WRITTEN STATEMENT OF THE AMERICAN CIVIL LIBERTIES UNION
FOR THE RECORD OF A HEARING ON

Examining State Efforts to Undermine Access to Reproductive Health Care

BEFORE THE

House Committee on Oversight and Reform

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On behalf of the American Civil Liberties Union (ACLU) and our over three million members, activists, and supporters, we submit this statement for the record of the House Oversight and Reform Committee's November 14, 2019 hearing titled "Examining State Efforts to Undermine Access to Reproductive Health Care."

Ongoing efforts by state legislators to restrict and outright ban abortion have created a serious crisis for abortion access across much of the country. This year, seven states—Alabama, Georgia, Kentucky, Louisiana, Mississippi, Missouri, and Ohio—made headlines when they passed laws banning abortion from the earliest days of pregnancy, aimed directly at teeing up a Supreme Court reversal of *Roe v. Wade.*[1] Legislators in these states, emboldened by President Trump's appointment of two Justices to the Supreme Court, believe that the newly-constituted Court will take the extraordinary step of actually taking away a constitutional right.

While these new bans have been swiftly challenged and blocked in courts[2] and abortion is still legal in all 50 states, the right to abortion is already hollow for many people in vast sections of the country. That's because the Supreme Court doesn't have to overturn *Roe* in order for states to push abortion entirely out of reach. The recent spate of bans is actually the latest chapter in a decades-long strategy to pile restriction on top of restriction in order to make it nearly impossible for people to access abortion.

This has had a profound impact in many states. For instance, Missouri is currently at risk of becoming the first state since *Roe* was decided to be without a health center that provides abortions.[3] Already, it is one of six states that today have only a single clinic left—along with Kentucky, Mississippi, North Dakota, South Dakota, and West Virginia.[4] Several other states have only a handful of remaining abortion clinics.

Abortion opponents in Congress started in on this strategy shortly after *Roe* was decided, when they first attached the Hyde Amendment to an appropriations bill to withhold coverage of abortion for people insured through Medicaid. Representative Henry Hyde openly admitted this was designed to prevent people with low incomes from getting abortions. When he first introduced his amendment in 1976, he said "I certainly would like to prevent, if I could legally, anybody having an abortion, a rich woman, a middle-class woman, or a poor woman.

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[1] 410 U.S. 113, 163-64 (1973). *Roe*'s central holding been applied and reaffirmed repeatedly for over four decades, including in *Planned Parenthood v. Casey*, 505 U.S. 833, 871 (1992), and most recently in *Whole Woman's Health v. Hellerstedt*, 579 US___ (2016).

[2] Rick Rojas and Allen Blinder, *Alabama Abortion Ban Is Temporarily Blocked by a Federal Judge*, NY Times (Oct. 29, 2019), https://www.nytimes.com/2019/10/29/us/alabama-abortion-ban.html

[3] Rebecca Klar, *Missouri to Begin Hearing on State's Last Abortion Clinic*, The Hill (Oct. 28, 2019), https://thehill.com/policy/healthcare/467693-missouri-to-begin-hearing-on-states-last-abortion-clinic; *see also* Reis Thebault, *Judge's order means Missouri hasn't yet become the only state without an abortion clinic*, Washington Post (May 31, 2019), https://www.washingtonpost.com/nation/2019/05/31/missouri-could-become-only-state-without-clinic-perform-abortions-pending-judges-ruling/?utm_term=.481ef653fe51.

[4] Sabrina Tavernise, '*The Time Is Now': States Are Rushing to Restrict Abortion, or to Protect It*, NY Times (May 15, 2019), https://www.nytimes.com/2019/05/15/us/abortion-laws-2019.html?module=inline.

Unfortunately, the only vehicle available is the…Medicaid bill."[5] In the years since, abortion coverage restrictions have had devastating effects. It is estimated that one in four Medicaid-eligible women seeking an abortion is unable to get one,[6] often with disastrous consequences for them and their families.[7]

State legislatures followed this lead, passing a variety of medically unnecessary and politically motivated laws designed to make it difficult, and in many cases impossible, for a person who has decided to have an abortion to actually get one. This trend picked up alarming speed after the 2010 elections. Since then, states have quietly passed 483 abortion restrictions in an attempt to regulate away access completely.[8] These restrictions have so severely eroded access to care that already for many people the right to abortion is more theoretical than real. This is particularly true for people who face multiple barriers to accessing quality health care, including people with low incomes, who are more likely to be people of color, as well as young people and LGBTQ people.[9]

