Testimony of Professor Michele Bratcher Goodwin[†]
Linda D. & Timothy J. O'Neill Professor
of Constitutional Law and Global Health Policy
Co-Faculty Director, O'Neill Institute for National and Global Health Law
Georgetown University Law Center
Before the Senate Finance Committee
On "Chaos and Control: How Trump Criminalized Women's Health Care"

Committee Chairman Wyden, Committee Ranking Member Crapo, and distinguished members of the Senate Finance Committee, thank you for inviting me to participate in today's hearing on "Chaos and Control: How Trump Criminalized Women's Health Care."

My name is Michele Bratcher Goodwin. I am the Linda D. and Timothy J. O'Neill Professor of Constitutional Law and Global Health Policy at the Georgetown University Law Center where I am also the Co-Faculty Director of the O'Neill Institute for National and Global Health Law. I write and teach in the areas of constitutional law, health law, reproductive law, and bioethics. My scholarship is published in the *California Law Review, Cornell Law Review, Harvard Law Review, Michigan Law Review, NYU Law Review, Texas Law Review* and *Yale Law Journal,* among others, and in books, including the *Policing The Womb: Invisible Women and The Criminalization of Motherhood*. I am a 2022 recipient of the American Bar Association's Margaret Brent Award as well as the 2020-21 recipient of the Distinguished Senior Faculty Award for Research, the highest honor bestowed by the University of California. I have served on committees of the National Academies of Sciences, Engineering, and Medicine on pressing, national health concerns.

Over the past twenty-five years, my writings about urgent matters of national and global health, including reproductive health, rights, and justice, have been published in books, elite law reviews, peer-reviewed medical journals, in newspapers of record, and in amicus briefs submitted to federal courts, including the United States Supreme Court. I have written about health inequities and disparities, as well as reproductive health, rights, and justice. This work has involved detailed research of domestic laws, policies, and cases, as well as international field research on matters of reproductive health and the rights of girls and women in India, the Philippines, Europe, Africa, Asia, and the United States.

Today, I am here to offer testimony at this hearing, titled: *"Chaos and Control: How Trump Criminalized Women's Health Care."* This hearing is aptly framed as the legal, social, and moral chaos unleashed since the United States Supreme Court's *Dobbs v. Jackson Women's Health Organization*[1] decision has brought about a torrent of pandemonium, fomenting havoc for medical providers and hospitals. It has exacerbated and caused the closure of clinics that provided the only healthcare services for tens—and even hundreds of miles for economically disenfranchised women and families. These closures, which were foreseeable, place the lives of women and girls at risks.

[†] My deep appreciation to the Senate Judiciary Committee for its convening of this important hearing. This testimony draws from my research and writing, including POLICING THE WOMB: INVISIBLE WOMEN AND THE CRIMINALIZATION OF MOTHERHOOD (Cambridge University Press, 2020); "Involuntary Reproductive Servitude: Forced Pregnancy, Abortion, and the Thirteenth Amendment," *University of Chicago Legal Forum*: Vol. 2022.

[1] 142 S.Ct. 2228 (2022).

Undeniably, the zealotry to overturn *Roe* and the sweeping legislative enactments of abortion bans show a tremendous disregard for the health and safety of women.

The Emergency Medical Treatment and Labor Act: EMTALA

The chaos unleashed on women's basic healthcare is most critically exposed in the shifting landscape on emergency medical treatments. In 1986, Congress enacted the Emergency Medical Treatment & Labor Act (EMTALA) "to ensure public access to emergency services regardless of ability to pay." EMTALA was a bold Congressional effort to ensure care for pregnant women as well as all persons in need of emergency care when at their most vulnerable. Explicitly "labor" is framed within the title of the law. Specifically,

> Section 1867 of the Social Security Act imposes specific obligations on Medicare-participating hospitals that offer emergency services to provide a medical screening examination (MSE) when a request is made for examination or treatment for an emergency medical condition (EMC), including active labor, regardless of an individual's ability to pay. Hospitals are then required to provide stabilizing treatment for patients with EMCs. If a hospital is unable to stabilize a patient within its capability, or if the patient requests, an appropriate transfer should be implemented.[2]

The purpose of this law is to ensure that patients in emergency situations are not turned away, sent off, or refused treatment. The legacy preceding EMTALA's enactment involved "patient dumping" a term used to describe the denial of emergency care to individuals because of their insurance status (or lack thereof), poverty, or even racial and gender status. Some patients died as a result of "dumping" or their conditions worsened. Quite relevantly, such decisions were neither medically nor ethically justifiable. Pregnant women were dumped if their pregnancies were perceived as complicated, often requiring them to deliver in compromised and unsanitary conditions, including in their cars while enroute to other hospitals located miles away. This was particularly problematic in rural communities. Sick children without health insurance were dumped if their parents—working class Americans—lacked health coverage.

This legacy of "patient dumping" has race, sex, and poverty-based discrimination at its foundation. Black patients were routinely turned away from medical clinics and hospitals that refused to admit them. Horrifically, Black patients literally died on the steps of hospitals that refused to treat them based on the color of their skin. This shameful legacy was—at least in part—addressed by EMTALA. However, in the wake of *Dobbs*, some antiabortion state lawmakers stunningly claim that the federal law does not reach pregnant patients in need healthcare that involves abortion.

