TESTIMONY

BEFORE THE SENATE JUDICIARY COMMITTEE

ON

A POST-*ROE* AMERICA: THE LEGAL CONSEQUENCES OF THE *DOBBS* DECISION

BY

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ALLIANCE DEFENDING FREEDOM

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Dear Chairman Durbin, Ranking Member Grassley, and Members of the Committee:

A teenage girl who unexpectedly becomes pregnant walks into a state-funded pregnancy resource center where she finds a compassionate community willing to help with medical expenses, baby formula and newborn clothes, parenting classes, counseling, connections to community support networks, and even educational and job-retraining opportunities. A couple who learns that their child has Down Syndrome is given information about public and private programs to equip them to parent a child with special needs and to help their beautiful child navigate a full and meaningful life. And while one State's legislature enacts a bill that protects life upon the detection of a heartbeat, another State works to expand funding opportunities for pregnancy centers, adoption providers, and other social service organizations helping women and their children.

This is what a post-*Roe* America looks like: a nation where States are unshackled from the judicially imposed restraints of *Roe* so that the "people's elected representatives" can not only affirm that life is a human right but can also innovate and cultivate a true culture of life that wholistically uplifts and supports women.

And while States may disagree where to draw the line on how women and their unborn children should be valued, they can still draw inspiration from the laws and policies each State enacts to provide more comprehensive care for women with unintended or challenging pregnancies. Alabama may seek to mimic California's funding of drug treatment programs for mothers and infants.[1] Massachusetts could implement Oklahoma's law that requires the Department of Health to maintain a directory of agencies and services available to a woman through pregnancy, childbirth, and her child's early development.[2]

A post-*Roe* America should be defined by a shared pursuit to provide a pregnant young woman with information about and access to care, resources, and a vast support network of both public and private entities that will walk with her and her child for years to come. By an unwavering commitment to recognize the value of individuals with disabilities – including those in the womb. And by an agreement that our country is best served when our judiciary respects the text of the Constitution and

[1] Cal. Health & Safety Code §§ 123605, 123610.
[2] Okla. Stat. Ann. tit. 63, § 1-752.

the authority of States to enact laws that affirm the dignity of all life – including the lives of women and their unborn children.

Reversing the Heavy-Handed Judicial Intervention of *Roe*

A so-called right to abortion "has no basis in the Constitution's text or in our Nation's history."[3] The U.S. Supreme Court made an egregious error when it decided *Roe v. Wade* and declared a newly discovered right to abortion emanating from other unspecified rights.[4] For decades, legal scholars across the ideological spectrum roundly criticized *Roe*'s reasoning and conclusion: from higher education where Professor John Hart Ely declared that *Roe* was "not constitutional law"[5] and Professor Mark Tushnet acknowledged it was a "totally unreasoned judicial opinion,"[6] to the late Justice Ruth Bader Ginsburg, a staunch abortion advocate, calling *Roe* a "[h]eavy-handed judicial intervention [that] was difficult to justify."[7] In short, *Roe* was an indefensible power grab by the majority of the Court, depriving States of their ability to support women and protect their unborn children, and stripping citizens of the ability to determine policies affirming the dignity of life through their elected representatives.

At the stroke of a pen, *Roe* upended the laws of almost every State. The seven men in the *Roe* majority told women that pregnancy "force[d] upon [them] a distressful life and future."[8] The Court substituted itself as a policymaker and declared the taking of an innocent, unborn life – an act that States had long deemed *illegal* – to be a *fundamental right*. Indeed, when *Roe* was decided in 1973, the overwhelming majority of States prohibited abortion in most or all circumstances.[9] This was nothing new. At common law, abortion was unlawful at all stages of pregnancy and criminal in some because it involved ending an innocent human life.[10] "By the time of the adoption of the Fourteenth Amendment, three-quarters of the States had made abortion a crime at any stage of pregnancy, and the remaining States would soon follow."[11] Even while recognizing that States have an "important and

[3] *Dobbs v. Jackson Women's Health Org.*, No. 19-1392, 2022 WL 2276808, at *42 (2022).
[4] *Id.* at *26 (concluding that "*Roe* was also egregiously wrong and deeply damaging").
[5] John Hart Ely, *The Wages of Crying Wolf: A Comment on* Roe v. Wade, 82 YALE L. J. 920, 947 (1973).
[6] Mark V. Tushnet, RED, WHITE, AND BLUE: A CRITICAL ANALYSIS OF CONSTITUTIONAL LAW 54 (1988).
[7] Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to* Roe v. Wade, 63 N.C. L. REV. 375, 385 (1985).
[8] *Roe v. Wade*, 410 U.S. 113, 153 (1973).
[9] *Dobbs,* 2022 WL 2276808, at *22.
[10] *Id.* at *12-14.
[11] *Id.* at *12.

legitimate interest" in unborn life from the outset of pregnancy[12] – as the existing laws reflected – the Court in *Roe* held that the people could suddenly do nothing to protect life until the third trimester of pregnancy, at which point the child can feel pain, move its fingers, and perhaps even smile.[13]

When the Supreme Court revisited *Roe* in *Planned Parenthood v. Casey* in 1992, it did not defend *Roe*'s reasoning, but rather discarded *Roe*'s legal test and replaced it with a new one. While *Roe* claimed that "privacy" somehow granted the right to take an innocent human life,[14] *Casey* said the purported right was grounded in the "liberty" to make "intimate and personal choices."[15] Whereas *Roe* determined that the asserted constitutional right to abortion varied by trimester of pregnancy, *Casey* concluded that a "rigid trimester framework" was "unnecessary" and "undervalues the State's interest in potential life."[16]