Among these restrictions are laws known as Targeted Regulations of Abortion Providers (TRAP) that place burdensome and medically unnecessary requirements on abortion providers that are not placed on other health care providers, such as requirements that they obtain admitting privileges at local hospitals, or that their clinics meet the same standards as ambulatory surgical centers. As courts around the country have found, these laws do not make patients safer, and are actually intended to—and do—force providers to shut their doors. Indeed, in June 2016, in *Whole Woman's Health v. Hellerstedt*, the Supreme Court struck down two such Texas requirements noting that while the laws would decimate access to abortion, it "found nothing in Texas' record evidence that shows that … the new law advanced Texas' legitimate interest in protecting women's health."[10]

Despite this ruling, the Supreme Court will hear a challenge this term to a nearly identical Louisiana law modeled after the Texas law the Court struck down just three years ago.[11] If the

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[5] Heather Boonstra, A*bortion in the Lives of Women Struggling Financially: Why Insurance Coverage Matter*s, Guttmacher Policy Review (July 14, 2016), https://www.guttmacher.org/gpr/2016/07/abortion-lives-women-struggling-financially-why-insurance-coverage-matters.

[6] Henshaw SK, et. al., *Restrictions on Medicaid Funding for Abortions: A Literature Review*, Guttmacher Institute, 2009, http://bit.ly/1IK5XcF; *see also* Board of Governors, Federal Reserve System, *Report on the Economic Well-Being of U.S. Households in 2018* (May 2019) at *21*, https://www.federalreserve.gov/publications/files/2018-report-economic-well-being-us-households-201905.pdf?smid=nytcore-ios-share (finding that nearly 40% of Americans would have difficulty covering an unexpected expense of $400).

[7] Foster DG, Roberts SCM, and Mauldon J, *Socioeconomic consequences of abortion compared to unwanted birth*, 2012, http://bit.ly/1PvNd4w.

[8] *State Facts About Abortion: Missouri*, Guttmacher Institute (Sept. 2019), https://www.guttmacher.org/fact-sheet/state-facts-about-abortion-missouri

[9] *See, e.g.*, Samantha Artiga et. al., *Changes in Health Coverage by Race and Ethnicity since Implementation of the ACA, 2013-2017*, Kaiser Family Foundation (Feb 13, 2019), https://www.kff.org/disparities-policy/issue-brief/changes-in-health-coverage-by-race-and-ethnicity-since-implementation-of-the-aca-2013-2017/.

[10] 579 US___ (2016).

[11] *June Med. Servs. v. Gee*, Dkt. 18-1323. Earlier this year, the United States Court of Appeals for the Fifth Circuit upheld the Louisiana law. *June Med. Servs. v. Gee*, No. 17-30397 (5th Cir. 2019).

Supreme Court allows that law to stand there would only be a single provider left in the entire state of Louisiana eligible to provide abortion care.

States have also passed a wide range of other laws that create unnecessary obstacles for patients, such as forced ultrasound laws and requirements that patients make unnecessary additional trips to the clinic at least 24 to 72 hours before an abortion. Because TRAP laws have caused many clinics to shut down, patients are often forced to travel hundreds of miles to get to the closest abortion provider, posing significant financial and logistical hurdles for patients seeking abortion care, 75% of whom are poor or low-income.[12] These requirements mean that a person must attempt to take additional days off work (losing needed income), arrange and pay for childcare, find and pay for transportation, and in some cases, lodging. It is not uncommon for patients seeking abortion care to have to sleep in their cars overnight near the clinic because they lack the means to stay in a hotel.

For many people, these barriers prevent them from obtaining an abortion at all.[13] Being denied a wanted abortion has serious consequences for individuals and their families. For example, people who were unable to get a wanted abortion are more likely to experience serious health complications associated with pregnancy,[14] to remain tethered to abusive partners,[15] and to experience increased economic insecurity.[16]

These are only some of the many types of restrictions that hostile state politicians have devised. For example, state legislatures have also passed laws that would criminalize providers for performing the only generally available method of ending a pregnancy in the second trimester,[17] as well as laws that would criminalize providers based on their patients' reasons for seeking abortions.[18]

Kentucky is a prime example of how severely access has already been limited by the avalanche of different restrictions, and the lengths that politicians opposed to abortion rights will go to limit it even further. Shortly after *Roe was* decided, there were 17 locations in Kentucky where a