For this reason, as my colleagues, Professors Allison Whelan, Lawrence Gostin, and I wrote in the *Journal of American Medical Association*,[3] despite what appeared to be a victory in *Moyle v. United States*,[4] which allowed abortions in Idaho to continue (for now) in life-threatening circumstances, all Americans should be alarmed. In that case, the Court explained that it was

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[2] See, Emergency Medical Treatment & Labor Act (EMTALA), at http://www.cms.gov/Regulations-and-Guidance/Legislation/EMTALA/index.html?redirect=/EMTALA/

[3] Michele B. Goodwin, Allison M. Whelan, and Lawrence O. Gostin, *The Supreme Court and The Emergency Medical Treatment and Labor Act-A Dangerous Time for Us All,* JAMA, Sept. 16, 2024, https://jamanetwork.com/journals/jama/fullarticle/2823760

[4] *Moyle v US*, 603 US __ (2024) (per curium).

imprudent to take the case and returned it to the Ninth Circuit for further review. This was a procedural holding.

Thus, even while the decision was lauded as a win for preserving women's health, we urge caution, explaining that although the decision prohibits the state of Idaho from enforcing its abortion ban in contravention of EMTALA while the case proceeds, it only temporarily spares pregnant women in Idaho from the grave health risks associated with modern-day patient "dumping." The reality is that the Court's punting on a clear, answerable question of federal preemption is distressing with potentially devastating consequences for women and all Americans. As we explain in significant detail, *Moyle* is a dangerous decision. After all, EMTALA requires Medicare-participating hospitals (most hospitals in the country) that offer emergency services to provide "necessary stabilizing treatment" to any patient with an emergency medical condition, including active labor, that seriously threatens the patient's life or health.[5]

For more than twenty years, dating back to the George W. Bush administration, the Department of Health and Human Services (HHS) has interpreted EMTALA to require pregnancy termination if it represents the stabilizing care necessary to save the pregnant patient's life or prevent grave harm to health.[6] This well-established and accepted interpretation is now vulnerable, potentially creating a two-tiered system of emergency medical services during pregnancy, depending on the state in which a pregnant woman or girl resides or happens to be. As we explain, the argument that state abortion bans supersede or take precedence over federal law is principally wrong and irrational. This interpretation is inconsistent with "over two-hundred years of well-settled legal principles that date back to the nation's founding—namely, that federal law preempts contrary state law."[7]

Most distressing is the legal, medical, and social disorder caused by *Dobbs,* which now reaches *Moyle.* The notion that pregnant patients must be close to death before medical treatment is permissible and without risk of civil and criminal punishments for medical providers is dangerous and irrational. This betrays the notion of a well-ordered government committed to the constitutional equality and protection of all its people.

Maternity Care Deserts and The Texas Case: Foreseeable Disregard For the Lives of Women and Girls

According to a recent study by the March of Dimes, "*Nowhere To Go: Maternity Care Deserts Across The U.S."* nearly seven million women "and almost 500,000 births in the U.S." are affected by maternity care deserts where there is low or no maternity healthcare.[8] Generally, maternity care deserts are defined as "counties where there is a lack of maternity care resources, where there are no hospitals or birth centers offering obstetric care and no obstetric providers."[9] The *Dobbs* decision alone did not create this phenomenon, but rather it was the nail that sealed the coffin. That is, the political and social movement to target, surveil, punish, shame, and ultimately

[5] 42 USC §1395dd.
[6] Brief for Former HHS Officials as *Amici Curiae* Supporting Respondent, *Moyle v. Idaho*, No. 23-726 (Mar. 28, 2024).
[7] *Id.*
[8] March of Dimes, MATERNITY CARE DESERTS REPORT 2022, https://www.marchofdimes.org/sites/default/files/2022-10/2022_Maternity_Care_Report.pdf.
[9] *Id.*

deny women reproductive healthcare and rights, shamefully began with targeted regulations of abortion providers (TRAP laws). Ultimately, this movement found an ally in the White House.

TRAP laws, which targeted the width of hallways, height of cabinets, medical privileges of doctors, and more, created burdens so onerous that clinics, which provided breast cancer screenings, contraceptives, sexually transmitted infections screenings, pap smears, prenatal care, and postnatal care, shuttered their doors. Their goal-to hobble abortion access and close healthcare facilities-was indifferent to the suffering of millions of women, especially poor and vulnerable women. Despite unequivocal scientific research[10] and empirical outcomes from abortion clinics[11] proving that legal abortions are as safe as penicillin shots,[12] antiabortion legislators and activists falsely claimed that TRAP laws protected women, even referring to this type of lawmaking as "sensible women's health legislation."[13]

Consider the Texas case. The TRAP Law and antiabortion movements, which are one in the same, doubled down after losing an important case before the Supreme Court in 2016. In *Whole Woman's Health v. Hellerstedt,*[14] a 5-3 decision authored by Justice Breyer, the Court struck down two Texas TRAP laws, H.B.2, which it found unconstitutional and rooted in deception. The Texas law had two components: a) requiring doctors that perform abortions have admitting privileges at nearby hospitals; and b) requiring clinics where abortions were performed retrofit to become ambulatory surgical centers—essentially requiring that abortion clinics become emergency rooms. After H.B. 2's enactment, the number of women living more than 150 miles from a clinic providing abortion services increased from about 86,000 to 400,000. In addition, the number of women residing in a "county more than 200 miles from a provider" increased from 10,000 to 290,000.[15]

The Court observed that where "prior to the enactment of H.B. 2, there were more than 40 licensed abortion facilities in Texas," that number precipitously "dropped by almost half leading up to and in the wake of enforcement of the admitting-privileges requirement that went into effect in late-October 2013."[16] The Court reiterated the lower court warning:

- "If the surgical-center provision were allowed to take effect, the number of abortion facilities, after September 1, 2014, would be reduced further, so that 'only seven facilities and a potential eighth will exist in Texas.'"[17]
- The state's claim "that these seven or eight providers could meet the demand of the entire state stretches credulity."[18]
- And, the "two requirements erect a particularly high barrier for poor, rural, or disadvantaged women."[19]

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[10] *See, e.g.*, Elizabeth G. Raymond et. al., *The Comparative Safety of Legal Induced Abortion and Childbirth in the United States,* 119 OBSTETRICS & GYNECOLOGY 215 (2012).
[11] *Whole Woman's Health* 136 S Ct 2292, at 2302, 2311 (2016).
[12] World Health Organization, SAFE ABORTION: TECHNICAL AND POLICY GUIDANCE FOR HEALTH SYSTEMS, 49 (2D EDN, 2012).
[13] Steven Ertelt, *Texas Law Banning Abortions After 20 Weeks Still Intact Despite Supreme Court Decision* LIFENEWS.COM (June 27, 2016), http://www.lifenews.com/2016/06/27/despite-supreme-court-decision-texas-law-banning-abortions-after-20-weeks-still-intact/.
[14] 136 S Ct 2292 (2016).
[15] *Id.*
[16] *Id* (citing *Whole Woman's Health v Lakey* 46 F Supp 3d at 681).
[17] *Id* (citing *Whole Woman's Health v Lakey* 46 F Supp 3d at 680).
[18] *Id* (citing *Whole Woman's Health v Lakey* 46 F Supp 3d at 682).
[19] *Id* (citing *Whole Woman's Health v Lakey* 46 F Supp 3d at 683).

A. Admitting Privileges: A False Narrative That Abortions Are Unsafe

Anti-abortion state legislatures as well as the Supreme Court are well-aware that abortions are safe and when restrictions are put in place, women's health suffers. Citing an amicus brief from the Society of Hospital Medicine, the Court noted the "undisputed" fact that "hospitals often condition admitting privileges on reaching a certain number of admissions per year."[20] As such:

> *[I]t would be difficult for doctors regularly performing abortions at the El Paso clinic to obtain admitting privileges at nearby hospitals because "[d]uring the past 10 years, over 17,000 abortion procedures were performed at the El Paso clinic [and n]ot a single one of those patients had to be transferred to a hospital for emergency treatment, much less admitted to the hospital."*[21]

Justice Breyer explained that "[i]n a word, doctors would be unable to maintain admitting privileges or obtain those privileges for the future, because the fact that abortions are so safe" and thus abortion providers were unlikely to treat patients whom they could admit.[22] Moreover, amicus briefs filed by Medical Staff Professionals and the American College of Obstetricians and Gynecologists (ACOG) clarifying that "admitting privileges…have nothing to do with the ability to perform medical procedures"[23] provided a persuasive factual foundation for the Court. In the latter brief, ACOG specifically explained that "some academic hospitals will only allow medical staff membership for clinicians who also accept faculty appointments."[24]

The Supreme Court took special note of a particular gynecologist with nearly forty years of practice experience, who despite experience in delivering over 15,000 babies, was yet unable to obtain hospital admitting privileges at the seven hospitals within a 30-mile radius of his office. The Court cited a letter from one of the nearby hospitals that explained the refusal to provide the doctor admitting privileges was "not based on clinical competence considerations."[25] The Court concluded that "[t]he admitting privileges requirement does not serve any relevant credentialing function." Instead, the law resulted in numerous clinic closures throughout the state of Texas and inordinate, unjustifiable burdens placed on pregnant women.

B. Surgical Center Requirements

In *Whole Woman's Health,* Justice Breyer stated that legislation in Texas already mandated clinics that perform abortions to develop, complete, and maintain: environmental and physical requirements; annual reporting; infection control; record keeping; patients' rights standards; quality assurance mechanisms; disclosure requirements; and anesthesia standards among others.[26] These requirements were far more stringent than for a host of medical procedures in Texas, including outpatient surgeries. Moreover, clinics performing abortions in Texas were already subject to random and unannounced inspections as a means of monitoring compliance with nearly

[20] *Id* (citation omitted).
[21] *Id* at 2312.
[22] *Id.*
[23] *Id.*
[24] *Id.*
[25] *Id* at 2313.
[26] *Id* at 2314 (citing Tex. Admin. Code, tit. 25, §§ 139.4, 139.5, 139.55, 139.58; §§ 139.43, 139.46; § 139.48; § 139.49; § 139.50; § 139.59. *See also*, §§ 139.23, 139.31; Tex. Health & Safety Code Ann. § 245.006(a) (West 2010)).

a dozen separate standards. In fact, the Texas Administrative Code, Title 25, § 139.33 and Texas Health & Safety Code Annotated § 245.011 imposed criminal penalties for failure to comply with the aforementioned regulations and for violating reporting guidelines.