Casey settled on a new "viability line" that recast the constitutional right as one dependent on the arbitrary point at which a particular child in the womb is "viable"[17] – a line that varies from pregnancy to pregnancy, based on several factors (including the mother's magnesium intake, fetal weight, and access to a high-quality NICU), and one that has also changed over time with scientific advancement. The plurality in *Casey* further added a new doctrine of unknown origin: the "undue burden" test. Under that standard, a state law protecting unborn life or maternal health would be invalid if it "ha[d] the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion."[18]

For 30 years following *Casey*, the U.S. was forced into becoming an outlier in the international community—one of only a handful of countries like China and North Korea that permitted elective abortions past 20 weeks.[19] In that time, courts struggled unsuccessfully to apply the undue burden standard alongside the viability line, while States attempted with great frustration to safeguard what

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[12] *Roe*, 410 U.S. at 162.
[13] *The Voyage of Life: Weeks 13 & 14*, CHARLOTTE LOZIER INSTITUTE, https://lozierinstitute.org/fetal-development/weeks-13-14/ (last visited July 10, 2022).
[14] *Id.* at 154.
[15] *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 851 (1992).
[16] *Id.* at 872, 873.
[17] *Id.* at 870.
[18] *Id.* at 877.
[19] Charlotte Lozier Institute, *Gestational Limits on Abortion in the United States Compared to International Norms* (Feb. 1, 2014), https://lozierinstitute.org/internationalabortionnorms/; Angelina B. Nguyen, Charlotte Lozier Institute, *Mississippi's 15-Week Gestational Limit on Abortion is Mainstream Compared to European Laws*, ON POINT, Issue 63 (July 2021) https://lozierinstitute.org/wp-content/uploads/2021/07/On-Point-63.pdf.

Casey acknowledged was their "legitimate interests from the outset of the pregnancy in protecting … the life of the fetus that may become a child."[20] Those well-recognized state interests include (1) respecting and preserving prenatal life; (2) mitigating fetal pain; (3) protecting the mother's health and safety; (4) eliminating gruesome procedures such as partial-birth or dismemberment abortion; (5) preserving the medical professionals' integrity; and (6) preventing discrimination based on race, sex, or disability.[21]

On June 24, 2022, the Supreme Court corrected the grave judicial error begun in *Roe* and perpetuated in *Casey*, freeing the people's elected representatives to once again craft policy solutions to the harms abortion imposes on unborn children and their mothers. No longer will courts clothe themselves with legislative power, substituting their own judgment of the weight of immeasurable interests like the right to human life and how to comprehensively support women and their families who find themselves in challenging situations. No longer will a judicial fiat block States from ensuring that their next generation is not killed in the womb.

At its core, *Dobbs* is a modest yet scholarly opinion. It rejects *Roe*'s unsupported, unworkable, and unsustainable reasoning and confirms that the Constitution never contained a right to take an innocent human life. *Dobbs* clarified that a rational-basis test applies to state laws limiting abortion.[22] Under this deferential standard, States may – as they long had before *Roe* – pass laws that advance women's health and well-being and protect their unborn children.

In a Post-*Roe* America, States are Free to Protect Life

The *Dobbs* decision "return[s] the issue of abortion to the people's elected representatives."[23] In reality, abortion law and policy have been debated at the municipal, state, and federal level since long before *Roe*. This debate has accelerated in recent years, and how to affirm the dignity of all life will remain a much-deliberated issue in legislatures for years to come.

Dobbs makes possible what *Roe* prohibited. It empowers States to protect life at its earliest stages and to better ensure that women are valued and supported and not subject to a dangerous,

[20] *Casey*, 505 U.S. at 846.
[21] *Dobbs*, 2022 WL 2276808, at *42.
[22] *Id.*
[23] *Id.* at *7.

irreversible, and life-altering procedure – one that implicates "a difficult and painful moral decision" that is "fraught with emotional consequences."[24] Some States will choose this newly available path. Others, however, will choose not to use their power to promote equality for women, celebrate motherhood, and protect the lives of their most vulnerable citizens, even though many such measures were even permitted under *Roe*. And some of these States will even continue to follow the lead of totalitarian regimes like China and North Korea and maintain their extreme abortion laws and policies that perpetrate significant human rights abuses.[25]

Legitimate State Interests Informing Life-Affirming Laws

Dobbs firmly establishes that a "law regulating abortion, like other health and welfare laws, is entitled to a 'strong presumption of validity'"[26] and "must be sustained if there is a rational basis on which the legislature could have thought that it would serve legitimate state interests"[27] – including those state interests discussed above.[28]

Even during the *Roe* era, the Supreme Court repeatedly recognized that a State "may use its voice and its regulatory authority to show its profound respect for the life within the woman."[29] Our current knowledge of fetal development effectively underscores the importance and legitimacy of this "profound respect" for unborn life.

