly criticism, even from supporters of broad access to abortion.⁷

Further, *Roe* and *Casey* distorted virtually every doctrine of constitutional law they touched, including the standard for facial constitutional challenges, third-party standing, *res judicata*, rules on the severability of unconstitutional provisions, and First Amendment doctrines.⁸ Ultimately, the Court declared,

² *Id.* at 9.

³ *Id.* at 10.

⁴ 163 U.S. 537 (1896).

⁵ *Dobbs*, slip op. at 44.

⁶ *Id.* at 45.

⁷ *Id.* at 45–46.

⁸ *Id.* at 62.

“[w]hen vindicating a doctrinal innovation [i.e., a purported abortion right] requires courts to engineer exceptions to longstanding background rules, the doctrine ‘has failed to deliver the principled and intelligible development of the law that stare decisis purports to secure.’”⁹ The Supreme Court acted wisely in repudiating the manufactured doctrine of abortion on demand and sending the issue back to the People.

The American People Increasingly Reject Abortion.

Demand for abortion has steadily fallen over the past three decades, and many doctors do not wish to use their medical training for life-ending, violent procedures. In fact, while the number of abortions in America has dropped steadily since the early 1990s, the abortion rate has declined precipitously, to the point where it is now same as it was in 1972 – the year before *Roe v. Wade*.¹⁰

Shortly before the Court issued the *Dobbs* opinion, Americans United for Life (AUL), in partnership with YouGov, released findings from a national survey of 1,000 American adults involving attitudes toward abortion, personhood, and legal rights.¹¹ The survey took place May 6-13, 2022 in the wake of the leaked U.S. Supreme Court draft opinion in *Dobbs*.¹² Among the survey’s key findings were that a majority (55%) of Americans believe an unborn fetus is a person either at the moment a woman becomes pregnant or within the first 12 weeks of pregnancy, and that a majority (51%) believe that abortion ends the life of a human before birth. Similarly, a majority (52%) support the U.S. Supreme Court extending legal rights of personhood to unborn children.¹³

Increasingly, then, 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, a national association of pregnancy care centers, and the Charlotte Lozier Institute, over 2,700 pregnancy centers served 1,848,376 people in the United States in 2019.¹⁴ This included:

⁹ *Id.* at 63 (citations omitted).

¹⁰ 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>.

¹¹ See <https://aul.org/wp-content/uploads/2022/06/2022-05-AUL-YouGov-National-Survey.pdf>.

¹² The survey’s findings are summarized at <https://aul.org/2022/06/20/aul-yougov-american-supermajorities-support-fetal-rights-majority-supports-personhood-rights/>.

¹³ *Id.* Notably, 39% of the survey’s respondents identified as pro-choice, with 32% identifying as pro-life, and 29% identifying as neither.

¹⁴ 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.

- 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.¹⁵ But five decades of Court-sanctioned 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.¹⁶ 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.”¹⁷

How often do pro-choice politicians prioritize abortion over authentic choices? If abortion is a “choice,” employers and the government¹⁸ can offer to pay for the cheaper, easier option—the one that most benefits them—while claiming the mantle of “women’s equity.”¹⁹ The Biden Administration’s “National Strategy on Gender Equity and Equality” includes warnings about the “grave threats to reproductive rights”²⁰ and the president himself said he is “not

¹⁵ 505 U.S. at 856 (1992) (“[F]or 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.”).

¹⁶ 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>.

¹⁷ *Id.*

¹⁸ 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>.

¹⁹ 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>.

²⁰ 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>.

prepared to leave that to the whims . . . of the public.”²¹ 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 mothers and families?

Moreover, 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. 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.²² A different study found that just 7% of OB-Gyns in private practice had done an abortion within a two-year period.²³ 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 objection²⁴ to abortion, or because of a lack of demand by patients.²⁵

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.²⁶

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 Welfare²⁷

²¹ 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/>.

²² 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.

²³ 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>.