Essentially, Texas already regulated abortion providers to such a strict degree that the state's ambulatory surgical-center mandate, which included "detailed specifications relating to the size of the nursing staff, building dimensions, and other building requirements,"[27] served only to unconstitutionally burden access to abortions. However, the new requirements included a full surgical suite "with an operating room that has 'a clear floor area of at least 240 square feet," as well as preoperative rooms and postoperative recovery suites, with specified traffic patterns, wall arrangements, shelving arrangements, specific types of ventilation, heating, and air conditioning among other requirements. However, the Supreme Court recognized that the law was meant to undermine abortion rights and not advance women's health. Justice Breyer wrote, "risks are not appreciably lowered for patients who undergo abortions at ambulatory surgical centers as compared to nonsurgical-center facilities."[28] In other words, women were no better off receiving an abortion at an ambulatory care facility than at a previously licensed facility. In addition, the new law offered "no benefit when complications arise in the context of an abortion produced through medication."[29]

Perhaps even more compelling to the Court was the important evidence that abortions performed at clinics prior to the enactment of H.B. 2 were safe. Justice Breyer wrote, "[t]he record also contains evidence indicating that abortions taking place in an abortion facility are safe — indeed, safer than numerous procedures that take place outside hospitals and to which Texas does not apply its surgical-center requirements."[30] To emphasize this point, the Court noted that a colonoscopy, which takes place outside of a surgical center and hospital setting, has a mortality rate 10 times higher than an abortion," and liposuction (also performed outside of a surgical center and hospital) has a mortality rate that "is 28 times higher than the mortality rate for abortion."[31]

Justice Breyer concluded that:

> [t]he upshot…[of this] record evidence, along with the absence of any evidence to the contrary, provides ample support for the District Court's conclusion that "[m]any of the building standards mandated by the act and its implementing rules have such a tangential relationship to patient safety in the context of abortion as to be nearly arbitrary."[32]

The lesson to be learned is that even prior to *Dobbs* state lawmakers and the Supreme Court where well-aware that the enactment of abortion bans would be tumultuous, disrupting women's lives, causing confusion, and ultimately, shutting down healthcare access for millions of women across the nation. For example, according to the Texas Policy Evaluation Project, within months of the H.B. 2's enactment, the number of abortion clinics in Texas dramatically declined by 56%; from forty-one licensed clinics to eighteen.[33] Wait periods for an abortion increased by nearly

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[27] *Id.*
[28] *Id* at 2315 (citation omitted).
[29] *Id* at 2315.
[30] *Id.*
[31] *Id.*
[32] *Id* at 2316.
[33] *See* TEXAS POLICY EVALUATION PROJECT, ACCESS TO ABORTION CARE IN THE WAKE OF HB2, http://www.utexas.edu/cola/txpep/_files/pdf/AbortionAccessafterHB2.pdf; *see also* Manny Fernandez and Erik

three weeks, because fewer clinics were available to provide services.[34] Longer wait periods produced serious barriers and harsh consequences, particularly for poor women, because Texas also enacted a ban on abortions after 20 weeks. Many women reported that the Texas restrictions placed an undue burden on their constitutionally protected right to an abortion by constructing barriers to access. One such example could be found in the Rio Grande of Texas, where only one abortion clinic operated. With its closure, the nearest clinic to perform abortion services would have been 230 miles away, a 12-hour roundtrip car ride.

Many lessons can be learned from *Whole Woman's Health.* First, abortions are safe. Second, labor and delivery, colonoscopy, tonsillectomy, liposuction, and a host of other outpatient surgeries are far more threatening to women's health than an abortion. Third, empirical evidence matters. In the case of TRAP laws, empirical evidence debunked meritless, false claims, and exposed the true motivations of H.B. 2, which was to undermine abortion rights by severely burdening women's access. In 2016, the Supreme Court recognized the Texas law for what it was. Today, the Supreme Court is differently comprised with Justices specifically appointed and tasked with diminishing and overturning *Roe*.

Indeed, Donald Trump seemingly laid out his plan to criminalize abortion and punish women almost immediately after oral arguments in *Whole Woman's Health.* On March 30, 2016, only weeks after the Supreme Court heard arguments in the case, at a townhall convening he asserted "There has to be some form of punishment" for women that have abortions.[35] And, on October 19, 2016, mere months after the important *Whole Woman's Health* decision, which reaffirmed *Roe* and *Planned Parenthood v. Casey,* Donald Trump revealed his intention to fully gut abortion rights. He promised that it "will happen, automatically," by his appointment of justices to the Supreme Court.[36]

C. Post-*Dobbs*

The mayhem resulting from the overturning of *Roe v. Wade*[37] and *Planned Parenthood v. Casey*[38] has introduced a new Jane Crow, creating an invidious second-tiered citizenship for women and girls, denying them basic healthcare, placing their health and even their lives at risk. In the first year after the *Dobbs* decision, over sixty clinics closed.[39] These closures and the abortion bans that triggered clinics shuttering created healthcare deserts. In Idaho, Bonner General

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Eckholm, *Court Upholds Texas Limits on Abortions*, NYT (June 9, 2015). https://www.nytimes.com/2015/06/10/us/court-upholds-texas-law-criticized-as-blocking-access-to-abortions.html.

[34] Stephen Young, *Texas Women Face Long Abortion Waits in HB2's Wake*, DALLAS OBSERVER (October 6, 2015), http://www.dallasobserver.com/news/texas-women-face-long-abortion-waits-in-hb2s-wake-7658610. *See also,* Mark Reagan, *HB2 Increasing Wait Times for Women Seeking Abortion Services,* SAN ANTONIO CURRENT (October 6, 2015) http://www.sacurrent.com/Blogs/archives/2015/10/06/hb2-increasing-wait-times-for-women-seeking-abortion-services.

[35] CBS NEWS, *Donald Trump: 'There Has To Be Some Form Of Punishment' For Women Who Get Abortions If They Become Illegal* (Mar. 30, 2016), https://www.cbsnews.com/newyork/news/donald-trump-abortions/.