For example, by 4 to 5 weeks gestation, "almost all major organs have started to form, including the lungs, liver, kidneys, stomach, and pancreas."[30] The unborn child "starts receiving nutrients and oxygen and expelling waste using the umbilical cord and placenta."[31] By 5 to 6 weeks gestation, the unborn child responds to touch,[32] and by week 6 to 7, the unborn child's "heart has

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[24] *Gonzales v. Carhart*, 550 U.S. 124, 159 (2007).
[25] Sean Salai, *U.S. in League with China, North Korea on Abortion*, THE WASHINGTON TIMES (Jan. 31, 2022), https://www.washingtontimes.com/news/2022/jan/31/report-us-china-north-korea-have-most-permissive-a/.
[26] *Dobbs*, 2022 WL 2276808, at *42 (quoting *Heller v. Doe*, 509 U.S. 312, 319 (1993)).
[27] *Id.*
[28] *Supra* n.21 and accompanying text.
[29] *Gonzales*, 550 U.S. at 157; *accord Casey*, 505 U.S. at 877 (recognizing as a legitimate interest the State's "profound respect for the life of the unborn").
[30] *The Voyage of Life: Week 4 to 5*, CHARLOTTE LOZIER INSTITUTE, https://lozierinstitute.org/fetal-development/week-4-to-5/ (last visited July 7, 2022).
[31] *Id.*
[32] *The Voyage of Life: Week 5 to 6*, CHARLOTTE LOZIER INSTITUTE, https://lozierinstitute.org/fetal-development/week-5-to-6/ (last visited July 7, 2022).

formed all four chambers" and has a heart rate that peaks at 170 beats per minute ("almost twice as fast as" her mother's).[33]

In recent years, medical evidence demonstrating the unborn child's ability to feel pain has developed significantly. Notably, we've learned that the basic anatomical organization of the human nervous system is established by 6 weeks gestation.[34] A 2020 comprehensive review of the scientific literature on neural development, psychology of pain sensation, and moral implications of fetal pain concluded that unborn babies may experience pain at 12 weeks gestation.[35]

The Supreme Court has also repeatedly recognized a State's well-established "legitimate interests from the outset of the pregnancy in protecting the health of [women],"[36] as the "medical, emotional, and psychological consequences of an abortion are serious and can be lasting."[37] Current medical evidence provides compelling support for state action to limit or regulate abortion and dispels the myth that abortion is generally safe.

Abortion can cause serious physical and psychological (both short- and long-term) complications for mothers, including:

- uterine perforation
- uterine scarring
- cervical perforation or other injury
- infection
- bleeding
- hemorrhage
- blood clots
- incomplete abortion (retained tissue)
- pelvic inflammatory disease
- endometritis
- missed ectopic pregnancy
- cardiac arrest
- respiratory arrest
- renal failure
- metabolic disorder
- shock
- embolism
- coma
- placenta previa in later pregnancies
- preterm birth in subsequent pregnancies
- free fluid in the abdomen
- organ damage
- adverse reactions to anesthesia and other drugs
- psychological or emotional complications
- depression
- anxiety
- sleeping disorders
- death[38]

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[33] *The Voyage of Life: Week 6 to 7*, CHARLOTTE LOZIER INSTITUTE, https://lozierinstitute.org/fetal-development/week-6-to-7/ (last visited July 7, 2022).
[34] *Fact Sheet: Science of Fetal Pain*, CHARLOTTE LOZIER INSTITUTE (Feb. 19, 2020), https://lozierinstitute.org/fact-sheet-science-of-fetal-pain/.
[35] *Id.*
[36] *Casey*, 505 U.S. at 846.
[37] *H.L. v. Matheson*, 450 U.S. 398, 411 (1981).
[38] *See, e.g.*, P.K. Coleman, *Abortion and Mental Health: Quantitative Synthesis and Analysis of Research Published 1995-2009*, 199 BRIT. J. OF PSYCHIATRY 180 (2011); P. Shah et al., *Induced Termination of Pregnancy and Low Birthweight and Preterm Birth: A Systematic Review and Meta-Analysis*, 116 BJOG 1425 (2009); H.M. Swingle et al., *Abortion and the Risk of Subsequent Preterm*

Abortion also has a higher medical risk when the procedure is performed later in pregnancy. Compared to abortion at eight weeks, the relative risk of mortality increases by 38% for each additional week at higher gestations.[39] So, a woman seeking an abortion at 20 weeks is 35 times more likely to die from the abortion than she was in the first trimester. At 21 weeks, she is 91 times more likely to die from the abortion than she was in the first trimester.

In *Gonzales v. Carhart*, the Supreme Court determined that government could regulate the "brutal and inhumane" partial-birth abortion procedure to avoid "coarsen[ing] society to the humanity of not only newborns, but all vulnerable and innocent human life."[40] The Eleventh Circuit later extended this precept to the dismemberment abortion procedure, the most common method of abortion after the first-trimester, concluding that "[t]he State has an actual and substantial interest in lessening, as much as it can, the gruesomeness and brutality of dismemberment abortions."[41]

All abortion procedures are gruesome and inhumane. Dilation and curettage (D&C) abortion forcibly sucks the unborn child into tiny pieces and out of her mother's womb and then scrapes out any remaining body parts with a scalpel. Dilation and extraction (dismemberment or D&E) abortion involves crushing the unborn child and tearing her apart limb from limb with forceps, after which the abortionist must count the baby's body parts to ensure that none were left in the mother's womb. And while abortion proponents suggest that chemical (or drug-induced) abortions are more humane, let's be clear about how they work: they starve the unborn child of nutrients until her life is extinguished. Each of these methods is a horrific act of violence against a vulnerable, living child.