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[12] Jerman J, Jones RK and Onda T, *Characteristics of U.S. Abortion Patients in 2014 and Changes Since 2008*, Guttmacher Institute (May 2016), https://www.guttmacher.org/report/characteristics-us-abortion-patients-2014.
[13] *See, e.g.*, *Planned Parenthood of Indiana and Kentucky* v. *Box*, 896 F.3d 809 (7th Cir. 2018) (cert. pet. pending).
[14] Gerdts C, Dobkin L, Foster DG and Schwarz EB, *Side Effects, Physical Health Consequences, and Mortality Associated with Abortion and Birth after an Unwanted Pregnancy*. Women's Health Issues 25(1):55-59 (Jan. 2016).
[15] Roberts SCM, Biggs MA, Chibber KS, Gould H, Rocca CH and Foster DG, *Risk of Violence From the Man Involved in the Pregnancy After Receiving or Being Denied an Abortion*, BMC Medicine 12:144 (Sept. 2014).
[16] Foster DG, Biggs MA, Ralph L, Gerdts C, Roberts S and Glymour MM, *Socioeconomic Outcomes of Women Who Receive and Women Who Are Denied Wanted Abortions in the United States*, Am. J. Public Health 108(3):407-413 (Mar. 2018); *See also Socioeconomic outcomes of women who receive and women who are denied wanted abortions*, ANSIRH Issue Brief (Aug. 2018), www.ansirh.org/sites/default/files/publications/files/turnaway_socioeconomic_outcomes_issue_brief_8-20-2018.pdf (For women denied a wanted abortion, there was an almost fourfold increase in odds that their household income was below the Federal Poverty Level compared to those who were able to obtain a wanted abortion).
[17] Like every other court in the country to consider a challenge to such a law, the United States Court of Appeals for the Eleventh Circuit, in a case brought by the ACLU, held Alabama's law was unconstitutional. The Supreme Court has declined to review. *West Ala. Women's Ctr. v. Marshall*, 900 F.3d 1310 (11th Cir 2018).
[18] *Preterm-Cleveland v. Himes*, 940 F.3d 318 (6th Cir. 2019).

person could get an abortion.[19] Today, there is only a single clinic left standing.[20] Yet Governor Matt Bevin has attempted to use bogus health regulations to force even that last clinic, EMW Women's Surgical Center, to close. Although the clinic had a transfer agreement with a local hospital signed by the head of the hospital's ob-gyn department, the state argued that the clinic needed an agreement signed by the CEO of the hospital, which it could not get in part due to political pressure from the Governor's office. After EMW rushed to court seeking an emergency order to keep its doors open, a court struck down Kentucky's requirement, finding that the transfer agreement "resulted in no benefit" to patients.[21] All it would do is make it impossible for a person to get an abortion in the state.

Opponents of abortion have frequently claimed that restrictions like Kentucky's are intended to protect women's health. But with this year's all-out bans, states like Alabama and Georgia have dropped this pretense entirely and made plain what their goal has always been: to ban abortion wholesale. There is no question that these restrictions have never really been about health; indeed, some of the states that have passed the most aggressive abortion restrictions also have the most abysmal records when it comes to maternal and infant health outcomes.[22] Georgia has one of the highest maternal mortality rates in the country,[23] with a rate for Black women that is three times higher than the rate for white women.[24] Alabama has one of the highest infant death rates in the country.[25] Indeed, two-thirds of the counties in the state do not even have a hospital that provides obstetrical care.[26] The politicians in these states, while focused on forcing people to stay pregnant against their will, have failed in their duty to ensure that people who want to carry a pregnancy to term can have a health pregnancy and give birth safely.

The ACLU is currently challenging more than 40 abortion restrictions across 13 states, and Planned Parenthood and the Center for Reproductive Rights are challenging dozens more. Although litigation is a powerful tool, litigation alone cannot stop these laws—and even when it is successful, patients can be impacted while a case is ongoing. When clinics must shut their

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[19] *EMW Women's Surgical Ctr v. Glisson*, 2018 WL 6444391, *9 (Sept. 28, 2018).
[20] *Id.*
[21] *Id.* at *28.
[22] *See, e.g.*, Erika Edwards, *States pushing abortion bans have higher infant mortality rates*, NBC News (May 24, 2019), https://www.nbcnews.com/health/womens-health/states-pushing-abortion-bans-have-higher-infant-mortality-rates-n1008481.
[23] Joseph P. Williams, *Limiting Access to Abortion Could Cause Maternal Deaths to Rise*, U.S. News and World Report (May 31, 2019), https://www.usnews.com/news/healthiest-communities/articles/2019-05-31/reduced-access-to-abortion-could-lead-to-more-maternal-deaths; *see also Maternal Mortality*, America's Health Rankings, https://www.americashealthrankings.org/explore/health-of-women-and-children/measure/maternal_mortality/state/GA (*last accessed* June 1, 2019).
[24] Georgia Maternal Mortality Report 2014, Georgia Department of Public Health (March 2019) https://dph.georgia.gov/sites/dph.georgia.gov/files/related_files/site_page/Maternal%20Mortality%20BookletGeorgia.FINAL_.hq_.pdf.
[25] Michael Hiltzik, *States with the worst anti-abortion laws also have the worst infant mortality rates*, LA Times (May 15, 2019), https://www.latimes.com/business/hiltzik/la-fi-hiltzik-anti-abortion-infant-mortality-20190515-story.html.
[26] Jessica Ravitz, *Alabama says it wants to protect life. How does that claim stack up outside the womb?*, CNN (May 16, 2019), https://www.cnn.com/2019/05/16/health/alabama-treatment-ofliving/index.html; *In Rural Alabama, Limited Access To Obstetrics Care*, NPR (May 31, 2015), https://www.npr.org/2015/05/31/411044409/in-rural-alabama-limited-access-to-obstetrics-care.