[36] Dan Mangan, *Trump: I'll Appoint Supreme Court Justices To Overturn Roe v. Wade Abortion Case,* CNBC, (Oct. 19, 2016), https://www.cnbc.com/2016/10/19/trump-ill-appoint-supreme-court-justices-to-overturn-roe-v-wade-abortion-case.html.

[37] 410 U.S. 113 (1973), *overruled by* Dobbs v. Jackson Women's Health, 142 S.Ct. 2228 (2022).

[38] 505 U.S. 833 (1992), *overruled by Dobbs.*

[39] Allison McCann and Amy Schoenfeld Walker, *One Year, 61 Clinics: How Dobbs Changed The Abortion Landscape,* NYT, (June 22, 2023), https://www.nytimes.com/interactive/2023/06/22/us/abortion-clinics-dobbs-roe-wade.html.

Health suspended its labor and delivery services, "meaning there [is] zero obstetricians practicing there," including to assist with the delivery of babies.[40]

This problem—maternity care deserts--has now spread throughout states with abortion bans such as in Alabama, Arkansas, Georgia, Idaho, Indiana, Louisiana, Mississippi, Missouri, Nebraska, North Dakota, South Dakota, Oklahoma, Tennessee, and West Virginia among others. This problem has serious consequences for women, their pregnancies, and the infants born to them. In other words, abortion bans have ripple effects, creating abortion deserts that lead to maternity and healthcare deserts. And, without basic healthcare accessibility, women and girls will suffer. With no reasonable healthcare available, women who desire pregnancy will suffer. Consider Aleeshia Huguley, featured in the 2024 March of Dimes report on maternity care deserts: *Nowhere To Go: Maternity Care Deserts Across The US*. In Ms. Huguley's case, "due to her high-risk pregnancy, Aleeshia has weekly doctor appointments. Her community's lack of resources means her struggle with access to care won't end with childbirth—she also worries about getting her new baby to regular appointments."[41]

To be clear, abortion bans do not promote health and safety. They do not create new pathways for health access. Instead, they create invidious, life-threatening and altering circumstances. The 2024 March of Dimes report on maternity care deserts places these concerns and observations in context. Since *Dobbs,* one in twenty-five obstetric units "in the US shuttered their doors."[42]

> *The 2024 Nowhere to Go: Maternity Care Deserts in the US report reveals that over 35% of counties are considered maternity care deserts. This means that in 1,104 US counties, there is not a single birthing facility or obstetric clinician. These counties are home to over 2.3 million women of reproductive age and are the resident county of women who gave birth to over 150,000 babies in 2022.*[43]

To put it plainly, not only has the *Dobbs* decision left women without options to terminate pregnancies in states that ban abortion. In the last two years, meaningful opportunities to have access to reproductive healthcare to assist with prenatal care, labor and delivery, and postnatal care are also tragically diminished and increasingly nonexistent for millions of women across the United States. According to Dr. Kristy Acosta, "It's not uncommon for me to get a call that the mom just delivered at the gas station, and then I just wait for them at the emergency department."[44]

The stark reality in the United State is that "[o]ver 1 in 3 US counties lack a single obstetric clinician, and in many parts of the country obstetricians-gynecologists (OB-GYNs) and family physicians who deliver babies are leaving the workforce."[45] Roughly, 1.2 million women live in counties where here is only one obstetric clinician.[46] Even as midwifery revitalizes, "70% of birth

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[40] Amanda Musa and John Bonifield, *Maternity Units Are Closing Across America, Forcing Expectant Mothers To Hit The Road,* CNN, Apr. 7, 2023, https://www.cnn.com/2023/04/07/health/maternity-units-closing/index.html.
[41] March of Dimes, MATERNITY CARE DESERTS REPORT 2024, https://www.marchofdimes.org/sites/default/files/2024-09/2024_MoD_MCD_Report.pdf.
[42] *Id.* at 3.
[43] *Id*.
[44] *Id.* at 21.
[45] *Id.* at 3.
[46] *Id.* at 22.

centers in the US are within just 10 states."[47] Further, "Birth center births occur more often among those who are White, non-Hispanic and college educated, compared to hospital births.

When Cruelty Is The Point: Civil and Criminal Punishments

In the two years since the Supreme Court struck down *Roe* and *Planned Parenthood v. Casey,* a torrent of harmful, antiabortion restrictions cast doubt, fear, and uncertainty across a broad and deepening spectrum involving reproductive health. Women have been denied medical interventions in the most horrific and terrifying circumstances, including when miscarrying, even when suffering from deadly infections such as sepsis in antiabortion states. Matters that were once certain, including reproductive health protections for victims of rape and incest, can no longer be assumed, or counted upon by survivors of sexual violence. Mere weeks after *Dobbs,* a ten-year-old rape survivor fled Ohio to obtain an abortion in Indiana, because Ohio's abortion restrictions made no exception for rape or incest.[48] Some lawmakers implied that it was a hoax, showing a deep naiveté regarding the scope and scale of antiabortion laws that they voted to support, which make no exception for rape and incest.