Roe's legacy is a society increasingly "coarsen[ed] … to the dignity of human life"[42] and accepting of acts that purposely destroy human life. By prohibiting or limiting the taking of unborn life, States exercise their right to affirm the value of human life at all stages.

Birth: A Systematic Review and Meta-Analysis, 54 J. REPROD. MED. 95 (2009); R.H. van Oppenraaij et al., *Predicting Adverse Obstetric Outcome After Early Pregnancy Events and Complications: A Review*, 15 HUMAN REPROD. UPDATE ADVANCE ACCESS 409 (2009); J.M. Thorp et al., *Long-Term Physical and Psychological Health Consequences of Induced Abortion: Review of the Evidence*, 58 OBSTET. & GYNECOL. SURVEY 67, 75 (2003); J.M. Barrett, *Induced Abortion: A Risk Factor for Placenta Previa*, 147 AM. J. OBSTET. & GYNECOL. 769 (1981).

[39] L. Bartlett et al., *Risk Factors for Legal Induced Abortion-Related Mortality in the United States*, 103 OBSTET. GYNECOL. 729 (2004).

[40] *Gonzales*, 550 U.S. at 157.

[41] *W. Ala. Women's Center v. Williamson*, 900 F.3d 1310, 1320 (11th Cir. 2018).

[42] *Dobbs*, 2022 WL 2276808, at *67) (Roberts, J., concurring) (cleaned up).

For more than a decade, the Supreme Court has recognized that a State "may use its regulatory power to bar certain [abortion] procedures and substitute others, all in furtherance of its legitimate interests in regulating the medical profession in order to promote respect for life, including life of the unborn."[43] States may also regulate abortion to protect the integrity of the medical profession and their Hippocratic oath to do no harm.[44] Any gruesome or inhumane abortion procedure "confuses the medical, legal, and ethical duties of physicians to preserve and promote life, as the physician acts directly against the physical life of a child" and "undermines the public's perception of the appropriate role of a physician."[45]

Finally, as Justice Thomas noted in his concurring opinion in *Box v. Planned Parenthood of Indiana and Kentucky*, States have a "compelling interest in preventing abortion from becoming a tool of modern-day eugenics," since "[e]ach of the immutable characteristics protected by [a limit on discriminatory abortions, including race, sex, and disability] can be known relatively early in a pregnancy, and [such a limit] prevents them from becoming the sole criterion for deciding whether the child will live or die."[46]

Life-Affirming State Laws Leading Up To and After Dobbs

States can rely on any one of these or other interests to enact or enforce life-affirming laws and policies after *Dobbs*. These pro-life laws and policies may take many forms, including affirming that there is no "right" to abortion or to taxpayer funding of abortion under the State's constitution;[47] gestational and other limits on abortion; commonsense health-and-safety standards such as informed consent and medically supported regulations on abortion businesses; and conscience protections for healthcare professionals with moral, religious, or other objections to abortion.

The States' interests in protecting unborn life, maternal health and safety, and the integrity of the medical profession, as well as the other state interests affirmed by the Court in *Dobbs*, provide a rational basis for state laws that affirm life. As of today, 21 States have laws that protect unborn life

[43] *Gonzales*, 550 U.S. at 158.
[44] *See id.* at 157.
[45] *See, e.g.*, Partial Birth Abortion Ban Act of 2003, S.3, 108th Cong. §§ 2(14)(J) and 2(14)(K).
[46] 139 S. Ct. 1780, 1783 (2019).
[47] Four States have already added pro-life constitutional amendments (Alabama, Louisiana, Tennessee, and West Virginia). Voters in two additional States will consider such matters in 2022 (Kansas and Kentucky).

at all stages either in effect or that they are actively defending in court.[48] Eleven States have laws that protect life upon the detection of a heartbeat.[49] And at least 17 have laws preventing discriminatory abortions based on race, sex, and/or disability.[50] All of these laws had been previously blocked by *Roe*'s error.

Commonsense regulations on the abortion procedure itself have also been enacted or are under consideration in most States. These include abortion clinic health-and-safety standards, ultrasound requirements, reflection periods, informed-consent enhancements, and unborn-infant dignity statutes ensuring the respectful disposition of the remains of deceased unborn children and prohibiting the sale of their tiny body parts.[51] Many of these modest laws were enforceable even prior to *Dobbs*, and the state interests identified in *Dobbs* justify enacting and enforcing these laws.

Although scores of pro-life laws were wrongly enjoined under *Roe* and *Casey*, States are already seeking or will soon seek to have those injunctions lifted so that these laws can provide their long-intended protection for unborn life, maternal health and safety, and the integrity of the medical profession.

State Laws Ensuring Access to Abortion After Dobbs

Twenty States and the District of Columbia currently fail to support and respect women and protect their unborn from abortion in any meaningful way.[52] Many of these States allow for abortion up until the moment of birth. This failure stems from state court decisions declaring a state constitutional right to abortion, state statutes rejecting even modest protections for life, or state legislation declaring abortion a "fundamental right."

