



STATEMENT OF

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FOR A HEARING ON

THREATS TO REPRODUCTIVE RIGHTS IN AMERICA

BEFORE

HOUSE JUDICIARY COMMITTEE
SUBCOMMITTEE ON THE CONSTITUTION, CIVIL RIGHTS, AND CIVIL
LIBERTIES

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Chairman Cohen, Ranking Member Johnson, and Members of the Committee,

Thank you for holding this hearing and inviting me to testify. My name is Jennifer Dalven and I am the Director of the Reproductive Freedom Project at the American Civil Liberties Union, where I oversee litigation seeking to protect and expand access to abortion and reproductive health care. We are honored to bring that litigation on behalf of abortion providers and their patients, including Dr. Yashica Robinson, an obstetrician-gynecologist from Alabama who is on the panel today as well. I am proud to testify today on behalf of our nearly three million members, activists and supporters.

I have been litigating abortion rights cases for more than two decades and have argued cases throughout the country, including before the United States Supreme Court.¹ I am here to tell you that we are facing a crisis.

In recent months, seven states--Alabama, Georgia, Kentucky, Louisiana, Mississippi, Missouri, and Ohio--have passed extreme laws banning abortion, aimed at prompting the Supreme Court to reverse *Roe v. Wade*.² Legislators in these states, emboldened by President Trump's appointment of two new Justices to the Supreme Court, believe that the newly-constituted Court will take the extraordinary step of actually taking away one of our constitutional rights. While it is important to note that today, abortion is still legal in every state, as these bans have been or will soon be challenged in court and have not taken effect,³ the prospect that *Roe* may be overturned is a very real and very frightening possibility.

However, it's also critical to understand that the Supreme Court doesn't have to overturn *Roe* in order for states to push abortion entirely out of reach. That is because these bans are the culmination of a decades'-long strategy to pile restriction on top of restriction in order to make it nearly impossible for people to get an abortion.

Congress started in on that strategy shortly after *Roe* was decided, when it first attached the Hyde Amendment to an appropriations bill to withhold coverage for 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. Unfortunately, the only vehicle available

¹ *Ayotte v. Planned Parenthood of Northern New England*, 546 U.S. 320 (2006).

² 410 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).

³ The laws in Kentucky and Mississippi have been enjoined in cases brought by the ACLU and the Center for Reproductive Rights, respectively. See Alan Blinder, *Federal Judge Blocks Mississippi Abortion Law*, NY Times (May 24, 2019), <https://www.nytimes.com/2019/05/24/us/mississippi-abortion-law.html>. Challenges have also been filed in Ohio and Alabama by the ACLU and Planned Parenthood. The ACLU has also announced its intention to challenge Georgia's ban.

is the...Medicaid bill.”⁴ His plan worked. It is estimated that one in four Medicaid-eligible women seeking an abortion is unable to get one,⁵ which can have devastating consequences for themselves and their families.⁶

State legislatures followed suit, passing a variety of medically unnecessary and politically motivated laws designed to make it impossible for people to access care. This trend picked up alarming speed after the 2010 elections. Since then, states have quietly passed 479 abortion restrictions.⁷ The ACLU is currently challenging more than 30 such restrictions in 14 states. Planned Parenthood and the Center for Reproductive Rights are challenging dozens more.

The laws pushed by abortion opponents include laws known as Targeted Regulations of Abortion Providers (TRAP) that place burdensome 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 actually make patients safer, and are 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 although 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.”⁸

Despite this ruling, not even three years later, the United States Court of Appeals for the Fifth Circuit upheld a nearly identical Louisiana law,⁹ and a petition for review is currently pending before the Supreme Court in that case brought by the Center for Reproductive Rights.¹⁰ That law was patterned after the Texas law and designed to shut down clinics. Indeed, if that law is allowed to stand there would only be a single doctor left in the entire state eligible to provide abortions.

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

⁴ Heather Boonstra, *Abortion in the Lives of Women Struggling Financially: Why Insurance Coverage Matters*, Guttmacher Policy Review (July 14, 2016), <https://www.guttmacher.org/gpr/2016/07/abortion-lives-women-struggling-financially-why-insurance-coverage-matters>.

⁵ 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).

⁶ Foster DG, Roberts SCM, and Mauldon J, *Socioeconomic consequences of abortion compared to unwanted birth*, 2012, <http://bit.ly/1PvNd4w>.

⁷ Elizabeth Nash, *Unprecedented Wave of Abortion Bans is an Urgent Call to Action*, Guttmacher Policy Review (May 31, 2019) <https://www.guttmacher.org/article/2019/05/unprecedented-wave-abortion-bans-urgent-call-action>

⁸ 579 US ___ (2016).

⁹ *June Med. Servs. v. Gee*, No. 17-30397 (5th Cir. 2019).

¹⁰ *June Med. Servs. v. Gee*, Dkt. 18-1323.

abortion provider, posing significant financial and logistical hurdles for patients seeking abortion care, 75% of whom are poor or low-income.¹¹ These requirements mean that a person must attempt to take additional days off work (losing needed income), attempt to 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.¹²

In addition, hostile state legislatures have passed laws that would criminalize providers for providing the only generally available method of ending a pregnancy in the second trimester. 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.¹³ However, Alabama has asked the Supreme Court to review that decision.