doors, even temporarily, patients are turned away and may be unable to find alternate sources for care. And it is often very difficult for clinics to re-open after they have been forced to close, which has long-term effects on access.[27]

Moreover, some state legislatures, still emboldened by the Supreme Court's new makeup, will likely pass additional restrictions when their next legislative sessions begin, leading to another wave of legal challenges in the coming year. In fact, Tennessee used a summer study session to consider turning a 6-week abortion ban into a total ban,[28] and South Carolina continues to tinker with its 6-week ban, removing rape and incest exceptions and then adding them back in[29]—both indicators that these bills could move forward shortly after they return to session in January.

In order to ensure that people have not only the theoretical right to abortion but the actual ability to get the care they need, Congress must act. We urge Congress to pass two pieces of critical federal legislation: the Women's Health Protection Act (WHPA) and the EACH Woman Act. WHPA would provide a powerful nationwide safeguard against not only outright bans, but also clinic shutdown laws and other restrictions that prevent people from getting the care they need.[30] The EACH Woman Act would lift the Hyde Amendment and related bans on abortion coverage in government insurance programs, as well as put an end to political interference in private insurance markets by prohibiting federal, state, and local politicians from meddling with insurance companies that choose to cover abortion.[31] Together, these bills would both keep clinic doors open and make care more affordable. They would protect and expand access for people throughout the country, no matter where they live, how much they make, or what type of insurance they have.

Passing these bills to protect abortion access nationwide is also clearly aligned with public opinion. There is overwhelming public support for abortion access. According to recent polling, two-thirds of Americans do not want to see *Roe* overturned.[32] A significant majority of voters also support Medicaid coverage for abortion, and agree that a woman's financial situation should not determine her access to abortion care.[33] They agree that once a person has decided to have

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[27] David Yaffe-Bellany, *A Five years after Wendy Davis filibuster, Texas abortion providers struggle to reopen clinics*, Texas Tribune (June 25, 2018), https://www.texastribune.org/2018/06/25/five-years-after-wendy-davis-filibuster-abortion-clinics/.

[28] Anita Wadhwani, *Tennessee abortion bill: Lawmakers consider 'conception bill' to limit abortions, overturn Roe V. Wade*, Nashville Tennessean, (Aug. 12, 2019), https://www.commercialappeal.com/story/news/2019/08/12/tennessee-bill-abortion-ban-roe-v-wade-heartbeat-bill/1985169001/.

[29] Avery G. Wilks, *SC's heartbeat abortion ban heads to Senate floor, now with exceptions for rape, incest*, Raleigh News & Observer (Nov. 5, 2019), https://www.newsobserver.com/site-services/newsletters/politics-government-nl/article237018169.html.

[30] Women's Health Protection Act, H.R. 2975, 116th Cong. (2019).

[31] EACH Woman Act, H.R. 1692, 116th Cong, (2019).

[32] Jennifer DePinto, *Majority of Americans don't want Roe v. Wade overturned, CBS News poll finds*, CBS News (May 21, 2019), https://www.cbsnews.com/news/majority-of-americans-dont-want-roe-v-wade-overturned-cbs-news-poll-finds/.

[33] *New polling shows that a significant majority of the American electorate supports Medicaid coverage of abortion services; support in battleground congressional districts is even stronger*, Hart Research Associates (Sept. 26, 2019), https://allaboveall.org/wp/wp-content/uploads/2019/09/ME-12724-AllAboveAll-release-Sept26.pdf

an abortion, they should be able to get care that is supportive and affordable without additional obstacles.[34]

The decision about whether and when to become a parent is one of the most important ones that a person makes. Enabling people to make these decisions in a way that is best for themselves and their families is critical to ensuring that individuals and families thrive and that everyone in our community can participate with freedom, dignity, and equality.

[34] *See, e.g., Analysis of Voters' Opinions on Abortion Restrictions and Affirmative Policies*, PerryUndem Research/Communication (Jan. 20, 2016), https://www.nirhealth.org/wp-content/uploads/2016/01/Memo-NIRH-Poll_Final_3.pdf.