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[48] These include (1) pre-*Roe* laws that were enjoined or not enforced because of *Roe* and (2) so-called "Trigger Laws" that protect life upon the overturning of *Roe*. *See, e.g.,* Family Policy Alliance, *Where Does Your State Stand on Protecting Life?*, https://familypolicyalliance.com/after-roe/ (last visited July 10, 2022).
[49] Some of these states also have laws that provide more comprehensive protection for unborn life.
[50] Guttmacher Institute, *Abortion Bans in Cases of Sex or Race Selection or Genetic Anomaly* (July 1, 2022), https://www.guttmacher.org/state-policy/explore/abortion-bans-cases-sex-or-race-selection-or-genetic-anomaly.
[51] Sadly, some in Congress seek to unconstitutionally restrict the authority of the States to protect life through proposals like the Women's Health Protection Act of 2021, H.R. 3755, 117th Cong. (2021). While the Constitution permits Congress to regulate interstate commerce – which provided the basis for 2003's Partial-Birth Abortion Ban Act – there is an important distinction between regulating abortion that affects interstate commerce versus directly banning States from enacting pro-life measures. The Constitution does not permit the latter.
[52] Family Policy Alliance, *supra* n.48.

Many of these States have also enacted or are considering additional measures that threaten the dignity of women and their unborn children, such as by affirmatively amending their state constitutions to include a "right" to abortion,[53] allowing non-physicians to perform abortions, increasing state taxpayer funding of abortion, and instituting insurance-coverage mandates. Some have also considered measures to repeal life-affirming laws such as parental-involvement protections for minor girls.[54]

More recently, California, New Jersey, New York, Washington, and other States proposed measures to encourage women from States with laws affirming the dignity of life to travel to their States to obtain unrestricted and relatively unregulated abortion procedures that take the life of an unborn child and harm her mother. Each State supporting the abortion industry seemingly seeks to encourage the death of its youngest and most vulnerable, while failing to respect women and bolster real solutions for pregnant mothers.

In a Post-*Roe* America, States Provide Care for Mothers and Infant

Long before the *Dobbs* decision, States were taking meaningful action to provide compassionate care and wholistic support to women facing unexpected pregnancies. Beginning with Texas in 1999, all fifty States have enacted "Safe Haven Laws" that permit a new mother to safely and anonymously place her child in a safe location like a hospital without fear of prosecution or punishment of any kind.[55] Other States have increased their support for adoption and foster care providers by passing laws that preserve a diversity of adoption and foster care providers in the State and ensure birth moms have the choice to place their child in a home that shares her values.[56] Mothers who do not feel able to parent have numerous safe and loving alternatives to raising their children themselves.

States are also ensuring that expectant mothers have access to the latest information about state medical-assistance benefits, pre- and post-natal care for both mother and child, and other

[53] As of the date of this testimony, voters in California and Vermont will decide whether to adopt pro-abortion constitutional amendments in November 2022.
[54] Sara Burnett, *Illinois Governor Repeals Parental Notification of Abortion*, ASSOCIATED PRESS (Dec. 17, 2021), https://apnews.com/article/lifestyle-reproductive-rights-illinois-04bcefa21d7781b64147c4867c6b0432.
[55] Hannah Howard, *Safe Haven Laws: An Invitation to Life*, CHARLOTTE LOZIER INSTITUTE (Dec. 1, 2021), https://lozierinstitute.org/safe-haven-laws-an-invitation-to-life/.
[56] *Which States Protect the Freedom of All Adoption and Foster Care Providers?,* KEEP KIDS FIRST, https://keepkidsfirst.com/adoption-map/ (last visited July 7, 2022).

essential services provided by public and private agencies. For instance, last year Arizona enacted a law requiring its Department of Health Services to maintain "a list of public and private agencies and services available to assist a woman through pregnancy, on childbirth and while her child is dependent."[57] Other States, including Florida, Indiana, Louisiana, Michigan, Mississippi, North Carolina, North Dakota, and Ohio, have similar requirements to ensure that mothers know about the many services available to help them navigate the challenges of an unplanned pregnancy.[58]

While Planned Parenthood and others in the abortion industry convince women, particularly those in minority and low-income areas, that abortion is the only solution for an unintended pregnancy,[59] States dispel this lie by directing more and more funding into organizations and programs that provide long-term, critical support for these mothers and their infants.

- In 2022, Arkansas passed a law designating up to $1 million in new funding for pregnancy care centers, maternity homes, adoption providers, and other social-service organizations that "provide material support and other assistance to individuals facing an unintended pregnancy."[60]
- Fourteen States, including Florida, Kansas, Louisiana, Missouri, Oklahoma, Pennsylvania, Texas, and Wisconsin, also provide direct government funding to pregnancy resource centers and similar organizations that offer various services to mothers to enable them to have the healthcare, material support, counseling, and training they need to welcome a new child into the world.[61] Texas, in particular, has been a leader in funding services for expectant mothers,

[57] Ariz. Rev. Stat. Ann. § 36-2153.01(A)(1).
[58] Fla. Stat. Ann. § 390.0111; Ind. Code Ann. § 16-34-2-1.1; La. Stat. Ann. § 40:1061.17; Mich. Comp. Laws Ann. § 333.17015; Miss. Code. Ann. § 41-41-33; N.C. Gen. Stat. Ann. § 90-21.82; N.D. Cent. Code § 14-02.1-02; Ohio Rev. Code Ann. § 2317.56.
[59] Planned Parenthood's history of targeting its services to Black women and other minorities is well documented. Seventy-nine percent of Planned Parenthood's abortion facilities are located within walking distance of Black or Hispanic neighborhoods. Susan Enouen, *New Research Shows Planned Parenthood Targets Minority Neighborhoods*, LIFE ISSUES CONNECTOR, 3 (Oct. 2012), http://www.protectingblacklife.org/pdf/PP-Targets-10-2012.pdf.
[60] 2022 Ark. Laws Act 187 (S.B. 102), https://www.arkleg.state.ar.us/Acts/FTPDocument?path=%2FACTS%2F2022F%2FPublic%2F&file=187.pdf&ddBiennniumSession=2021%2F2022F.
[61] Jeanneane Maxon, *Fact Sheet: State Alternatives to Abortion Funding*, CHARLOTTE LOZIER INSTITUTE (June 28, 2022) https://lozierinstitute.org/fact-sheet-state-alternatives-to-abortion-funding/.

