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Hearing of the House Committee on the Judiciary

“The Texas Abortion Ban and its Devastating Impact on Communities and Families”

November 4, 2021, 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 Texas Health & Safety Code § 171.204 (SB 8, or the “Heartbeat Law”) 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 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 toward a day when every member of the human family is welcomed in life and protected in law.

Thank you for the opportunity to argue against the narrative that SB 8 and laws like it “devastate” communities and families. The reality is that the abortion rate in this country has been falling dramatically for years, and Texans are stepping up to support their friends and neighbors now that SB 8 is in effect.

I. Congress should not overrule the will of the people of Texas.

Texans enacted SB 8. Too often Members of Congress speak about state-level lawmaking as if it is being imposed upon the voters against their will. Indeed, throughout the legislative process, SB 8 has been supported by people of Texas and their duly elected members of the Texas Legislature. SB 8 had ninety-one bill authors and co-sponsors, including one pro-life Democrat.¹ Both Chambers held in-person hearings and adopted amendments offered.² The public weighed in, and lawmakers spent many hours asking questions about the bill. It passed through two committees, was voted favorably through both Chambers, and SB 8 was signed by Governor Abbott on May 19, 2021.³ Texans sent pro-life majorities to Austin and those lawmakers enacted legislation that serves their constituents.

¹ For a breakdown of sponsors and cosponsors, *see* SB 8, Texas Legislature Online, <https://capitol.texas.gov/billlookup/History.aspx?LegSess=87R&Bill=SB8> (last visited Nov. 2, 2021).

² For hearing dates and amendments, *see id.*

³ *Id.*

Polling data is beginning to bear this out. The “Texas Trends Survey 2021” conducted by researchers at the University of Houston and Texas Southern University in October 2021 found that 55% of Texans supported SB 8, and 70% of Texans support significant limits on abortion generally (prohibition or narrow exceptions like the mother’s life and health, rape, or incest).⁴ This is an increase from a University of Texas/Texas Tribune poll in June 2021 that found 44% support for even the poorly worded “making abortion illegal after six weeks of pregnancy.”⁵

In the findings section of SB 8, Texas asserted its “compelling interests from the outset of a woman's pregnancy in protecting the health of the woman and the life of the unborn child.”⁶ Texas, like a dozen other states,⁷ passed a law prohibiting physicians from performing abortions after a fetal heartbeat is detected, around six weeks’ gestation. In every one of those states, the law has been challenged and immediately enjoined. What made the Texas law different is the lack of government enforcement,⁸ which is why it is the only Heartbeat Law currently in effect. As the first of these laws to survive a pre-enforcement challenge, SB 8 provides us with a glimpse of what a post-*Roe* world would look like.

Under our federalist system, Texas has authority to create and enforce laws that improve the health and welfare of its citizens, including the youngest members of the human family. SB 8 is the policy preference of the voters of Texas, regardless of its popularity on Capitol Hill.

⁴ University of Houston Hobby School of Public Affairs & Texas Southern University Barbara Jordan-Mickey Leland School of Public Affairs, *Texas Trends Survey 2021* (Oct. 2021) https://uh.edu/hobby/txtrends/txtrends2021_report1.pdf.

⁵ The Texas Politics Project at the University of Texas at Austin, *Support or Oppose: Making Abortion Illegal After 6 Weeks of Pregnancy* (June 2021) <https://texaspolitics.utexas.edu/set/support-or-oppose-making-abortion-illegal-after-6-weeks-pregnancy-june-2021>.

⁶ Tex. Health & Safety Code § 171.202(3).

⁷ Alabama (total prohibition, Ala. Code § 26-23H-4), Arkansas (heartbeat and 12 weeks, Ark. Code § 20-16-1304), Georgia (heartbeat, Ga. Code § 31-9B-2), Iowa (heartbeat, Iowa Code § 146C.2), Kentucky (heartbeat, Ky. Rev. Stat. § 311.7706), Louisiana (heartbeat, La. Stat. tit. 40 § 1061.1.3), Mississippi (heartbeat, Miss. Code § 41-41-34.1), Missouri, (8 weeks, Mo. Rev. Stat. § 188.056), North Dakota (heartbeat, N.D. Cent. Code § 14-02.1-05.2), Ohio (heartbeat, Ohio Rev. Code § 2919.193), Oklahoma (heartbeat, Okla. Stat. tit. 63 § 1-731.3), South Carolina (heartbeat, S.C. Code § 44-41-680), Tennessee (heartbeat, Tenn. Code § 39-15-216).