The post-*Dobbs* landscape reveals a chilling disregard for the health and safety of pregnant women and their pregnancies. The snapshot below captures a thin margin of the odious ways in which women and girls now suffer:

- **Women are dying because of abortion bans.** These are preventable deaths such as in the case of Amber Nicole Thurman who passed away at 28 years old in Georgia, a state where abortion is banned. As her blood dropped and her organs failed, doctors did not intervene. According to ProPublica, "in her final hours, Amber Nicole Thurman suffered from a grave infection that her suburban Atlanta hospital was well-equipped to treat. However, Georgia lawmakers enacted criminal laws that make performing an abortion a felony. Violating the law could result in ten years' incarceration. Doctors waited—sadly until it was too late. Ms. Thurman is survived by an 8-year-old son. Kandi Miller, another Georgia mother, aged 41, also tragically died. In her case, despite pre-existing medical conditions, the Georgia law made no exceptions for cases such as hers where multiple chronic disease such as lupus, hypertension, and diabetes undermined her pregnancy. Her death was also preventable.
- **In Texas, there is "a dramatic rise in pregnant women dying**…after abortion [the state's] ban."[49] New data sows "the rate of maternal deaths in Texas increased 56% from 2019 to 2022 compared with the national average, during the same period.[50]

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[47] According to the March of Dimes, "[b]irth centers provide maternity care services for pregnancies free of active complications, or maternal and fetal factors that place the pregnancy at increased risk for complications. Care at birth centers follows the midwifery model, which focuses on nonmedicalized, low-intervention care." *Id.* at 18.

[48] Indiana's medical board determined Dr. Caitlin Bernard who provided the abortion to the girl violated privacy rules, issuing her a fine of $3,000 and a letter of reprimand. *See,* Aria Bendix and Phil Helsel, *Indiana Doctor Caitlin Bernard Reprimanded Over 10-Year-Old's Abortion Case*, NBCNEWS.COM, May 25, 2023. https://www.nbcnews.com/health/health-news/indiana-doctor-gave-10-year-old-girl-abortion-disciplinary-hearing-rcna86214.

[49] Erika Edwards, Zinhle Essamuah, and Jason Kate, NBC NEWS, Sept. 2024, https://www.nbcnews.com/health/womens-health/texas-abortion-ban-deaths-pregnant-women-sb8-analysis-rcna171631.

[50] *Id.*

- **Five women who were denied abortions in life-threatening circumstances sued the state** of Texas for a lack of access to abortion. The women faced risks of hemorrhaging, near-fatal infections, and death, and yet were denied abortions. Ms. Amanda Zurawski, who testified at the April 26, 2023, hearing on *The Assault On Reproductive Rights In A Post-Dobbs America* along with me before the United States Senate Committee on the Judiciary is among the five. Two of the women gestated fetuses with no developing skulls.[51]
- **Deborah Dorbert's pregnancy shifted dramatically after learning that her pregnancy was affected by Potter syndrome,** a rare and lethal fetal condition in which most babies do not survive. However, Florida, where Ms. Dorbert resides, *does* include an exception for abortion for fatal fetal abnormalities after 15 weeks of gestation. However, in this case doctors refused to intervene despite the tragic circumstances, likely because of the severe civil and criminal penalties that could result from violating the state's restrictive abortion laws. In this case, after Ms. Dorbert gave birth, her newborn gasped for air for 99 minutes before dying.[52]
- **In Louisiana, medical providers denied Ms. Nancy Davis an abortion** when her fetus was diagnosed with acrania, a rare congenital disorder that prevents a fetus from forming a skull within the womb. The *Dobbs* decision triggered Louisiana's abortion ban, and Ms. Davis was forced to seek abortion care in another state.[53]
- **In Wisconsin, a woman experiencing a miscarriage was denied care and turned away** by medical providers fearful of violating an 1849 trigger ban. Post-*Dobbs*, almost all abortions were banned due to the law, which punished violators with up to six years in prison.[54]
- **In Ohio, Brittany Watts was charged with desecrating a corpse after having a miscarriage** at home in her toilet. She had been turned away several times by medical providers. She eventually miscarried at home and was subjected to criminal charges, a grand jury probe, and law enforcement raiding her home.
- **In Clarksdale, Mississippi, a 13-year-old rape victim** was too poor and too late to receive an abortion. She went into 7th grade as a mother.

These cases represent the thinnest sampling of the types of tragedies that have unfolded in the wake of *Dobbs.* In Texas, violation of its law could result in 99 years incarceration, one-hundred thousand fine (for each violation), and loss of one's medical license. In South Carolina and Louisiana lawmakers have called for the death penalty in response to violating their states abortion bans. Fortunately, their proposals have thus far failed. Sadly, some lawmakers have expressed joy and reverie at the passage of their cruel legislation. Georgia Governor, Brian Kemp, expressed being "overjoyed," at the state's abortion ban.

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[51] Kate Zernike, *Five Women Sue Texas Over The State's Abortion Ban*, NYT, March 6, 2023, https://www.nytimes.com/2023/03/06/us/texas-abortion-ban-suit.html.

[52] Thomas Simonetti et. al, *The Short Life Of Baby Milo*, WASH PO, May 19, 2023, https://www.washingtonpost.com/health/interactive/2023/florida-abortion-law-deborah-dorbert/.

[53] Minyvonne Burke, *Woman Carrying Fetus Without A Skull To Seek Abortion In Another State Following Louisiana Ban* NBCNEWS Aug. 26, 2022, https://www.nbcnews.com/news/us-news/louisiana-woman-carrying-fetus-skull-seek-abortion-another-state-rcna45005.

[54] Rachel Sharp*, Woman Left To Bleed For 10 Days From Incomplete Miscarriage Amid Post-Roe Confusion,* THE INDEPENDENT, July 17, 2022, https://www.independent.co.uk/news/world/americas/wisconsin-miscarriage-roe-v-wade-abortion-b2125168.html.