²⁴ Perhaps because the Hippocratic Oath forbade it. *Greek Medicine--The Hippocratic Oath*, NIH (2002), https://www.nlm.nih.gov/hmd/greek/greek_oath.html.

²⁵ Guttmacher (2017), *supra*.

²⁶ 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).

²⁷ 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).

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*.²⁸ 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.²⁹ 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, bipartisan addition to appropriations bills. As a U.S. Senator, Joe Biden voted in support of the Hyde Amendment every year from 1976–2008.³⁰ 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.³¹ At least one researcher estimated that it has saved 2.4 million lives over the past four decades.³² The Committee’s determination to insist that free access to abortion without limits, funded by taxpayer dollars, flies in the face of strong majorities of Americans.

The House Majority’s Promotion of Abortion on Demand Goes Far Beyond Even *Roe*.

The so-called Women’s Health Protection Act, which passed the House but failed in the Senate, would have trampled any pretense of federalism, effectively banning all state abortion regulations and forcing every state to allow abortion on demand throughout pregnancy. 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.

²⁸ 448 U.S. 297 (1980).

²⁹ *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>.

³⁰ 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>.

³¹ *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>.

³² 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/>.

West Virginia Democrat Joe Manchin opposed the WHPA and refused to vote for it, correctly stating that the bill was “not *Roe v. Wade* codification. It is an expansion. It wipes 500 state laws off the books, it expands abortion”³³ Hundreds of health and safety laws would be invalidated by the WHPA, including gestational age limits, laws based on scientific evidence that the baby can feel pain on being aborted,³⁴ informed consent laws, and parental involvement provisions.

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.³⁵ 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 virtually no say in enacting abortion laws, even though health and safety standards are generally set and regulated at the state level. This bill would push federal power over the power given to the states.

As if stripping many robust protections from existing state law were not enough, the WHPA would also prohibit 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.³⁶ 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.³⁷ 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.³⁸ By lowering professional accountability, abortion providers would be free to

³³ 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/>.

³⁴ *Dobbs*, supra, Brief *Amici Curiae* of 228 Members of Congress in Support of Petitioners.

³⁵ Ams. United for Life, State Legislative Sessions Report (2021) <https://aul.org/2021/10/27/auls-2021-state-legislative-sessions-report>.

³⁶ 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).

³⁷ 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.

³⁸ 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>.

operate without regulation and oversight, to the detriment of women and young girls.³⁹

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.⁴⁰ Removing every medical component of the abortion procedure in the name of unfettered "access" is not women's health—it's just abortion.

Now abortion activists have added a new page to their playbook – threatening and intimidating pro-life advocates and caring individuals who offer hope and help in difficult circumstances. Having promised a "summer of rage," activists have certainly delivered since the *Dobbs* decision came down on June 24th. Since that date, there have been over 70 acts of violence recorded, and counting⁴¹ -- blatant violations of the federal FACE Act (18 U.S. Code § 248), which ostensibly protects pregnancy care centers as well as abortion centers. Despite this, the Biden Administration has announced no investigations or arrests of individuals associated with the radical violent groups "Jane's Revenge" or "Ruth Sent Us." Instead, the Administration's Department of Justice dispatches a 35-member SWAT team to arrest a Catholic father of seven at gunpoint in front of his children – for the "crime" of defending his young son from obscenities and intimidation by an abortion clinic escort.⁴² And the violence is escalating horribly, as an 83-year-old Michigan woman was shot in the back this week while petitioning against that state's pro-abortion ballot resolution.⁴³

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

³⁹ 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).

⁴⁰ 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).

⁴¹ See <https://catholicvote.org/pregnancy-center-attack-tracker/>.

⁴² See <https://www.newsmax.com/newsfront/pro-life-catholic-arrest/2022/09/26/id/1089045/>.

⁴³ See <https://www.foxnews.com/us/elderly-pro-life-volunteer-michigan-shot-heated-conversation-pro-life-group-says>.

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.

Sincerely,

Americans United for Life