⁸ Tex. Health & Safety Code § 171.207(a) (“Notwithstanding Section 171.005 or any other law, the requirements of this subchapter shall be enforced exclusively through the private civil actions described in Section 171.208. No enforcement of this subchapter, and no enforcement of Chapters 19 and 22, Penal Code, in response to violations of this subchapter, may be taken or threatened by this state, a political subdivision, a district or county attorney, or an executive or administrative officer or employee of this state or a political subdivision against any person, except as provided in Section 171.208.”).

Because Texas collects and reports abortion data each month, we already know that SB 8 is having an effect. In September 2021, abortion was down 50% from September 2020.⁹ While some women may travel out of state to obtain an abortion, many will not, meaning that thousands of lives will be spared from the violence of abortion. As data becomes available from Texas' neighboring states, and more babies are born, we will have a better understanding of the long-term impacts of SB 8.

II. Women deserve better than abortion.

In the past two decades, the abortion rate has steadily fallen, dropping below its pre-*Roe* rate.¹⁰ The current abortion rate is nearly half what it was at the high point in the 1980's.¹¹ 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 in Texas stand ready to assist women, providing free resources, counseling, and material support. In fact, Texas has over 200 dedicated pregnancy centers, more than any other state.¹²

According to CareNet and the Charlotte Lozier Institute, pregnancy centers served 178,724 Texans in 2019.¹³ This included:

- \$19,448,790 in medical services like pregnancy tests, ultrasounds, and STI testing
- \$10,889,759 in family services like counseling, parenting education, and post-abortion support
- \$2,218,416 in material items like diapers, clothing, and car seats.

⁹ Kari White et al., *Initial Impacts of Texas' Senate Bill 8 on Abortions in Texas and at Out-of-State Facilities*, Texas Policy Evaluation Project at The University of Texas at Austin (Oct. 2021) <http://sites.utexas.edu/txpep/files/2021/10/sb-8-initial-impact-oct-28-txpep-brief.pdf>.

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 *Id.*

¹² Caroline Kitchener, *With Most Abortions Illegal in Texas, Crisis Pregnancy Centers See an Opportunity*, THE LILY (Sept. 4, 2021) <https://www.thelily.com/with-most-abortions-illegal-in-texas-crisis-pregnancy-centers-see-an-opportunity/>.

¹³ CareNet & Charlotte Lozier Institute, *Pregnancy Center State Impact Report* (Oct. 2021) https://s27589.pcdn.co/wp-content/uploads/2021/10/Final-Texas-State-Impact-Report_2019-Data.pdf.

This year, Texas again increased funding for its Alternatives to Abortion¹⁴ program, allocating \$100 million over the upcoming biennium.¹⁵ Run through the Texas Department of Health and Human Services, the program provides material support and connects families in need with referrals for government assistance programs for which they are eligible. Additionally, 73 federally qualified health centers operating more than 660 service delivery sites serve Texas women and families across the state.¹⁶

SB 8 is giving some people flashbacks to earlier Texas litigation. In 2013, there were around forty abortion clinics in Texas.¹⁷ After the legislature enacted a law requiring hospital admitting privileges to ensure continuity of care if a complication occurred during the abortion, over half of these clinics closed. They never reopened even after the law was struck down, and the remaining 19 Texas abortion businesses fear the same will happen now.¹⁸ In reality, when women and families are offered other options, they take them. The industry is failing in Texas because demand has dropped. In 2008, Texas reported 81,591 abortions done in the state; by 2020, that number was 56,358.¹⁹

In *Planned Parenthood v. Casey*, a plurality of the Court relied on the mistaken belief that people (primarily women) have made choices about their intimate lives with the understanding that abortion exists as a fallback if contraception fails and to remove that option would cause grave harm.²⁰ But five decades of Court-sanctioned

¹⁴ Alternatives to Abortion, Tex. Health & Hum. Servs., <https://www.hhs.texas.gov/services/health/women-children/alternatives-abortion> (last visited Nov. 2, 2021).

¹⁵ Shannon Najmabadi & Carla Astudillo, *An Anti-Abortion Program Will Receive \$100 Million in the Next Texas Budget, But There's Little Data on What's Being Done With the Money*, THE TEXAS TRIBUNE (June 8, 2021) <https://www.texastribune.org/2021/06/08/texas-abortion-budget/>.

¹⁶ Texas Department of State Health Services, *Texas Primary Care Office (TPCO) – Federally Qualified Health Centers* (Apr. 23, 2021) <https://dshs.texas.gov/TPCO/fqhc/>.

¹⁷ Julia Harte, *Texas Abortion Clinics Struggle to Survive Under Restrictive Law*, REUTERS (Sept. 30, 2021) <https://www.reuters.com/world/us/texas-abortion-clinics-struggle-survive-under-restrictive-law-2021-09-30/>.