These are just some examples of the types of laws that state legislatures have passed that make it difficult, and in some cases impossible, for a person who has decided to have an abortion to actually get one. Indeed, 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.¹⁴

Kentucky is a prime example of how severely access has already been limited by the avalanche of restrictions. Shortly after *Roe* was decided, there were 17 locations in Kentucky where a person could get an abortion.¹⁵ Today, there is only a single clinic left standing.¹⁶ Yet Governor Bevin, like many politicians opposed to abortion rights, 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 it 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. Refusing to abandon its patients, EMW rushed to court seeking an emergency order to keep its doors open. In the end, the court struck down Kentucky's requirement, finding that the transfer agreement "resulted in no benefit" to patients.¹⁷ All it would do is make it impossible for a person to get an abortion in the state. That case is now on appeal, leaving the clinic's ability to continue seeing patients in jeopardy.

¹¹ 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>.

¹² *See, e.g., Planned Parenthood of Indiana and Kentucky v. Box*, 896 F.3d 809 (7th Cir. 2018) (cert. pet. pending).

¹³ *West Ala. Women's Ctr. v. Marshall*, 900 F.3d 1310 (11th Cir 2018).

¹⁴ *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/>.

¹⁵ *EMW Women's Surgical Ctr v. Glisson*, 2018 WL 6444391, *9 (Sept. 28, 2018).

¹⁶ *Id.*

¹⁷ *Id.* at *28.

Before 2019, opponents of abortion frequently tried to pretend that restrictions like Kentucky's were put in place to protect women's health. Of course, that claim has always been a farce. After all, 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.¹⁸ Georgia has one of the highest maternal mortality rates in the country,¹⁹ with a rate for Black women three times higher than the rate for white women.²⁰ In Alabama, two-thirds of the counties do not even have a hospital that provides obstetrical care.²¹ Alabama also has one of the highest infant death rates in the country.²² The politicians in these states, while focused on banning women's medical decisions, have failed in their duty to ensure that people who want to have babies can be pregnant and give birth safely.

Now, with the most recent bans, states like Alabama and Georgia have dropped the pretense about women's health entirely. They are making plain what their goal *has always been*: to ban abortion entirely.

Americans are rightly incensed by the passage of these laws which expressly force people to stay pregnant against their will. We must fight these bans, and we are. But, while the headlines are focused on the bans, its important to keep in mind that states are also continuing to quietly regulate away abortion access in the same manner that they have for years.

In fact, medically unnecessary regulations like the one EMW faced in Kentucky are threatening to close clinics throughout the South and Mid-West. Six states today have only a single provider left—Kentucky, Mississippi, Missouri, North Dakota, South Dakota, and West Virginia.²³ Several others have only a handful. And Missouri is at risk of becoming the first state since *Roe* was decided to be without a health center that provides abortions.²⁴ In Louisiana, unless the

¹⁸ 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>.

¹⁹ 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).

²⁰ 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.

²¹ 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-of-living/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>.

²² 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>.

²³ 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>.

²⁴ 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.

Supreme Court steps in in a case brought by the Center for Reproductive Rights, there will only be a single doctor left *in the entire state* eligible and able to provide abortion care.²⁵ In Alabama, but for lawsuits brought by the ACLU on behalf of providers, every single clinic in the state would have been forced to close.²⁶ In Ohio, the state has been slowly going after clinics one by one, using regulation after regulation, to force clinics to shut their doors. And the list goes on.

Although litigation is a powerful tool, we cannot always count on the courts to stop these laws. And, I have seen firsthand the impact on patients. I have seen a clinic have to turn away patients who were sitting in the waiting room when a restriction unexpectedly went into effect. I have seen a clinic unable to care for a patient who had been referred by a hospital in another state because we did not get a court ruling in time. And research tells us that being denied a wanted abortion has serious consequences for people 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,²⁷ to remain tethered to abusive partners;²⁸ and to experience increased economic insecurity.²⁹

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 the Women's Health Protection Act, which would provide a powerful federal safeguard against not only outright bans, but also against clinic shut down laws and other restrictions that prevent people from getting the care they need.³⁰ In addition, Congress should pass the EACH Woman Act, which would lift the Hyde Amendment and related bans on abortion coverage in government insurance programs, and also 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.

²⁵ *June Med. Servs. v. Gee*, Dkt. 18-1323.

²⁶ *West Alabama Women's Ctr. v. Miller*, 299 F. Supp. 3d 1244 (M.D. Ala. 2017); *W. Alabama Women's Ctr. v. Williamson*, 120 F. Supp. 3d 1296, 1317 (M.D. Ala. 2015); *Planned Parenthood Southeast v. Strange*, 33 F. Supp. 3d 1330 (M.D. Ala. 2014).

²⁷ Gerdtts 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).

²⁸ 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).

²⁹ Foster DG, Biggs MA, Ralph L, Gerdtts 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).

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

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

There is overwhelming public support for abortion access. According to the recent polling, two-thirds of Americans do not want to see *Roe* overturned.³² And a majority of voters agree that everyone should have health insurance that covers reproductive healthcare, including abortion.³³ They agree that once a person has decided to have an abortion, they should be able to get care that is supportive and affordable without additional obstacles.³⁴

As the mother of two fabulous children, I know that the decision about whether and when to become a parent is one of the most important ones we make in our lives. It's incumbent upon our government to enable us to make these decisions in a way that is best for ourselves and our families. That is critical to ensuring that people and families thrive and that everyone in our community can participate with freedom, dignity, and equality.

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 voters see the impact of abortion coverage on women's economic opportunities and security*, Hart Research Associates (Oct. 18, 2017), <https://allaboveall.org/wp/wp-content/uploads/2017/10/Economic-Opportunity-and-Reproductive-Health-Polling-Memo-October-2017.pdf>.

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.