their families, and adoptive and foster parents. It provided nearly $80 million in such funding during the 2020-21 fiscal year,[62] and has pledged to increase that to $100 million this year.[63]

- One recent innovation among States has been to provide tax credits for individuals and even businesses that make charitable contributions to pregnancy care centers, adoption providers, and other organizations providing social services for mothers and infants. Missouri allows tax credits for donations to organizations "offering pregnancy testing and counseling with emotional and material support" for pregnant mothers.[64] Mississippi, which already authorized tax credits for donations to foster care providers, recently enacted the Pregnancy Resource Act that authorizes up to $3.5 million in tax credits for contributions to qualified pregnancy resource centers.[65]

And these measures are being coupled with renewed efforts to make childcare affordable for families and to increase accountability for fathers to contribute to child support.

States are also demonstrating their compassion and support for particularly vulnerable children – those with Down Syndrome or other disabilities or genetic abnormalities. Ten States prohibit abortions targeting unborn children with Down Syndrome or other actual or presumed disability.[66] Other States ensure that mothers are informed of state programs and grants available to families with children born with special needs. For example, Kansas, Idaho, Louisiana, and Utah provide information about grants, contracts, and cooperative agreements aimed at helping those with a child with Down Syndrome or other special needs.[67] And Arizona helps connect pregnant mothers receiving a diagnosis of a fatal fetal condition with perinatal hospice programs, showing the State's recognition of the dignity and inherent worth of every life – including those that may be unlikely to survive long after birth.

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[62] Texas Health and Human Services, *Alternatives to Abortion Report for Fiscal Year 2021* (Dec. 2021), https://www.hhs.texas.gov/sites/default/files/documents/alternatives-abortion-fy2021-rider68.pdf.
[63] Jennifer Sanders, *Texas' Alternatives to Abortion program impact*, KXAN (June 28, 2022), https://www.kxan.com/news/texas-abortion/texas-alternatives-to-abortion-program-impact/.
[64] Missouri Department of Social Services, *Pregnancy Resource Center Tax Credit*, https://dss.mo.gov/dfas/taxcredit/pregnancy.htm (last visited July 7, 2022).
[65] H.B. 1685, 137th Legis. Sess., Reg. Sess. (Miss. 2022), http://billstatus.ls.state.ms.us/documents/2022/pdf/HB/1600-1699/HB1685SG.pdf.
[66] Ariz. Rev. Stat. Ann. § 36-2157; Ark. Code Ann. § 20-16-2103; Ind. Code Ann. § 16-34-4-6; Ky. Rev. Stat. Ann. § 311.731; Miss. Code. Ann. § 41-41-407; Mo. Ann. Stat. § 188.052; S.D. Codified Laws § 34-23A-90; Tenn. Code Ann. § 39-15-217; Utah Code Ann. § 76-7-302.4; W. Va. Code Ann. § 16-2Q-1.
[67] Kan. Stat. Ann. § 65-1,259; Idaho Code Ann. § 39-9704; La. Stat. Ann. § 40:1109.2; Utah Code Ann. § 26-10-14.

Taken together, these various laws and policy initiatives show that a post-*Roe* America is one that will provide a comprehensive safety net of love, empowerment, life-affirming options, and support for mothers and infants both during and after pregnancy. States will continue to innovate and support new programs that provide healthcare, material needs, and other social services to pregnant women. And they will promote a culture that walks with the new family as the baby grows, helps to meet basic childcare and parenting needs, and continues to offer flexibility, care, and support to women to affirm their inherent dignity and worth.

In a Post-*Roe* America, Private Organizations Support Mothers and Children

Fifty years ago, women lacked access to the multitude of public programs like those described above. Today's culture is far more supportive of women than in 1973, when the U.S. Supreme Court was concerned about "the problem of bringing a child into a family already unable, psychologically and otherwise, to care for it."[68] On top of government support, private organizations – including pregnancy care centers, maternity homes, adoption agencies, churches, and religious social-service organizations – have arisen to fill gaps and provide resources far beyond what the government can provide.

Pregnancy centers, in particular, have stepped up and proven themselves to be highly effective at helping women through all stages of their pregnancy and beyond so they can "participate equally in the economic and social life of the Nation."[69] A significant majority of modern pregnancy centers provide medical services—nearly 3,000 today, as compared to a handful at the time of *Roe*.[70] These centers' services typically include medical-grade pregnancy testing, ultrasounds to confirm a pregnancy, sexually-transmitted-disease and infection testing, material assistance, and parenting-education courses – almost always at no cost to mothers.[71] In 2019, pregnancy centers:

- Served 1.85 million people with a multitude of free or low-cost services, totaling about $266 million in support to mothers and families,[72]

[68] *Roe*, 410 U.S. at 153.
[69] *Casey*, 505 U.S. at 856.
[70] Moira Gaul, *Fact Sheet: Pregnancy Centers – Serving Women and Saving Lives,* CHARLOTTE LOZIER INSTITUTE (July 19, 2021), https://lozierinstitute.org/fact-sheet-pregnancy-centers-serving-women-and-saving-lives-2020/.
[71] *Id.*; Charlotte Lozier Institute, *A Legacy of Life and Love: Pregnancy Centers Stand the Test of Time* at 9, 34 (2020), https://lozierinstitute.org/wp-content/uploads/2020/10/Pregnancy-Center-Report-2020_FINAL.pdf.
[72] Charlotte Lozier Institute, *Fact Sheet: What Are Pregnancy Help Organizations?* (May 18, 2021), https://lozierinstitute.org/fact-sheet-what-are-pregnancy-help-organizations-phos/ ("*PHO Fact Sheet*").