¹⁸ *Id.*

¹⁹ Induced Termination of Pregnancy, ITOP Statistics (2021) <https://www.hhs.texas.gov/about-hhs/records-statistics/data-statistics/itop-statistics>.

²⁰ 505 U.S. 833, 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

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.²¹ 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.”²²

How often do pro-choice politicians prioritize abortion over authentic choices? If abortion is a “choice,” employers and the government²³ can offer to pay for the cheaper, easier option—the one that most benefits them—while claiming the mantle of “women’s equity.”²⁴ Last month the Biden administration rolled out its “National Strategy on Gender Equity and Equality,” which included warnings about the “grave threats to reproductive rights.”²⁵ With abortion standing strong as one party’s solution to all women’s problems, how can we possibly come together to promote policies that support working moms and families?

III. The Supreme Court can—and should—revisit abortion jurisprudence later this year.

On December 1, 2021, the Supreme Court of the United States will hear oral arguments in *Dobbs v. Jackson Women’s Health Org.*²⁶ and consider the question

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).

²¹ 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>.

²² *Id.*

²³ 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>.

²⁴ 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/>.

²⁵ 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>.

²⁶ No. 19-1392 (2021).

presented: Whether all pre-viability prohibitions on elective abortions are unconstitutional.

The Court can—and should—take the opportunity to recognize the unsettled nature of *Roe v. Wade*²⁷ and *Planned Parenthood of Southeastern Pennsylvania v. Casey*²⁸ 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 v. Russo*].²⁹ 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 reasoned justification for the viability rule.³⁰ *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.³¹ 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.³²

²⁷ 410 U.S. 113 (1973).

²⁸ 505 U.S. 833 (1992).

²⁹ 140 S. Ct. 2103, 2182 (2020) (Kavanaugh, J., dissenting) (“Today, five Members of the Court reject the *Whole Woman’s Health* cost benefit standard.”); *Whole Woman’s Health v. Hellerstedt*, 136 S. Ct. 2292, 2321 (2016) (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).

³⁰ See Randy Beck, Gonzales, *Casey and the Viability Rule*, 103 Nw. U. L. Rev. 249 (2009).

³¹ *Payne v. Tennessee*, 501 U.S. 808, 828–830 (1991).

³² Brief of Americans United for Life as *Amicus Curiae* in Support of Petitioners at 2–3, *Dobbs v. Jackson Women’s Health Organization*, No. 19-1392 (2021).

The viability rule was dictum in *Roe*, since neither Texas’s nor Georgia’s statutes was tied to viability.³³ “Neither Congress nor state legislatures are bound by language unnecessary for a decision, however strong,”³⁴ 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.³⁵

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.³⁶ 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.³⁷ Again, the viability standard creates a messy, unequal outcome and hamstring states from acting upon their well-established compelling interest in preventing discrimination.

Indeed, the United States House of Representatives voting on HR 3755, the “Women’s Health Protection Act,” suggests that Leadership recognizes the end of *Roe/Casey* is nigh and lawmaking will finally be returned to lawmakers.

IV. The so-called Women’s Health Protection Act, Congressional Democrats’ response to Texas SB 8, would trample any pretense of federalism, effectively banning all state abortion regulations and forcing every state to have abortion on demand throughout pregnancy.

³³ Parts of an opinion are dicta if they are “not essential to [the court’s] disposition of any of the issues contested.” *Central Green Co. v. United States*, 531 U.S. 425, 431 (2001).

³⁴ Henry J. Friendly, *Time and Tide in the Supreme Court*, 2 Conn. L. Rev. 213, 216 (1968).

³⁵ Brief *Amici Curiae* of 228 Members of Congress in Support of Petitioners at 6–7, *Dobbs v. Jackson Women’s Health Organization*, No. 19-1392 (2021).

³⁶ *Id.*

³⁷ Compare *Preterm-Cleveland v. McCloud*, 994 F.3d 512, 517–18 (6th Cir. 2021) with *Little Rock Fam. Plan. Servs. v. Rutledge*, 984 F.3d 682, 690 (8th Cir. 2021).

The Women’s Health Protection Act does everything but protect women’s health. It impedes the States’ legitimate interest in protecting life, attempts to negate currently existing commonsense protections for women’s health, and prohibits 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 laws before viability, the Act would prevent basic regulation and oversight crucial to keeping women safe.