The post-*Dobbs* landscape is a frightening reality for patients and providers as new, proposed legislation threatens criminal and civil punishments against patients that seek to exercise the right to travel to terminate a pregnancy. New laws threaten individuals that aid and abet an individual who seeks abortions. *Dobbs* unleashed a culture of antiabortion lawmaking now rife with violence, including legislation that calls for the death penalty against women that obtain abortions and doctors and medical providers that perform the procedure.[55]

The State of Affairs

Abortion bans now threaten fundamental rights apart from healthcare. This includes the First Amendment freedom to associate with medical providers and relatives and friends. This threat is found in laws that punish people for "aiding and abetting" in the termination of a pregnancy. Abortion bans undermine fundamental aspects of speech and religion when individuals are fearful about whom they may speak to about medical choices and when their religious viewpoint, which permits abortion is burdened and undermined by state lawmaker's antiabortion policies. At their core, antiabortion policies are cruel and unusual given their scope and scale, including preventable death and suffering caused by state policies.

As my scholarship has pointed out, abortion bans contradict and violate the text and meaning of the Thirteenth Amendment, which bans "involuntary servitude." These policies place women in service of the state, causing them to literally labor for the interests of others. Fundamentally, abortion bans undermine the liberty interests found in the Fourteenth Amendment's protection of substantive due process and its principles of equality under law. Abortion bans invade fundamental aspects of a woman's privacy, including current and future threats related to medication abortion and its delivery through the mail to people's homes. At risk today are enumerated and unenumerated rights held dear in the United States, including the right to travel and to be left alone by government. Indeed, the shame of these laws is exposed in their lack of exceptions.

A. *Abortion Bans Make No Exception for Rape or Incest*

In the late 1950s, the American Law Institute (ALI) proposed exceptions to abortion bans, which notably included rape and incest exceptions. By the 1960s, the ALI provisions and the rape and incest exceptions were broadly adopted.[56] Shortly after *Roe,* while antiabortion activists opposed rape and incest exceptions, the exceptions became moot as abortion was legalized. Today, post-*Dobbs,* various states that ban abortion do not make exceptions for rape or incest—a bridge thought too far only two years ago.

Fourteen states banned abortion in all stages of pregnancy following the *Dobbs* decision.[57] Of these states, nine make no exceptions for rape or incest. These states include Alabama,

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[55] Ken Tran, *South Carolina GOP Lawmakers Consider Death Penalty For People Who Have Abortions*, USA TODAY, March 14, 2023, https://www.usatoday.com/story/news/politics/2023/03/14/south-carolina-bill-abortion-death-penalty/11471997002/.

[56] Michele Goodwin & Mary Ziegler, *Whatever Happened To The Exceptions For Rape And Incest?* THE ATLANTIC, NOV. 29, 2022, https://www.theatlantic.com/ideas/archive/2021/11/abortion-law-exceptions-rape-and-incest/620812/.

[57] The fourteen states which have banned abortion in all stages of pregnancy include Alabama, Arkansas, Idaho, Kentucky, Louisiana, Mississippi, Missouri, North Dakota, Oklahoma, South Dakota, Tennessee, Texas, West

Arkansas, Kentucky, Louisiana, Missouri, Oklahoma, South Dakota, Tennessee, and Texas. The remaining 5 (Idaho, Indiana, Mississippi, North Dakota, and West Virginia) have exceptions for cases of rape or incest but limit these exceptions to the earlier stages of pregnancy.[58] Some states have unique policies regarding rape and incest. For example, Mississippi bans abortion with exceptions for rape but not incest. It also requires the filing of a police report. North Dakota bans abortion with exceptions for rape or incest only in the first six weeks of pregnancy. Wisconsin has a law from before Roe that bans abortion with no exceptions for rape or incest. Of the states that ban abortion in all stages of pregnancy, only West Virginia and Idaho have exceptions for rape and incest.

B. *Abortion Bans Based on Weeks of Pregnancy (Gestational Limits)*

In the wake of *Dobbs,* states that previously enacted gestational limits to abortion access have enacted total bans. Some states, however, still permit abortion, although with severe restrictions based on weeks of pregnancy. This has become a dangerous moving target for patients and healthcare providers as myriad antiabortion laws have been enacted since June 2022. These moving targets have created a chilling effect for providers and patients. Fourteen states have enacted total abortion bans. Twenty-seven states "have abortion bans based on gestational duration." Among the latter, "8 states ban abortion at or before 18 weeks' gestation" and "19 states ban abortion at some point after 18 weeks."[59]

C. *The Rejection of Dobbs and Pathways Forward*

In nearly 20 states, abortion remains legal and among these states, many have also passed new protections through executive orders, state legislation, and state constitutional amendments. Among these states are California, Colorado, Connecticut, Delaware, Hawaii, Illinois, [60] Ohio, Maine, Maryland, Massachusetts, Michigan, Minnesota, Nevada, New Jersey, New Mexico, New York, Oregon, Pennsylvania, Rhode Island, Vermont, and Washington.[61] Constitutional referenda to protect abortion access in California, Kentucky, Michigan, Montana, and Vermont all passed in November 2022, further demonstrating consensus and the commitment among the vast majority of Americans to protect abortion rights. Nevertheless, threats to abortion access as well as other constitutional rights to bodily autonomy and integrity continue, including with regard to LGBTQ communities.

Virginia, and Wisconsin. Some of the states make exceptions for rape and incest, while others do not. See Section A for more details.