- Provided over 730,000 free pregnancy tests and over 485,000 free ultrasounds,[73] and
- Gave away more than 2 million baby outfits, 1.2 million packs of diapers, 19,000 strollers, and 30,000 new car seats.[74]

There are also about 400 maternity homes around the country serving thousands of women needing housing every year.[75] Along with providing a safe environment for a mother and her child even months after childbirth— – average stay is 8 months post-birth – these homes provide educational and counseling services to help equip a new mother for parenting, job-search services, and many other resources.[76]

Adoption providers are also ensuring greater support to women who choose adoption for their child. The over 3,000 such organizations across the country offer far more than adoption itself. They often provide pregnancy counseling, post-adoption support, counseling and training for adoptive parents, housing services, and even food, clothing, and school supplies to help adoptive families with the costs of welcoming a child into their home.[77]

And there are many, many more charitable organizations that provide food, clothing, shelter, education, and job training to mothers and families in need. In a post-*Roe* America, a family unable to care for a child – one of the Supreme Court's primary concerns when deciding *Roe* – now has an abundance of resources available so that both child and mother can not only survive but thrive. A post-*Roe* America is one where children are safe, women are valued, and motherhood is celebrated.

Misconceptions About Pro-life Laws in a Post-*Roe* America

In the wake of *Dobbs*, abortion proponents have circulated false information about the laws and policies that States are considering to better protect unborn life and maternal health. They perpetuate lies and promote viral misinformation claiming that pregnant mothers' lives will be at risk in the States with the strongest protections for life.

[73] *Id.*
[74] Charlotte Lozier Institute, *A Legacy of Life and Love: Pregnancy Centers Stand the Test of Time*, *supra* n.71 at 16.
[75] *PHO Fact Sheet*, *supra* n.72.
[76] *Id.*
[77] *Id.*

In truth, the abortion laws of ***every single State*** contain a medical emergency exception to save the life of the mother. Such an exception is ***pro-life***. Three examples in particular – ectopic pregnancies, miscarriages, and pregnancy complications – have been the primary subjects of misinformation and warrant addressing.

***Ectopic Pregnancies*:** Ectopic pregnancy is a life-threatening condition in which an embryo has implanted outside the uterus. Ectopic pregnancies cannot result in childbirth. The unborn child cannot survive due to the location of implantation; often the baby dies or stops growing at an early stage. Without treatment, a mother with an ectopic pregnancy is in severe danger of losing her life due to the high likelihood of internal rupture and hemorrhaging. This risk is one reason that early ultrasounds are necessary for sound medical care during pregnancy.

Because ectopic pregnancy is life-threatening, it is a medical emergency. Treatment for ectopic pregnancy seeks to save the mother's life and is not performed with the intent to end the life of the unborn child. Under any characterization, treatment for ectopic pregnancy does not meet the legal or medical definition for abortion – a medical procedure performed for the sole purpose of killing an unborn child.[78] Women can and should be treated at any hospital in the country if they experience an ectopic pregnancy.

***Miscarriages*:** Miscarriage, or a procedure to complete a miscarriage, is not an abortion. In a miscarriage, the unborn child has died of natural causes. At that point, it would be impossible to perform an abortion on the woman because (1) the baby is no longer alive and thus cannot have its life ended, and (2) the woman is no longer considered pregnant and therefore cannot have her pregnancy terminated. Although the treatment for some incomplete miscarriages involves a surgical procedure like those used in some first-trimester abortions[79] or use of the abortion drug misoprostol, under no legal or medical definition would removal of tissue remaining in the uterus after a miscarriage be an abortion.[80]

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[78] Planned Parenthood's own website acknowledges this: "Treating an ectopic pregnancy isn't the same thing as getting an abortion…. The medical procedures for abortions are not the same as the medical procedures for an ectopic pregnancy." *Ectopic Pregnancy*, PLANNED PARENTHOOD, https://www.plannedparenthood.org/learn/pregnancy/ectopic-pregnancy (last visited July 7, 2022).

[79] *Dilation and curettage (D&C)*, MAYO CLINIC, https://www.mayoclinic.org/tests-procedures/dilation-and-curettage/about/pac-20384910 (last visited July 7, 2022).

[80] Again, Planned Parenthood recognizes the clear difference between abortion and miscarriage because "[m]iscarriage is

***Pregnancy Complications*:** Procedures that save the mother's life during a rare pregnancy complication are not abortions. In such instances, a baby would be delivered early, likely by caesarian-section, and treatment would be given to attempt to save the baby's life, as well as the mother's. In no instance would an abortion—that is, stopping to first kill the child in the womb before separating her from her mother—be the method used. These tragic scenarios would, in any event, fall under the medical-emergency exception in abortion laws.