The invalidation of SB 8 would just be the beginning. Here are some of the hundreds of health and safety laws that could be invalidated by WHPA:

- **Gestational age limits:** 43 states and counting³⁸ have laws that restrict elective abortions at or before “viability” based on women’s health and the interests of the child.³⁹
- **Fetal pain:** Currently 18 of those states limit abortion to 20 weeks’ gestation based on scientific evidence that the baby can feel pain.⁴⁰
- **Discrimination:** Every state would be prohibited from preventing discriminatory abortions on the basis of race, sex, or genetic anomaly.
- **Informed consent:** Most states have enforceable informed consent and reflection period laws.
 - 28 states require written materials be either given or offered.⁴¹
 - 25 states require specific information be given on the abortion procedure.⁴²

³⁸ New Hampshire Governor Sununu signed a 24 weeks’ law this year which will take effect on Jan. 1, 2022.

³⁹ 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/>.

⁴⁰ Brief *Amici Curiae* of 228 Members of Congress in Support of Petitioners at 6–7, *Dobbs v. Jackson Women’s Health Organization*, No. 19-1392 (2021).

⁴¹ 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.

⁴² 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.

- 31 states require the woman be informed of the probable gestational age of her fetus.⁴³
- **Reflection periods:** 26 states have a reflection period⁴⁴ like Pennsylvania’s 24-hour law upheld by the Supreme Court in *Casey*.⁴⁵
- **Prohibiting telemedicine abortion:** 7 states have already explicitly prohibited at-home abortions via telemedicine.⁴⁶ And around twenty states have laws requiring that abortion-inducing drugs be prescribed and supplied directly from the physician in a clinical setting.⁴⁷ Texas joined them when Governor Abbott signed SB 4 this summer.

According to Section 2(a)(9) of the WHPA, nearly 500 state laws to regulate abortion have been passed since 2011. This year, at least 22 states have enacted restrictions on abortion.⁴⁸ The WHPA seeks to invalidate most of them. The argument that abortion is a constitutionally protected right and therefore must be protected by the federal government means States would have virtually no say in enacting abortion laws. 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

⁴³ 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.

⁴⁴ These states are Alabama, Arizona, Arkansas, 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.

⁴⁵ *Casey*, 505 U.S. at 844.

⁴⁶ These states are Arizona, Idaho, Montana, Ohio, Oklahoma, West Virginia, and Wisconsin.

⁴⁷ 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>.

⁴⁸ Ams. United for Life, State Legislative Sessions Report (2021) <https://aul.org/2021/10/27/auls-2021-state-legislative-sessions-report/>.

clinics because that would interfere with access to abortion.⁴⁹ By lowering professional accountability, abortion providers will be free to operate without regulation and oversight, to the detriment of women and young girls.⁵⁰

V. *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 [ensure] maximum safety for the patient.”⁵¹ Affirming what is considered the essential holding of *Roe*, the Supreme Court in *Planned Parenthood 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.”⁵²

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 more permissible *Casey* standard after several years of *Hellerstedt*.⁵³ Indeed, the Justices exercised restraint in only addressing the standing issue as ripe and permitting SB 8 to take effect while the Court continues to hear challenges to the law.⁵⁴

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 and the biological reality that a preborn child is a member of the human family, not the other way around.

⁴⁹ 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-pagestory/274944/> (discussing the case of Kermit Gosnell).

⁵⁰ 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).

⁵¹ *Roe*, 410 U.S. at 150.

⁵² *Casey*, 505 U.S. at 869.

⁵³ See *June Med. Servs. v. Russo*, 140 S. Ct. 2103 (2020).

⁵⁴ *Whole Woman’s Health v. Jackson*, No. 21-463 (argued Nov. 1, 2021), *United States v. Texas*, No. 21-588 (argued Nov. 1, 2021).

The “right” to abortion in this country has never been unqualified or unregulated. This term it will likely be modified once again by the Supreme Court that created it. Removing every medical component of the abortion procedure in the name of unfettered “access” isn’t women’s health—it’s just abortion.

VI. Conclusion

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 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.⁵⁵

Congress expresses policy preferences in the bills it considers and the hearings it schedules. This hearing says that browbeating duly elected Texas lawmakers and the constituents who elected them is more important than funding the government or overseeing the administrative. The WHPA says that speedy abortions are valued over women and girls’ health and safety. That at no point in pregnancy do the child’s interests come into play. That the States, who broadly enact and enforce local healthcare regulations, no longer have a say in this one area of medicine. That more babies being born, and more resources being allocated to support women, children, and families, is “devastating” to certain members of this committee.

Congress—and the Supreme Court—should let Texans govern Texas.

Sincerely,



Catherine Glenn Foster
President and CEO
Americans United for Life

⁵⁵ 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).