[58] Mabel Felix, Laurie Sobel, and Alina Salganicoff, *A Closer Look At Rape and Incest Exceptions In States With Abortion Bans and Early Gestational Restrictions,* KFF, Aug. 7, 2024, https://www.kff.org/policy-watch/rape-incest-exceptions-abortion-bans-restrictions/.

[59] Guttmacher Institutes, *State Lawas and Policies: State Bans on Abortion Throughout Pregnancy,* July 29, 2024, https://www.guttmacher.org/state-policy/explore/state-policies-abortion-bans.

[60] For example, in Illinois a law awaits the governor's signature that "prevents law enforcement from other states from being able to access license plate reader data in Illinois with the intent of tracking or penalizing people seeking or assisting others with abortion care."
Joey Schneider, *Illinois Bill Would Limit Use Of License Plate Readers For Abortion Seekers*, WGN, June 8, 2023, https://wgntv.com/news/illinois/illinois-bill-would-limit-use-of-license-plate-readers-for-abortion-seekers/.

[61] *Tracking The States Where Abortion Is Now Banned*, NYT, June 5, 2023, https://www.nytimes.com/interactive/2022/us/abortion-laws-roe-v-wade.html.

Conclusion

Two years ago, in an article written by Lauren Hoffman, Osub Ahmed, and Isabela Salas-Betsch, they predicted that "state abortion bans will harm women and families' economic security across the U.S.[62] Their prediction was fortuitous and accurate. In truth, this was the warning issued in *Roe,* where Justice Blackmun, writing for the majority, stated it plainly that women will risk suffering mentally, emotionally, physically, and economically if forced to endure unwanted motherhood.

Justice Harry Blackmun's majority opinion in *Roe v. Wade* significantly interrupted the Court's prior jurisprudence and therefore its rhetoric related to women, their autonomy, and capacities.[63] Roughly one hundred years after the Supreme Court upheld state laws barring women from voting and entering the practice of law, the Court acknowledged the chilling impacts associated with social stereotyping and stigmatization of women. In *Roe*, which decriminalized abortion in the United States, the Court finally recognized the "detriment" that states had long imposed on women when it denied them the ability to determine their reproductive destinies. Justice Blackmun candidly acknowledged the "[s]pecific and direct harm medically diagnosable even in early pregnancy" that some women may endure by being forced by the state to bear children.[64]

For the first time, the Court clearly articulated that motherhood, and childbearing could be harmful to women. The Court asserted that to force women into those destinies fundamentally altered their constitutional freedom and essentially their human rights. He wrote:

> Maternity, or additional offspring, may force upon the woman a distressful life and future. Psychological harm may be imminent. Mental and physical health may be taxed by child care. There is also the distress, for all concerned, associated with the unwanted child, and there is the problem of bringing a child into a family already unable, psychologically and otherwise, to care for it. In other cases, as in this one, the additional difficulties and continuing stigma of unwed motherhood may be involved.[65]

Justice Blackmun's majority opinion in *Roe* is a powerful lesson for today and one that echoes scholarship that focuses on the costs of housing, healthcare, schooling, children's education, clothing, transportation, school activities (before and after school), and food. According to the Institute for Women's Policy Research (IWPR), restrictions on abortion cost the U.S. an average

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[62] Lauren Hoffman, Osub Ahmed, and Isabela Salas-Betsch, *State Abortion Bans Will Harm Women and Families' Economic Security Across The U.S.,* Center For American Progress, Aug. 25, 2022, https://www.americanprogress.org/article/state-abortion-bans-will-harm-women-and-families-economic-security-across-the-us/.
[63] 410 U.S. 113 (1973).
[64] *Id.* at 153.
[65] *Id.*

of $173 billion per year.[66] IWPR research "find that *not only does reproductive healthcare have an impact on women's economic well-being, but it also has a CAUSAL impact."*[67] As they note:

> On an individual level, abortion restrictions lower the likelihood a woman will graduate from school (both high school and college), lower her overall lifetime earnings, and ultimately lead to poorer outcomes for her children. Additionally, in states where abortion is banned, women work more hours per week, have a lower income, become mothers earlier, and give birth to more children. Access to abortion is especially important for economically vulnerable groups: denying abortion increases poverty among individuals. Conversely, reducing poverty can decrease the need for abortions.

Abortion bans have unleashed a tidal wave of foreseeable horrors. The despair caused through maternal mortality and morbidity, and now increased rates of infant mortality and morbidities, expose the pernicious disregard that undergirds the antiabortion stance. It pays little if any attention to women and girls except in promotion of their suffering through doubling down on bans that deny relief even in cases of rape, incest, miscarriage, and suffering. Even as women lacked the fundamental rights of voting and other essential rights in the Antebellum period, it could hardly be said that drafters of the constitution reveled in the potential death of girls and women or that they took joy in the pain of pregnant women suffering to the points of near-death and death. Sadly, in the space of the New Jane Crow, a period that reintroduces a gendered, sex-based separate but equal policy under law, those that die at the highest rates are women of color, especially Black women. Yet, the cruelty of abortion bans, means no woman no matter her wealth, education, or insurance will be spared the abject dementedness of abortion bans.

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[66] Institute for Women's Policy Research, *The Economic Fallout of Reproductive Rights Restrictions On Women's Futures,* (Mar. 1, 2024) *https://iwpr.org/the-economic-fallout-of-reproductive-rights-restrictions-on-womens-futures/#:~:text=According%20to%20IWPR%20research%2C%20abortion,of%20%24173%20billion%20per%20year*.

[67] *Id.* (emphasis in original).