In a Post-*Roe* America, the U.S. Can Lead the World in Respecting Life

Roe v. Wade made the United States an extreme outlier—one of only a handful of nations in the world permitting abortion on demand of an unborn child who can hear her mother's voice.[81] With its companion case, *Doe v. Bolton*, decided the same day, *Roe* took this nation from one where life was widely recognized as a human right and completely protected in forty-six States, to one in which no unborn child was safe.

Though the *Dobbs* decision overturning *Roe* may not automatically restore every state protection that *Roe* wrongly invalidated, it provides a crucial opportunity for States to come in line with international human-rights norms. Globally, 75% of nations either never permit elective abortion or limit it at 12 weeks.[82] Only three out of 50 European nation-states and regions allow elective abortion after 15 weeks gestation, which is the gestational limit challenged by the abortion providers in *Dobbs*.[83]

The United States' status as an extreme outlier in legally sanctioning the death of its youngest, devaluing women, and threatening women's physical and psychological health has been a stain on our nation and society. The overturning of *Roe* and *Casey* enables States to choose policies much more humane, sensible, and safe than those of North Korea and China, and to create a culture that respects and promotes life, advances the health and well-being of women, and honors motherhood. The *Dobbs*

when an embryo or fetus dies…." *What is a Miscarriage?*, PLANNED PARENTHOOD, https://www.plannedparenthood.org/learn/pregnancy/miscarriage (last visited July 7, 2022).

[81] *Fetal Development: The 2nd Trimester*, MAYO CLINIC, https://www.mayoclinic.org/healthy-lifestyle/pregnancy-week-by-week/in-depth/fetal-development/art-20046151 (last visited July 7, 2022) ("Twenty-five weeks into [ ] pregnancy, or 23 weeks after conception, your baby might be able to respond to familiar sounds, such as your voice….").

[82] Luke Coppen and Hannah Brockhaus, *How Does U.S. Abortion Law Compare to Those in European Countries?*, CATHOLIC NEWS AGENCY (Oct. 11, 2021), https://www.catholicnewsagency.com/news/249247/united-states-europe-abortion-law-comparison.

[83] *Id.*

decision will allow the United States—if the people and their elected representatives in the States collectively choose – to become an international leader in advancing human rights, the dignity of women, and the most vulnerable in society.

Conclusion

Roe v. Wade and *Planned Parenthood v. Casey* were constitutional travesties that deprived States of their ability to support women and protect their unborn children. These court decisions handcuffed state legislatures from affirming the dignity of women and the lives of their unborn children, even in the most modest ways.

The Supreme Court's decision in *Dobbs* corrected the grievous error of *Roe* and *Casey*. Recognizing that the so-called right to abortion "has no basis in the Constitution's text or in our Nation's history,"[84] the Court removed the shackles that long prohibited the people from protecting innocent life. States and communities now have the chance to affirm that life is a human right and ensure that women have real support — not the kind that pits them against their children to make a profit—but meaningful and comprehensive opportunities to choose motherhood and live full and flourishing lives.

In a post-*Roe* America, States will continue to innovate and support new programs that provide healthcare, material needs, and other services to women with unexpected pregnancies. These measures include laws that guarantee mothers can safely entrust their child to one of the many providers in our nation's adoption and foster care system. Legislatures can promote respect for the dignity of particularly vulnerable children, especially those with Down Syndrome and other disabilities or genetic abnormalities, while ensuring that mothers know about state resources available to help them care for their children.

States will continue to support women by ensuring that expectant mothers know about state medical assistance benefits, pre- and post-natal care for both mother and child, and other services provided by public and private agencies. And many States are funding these efforts with millions of

[84] *Dobbs*, 2022 WL 2276808, at *42.

dollars in financial backing for pregnancy care centers, maternity homes providing expectant and new mothers with housing, and other social service organizations that assist mothers and their children.

These efforts that provide 360-degree care for mothers and newborns show that a post-*Roe* America can be one where a woman who finds herself pregnant will have the full support of her community, offering a wide variety of resources she needs throughout the pregnancy and as she steps boldly and confidently into the rest of her life knowing that she is not alone but fully capable of living a life of meaning and purpose.

Today, thanks to *Dobbs*, the dignity of women, the unborn, and life is affirmed. And the American people once again have a voice and a vote to speak through their state legislatures to finally advance policies and laws that protect the unborn, value women, and honor motherhood.

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Prior to joining ADF, Harle served as deputy solicitor general in the Office of the Florida Attorney General, where she drafted appellate briefs and presented oral arguments on behalf of the State in a wide variety of constitutional cases, including defending the constitutionality of pro-life laws. In 2017, she participated in the prestigious Supreme Court Fellow program, sponsored by the National Association of Attorneys General. She clerked for Justice Ricky L. Polston on the Florida Supreme Court and worked for several years as an appellate litigator at a large firm in California.

Harle earned bachelor's degrees in psychology and interdisciplinary social science from Florida State University, a master's degree in political science from Stanford University, and a Juris Doctor from Duke University School of Law. At Duke, she served as the executive editor of *Law & Contemporary Problems*. Gov. Ron DeSantis appointed Harle to the Florida Faith-Based and Community-Based Advisory Council in 2021 to support churches and nonprofits as they care for vulnerable members of society. A member of the state bars of California, Florida, and Georgia, she is admitted to multiple federal district and appellate courts, as well as the U.S. Supreme Court.