

United States Senate Committee on the Judiciary
Subcommittee on Federal Courts, Oversight, Agency Actions, and Federal Rights

Testimony of

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Good afternoon, Chairman Whitehouse and Senator Kennedy, and thank you for inviting me today.

When the Supreme Court decided in *Dobbs* that the Constitution does not preclude the people from governing themselves on the fraught question of abortion, it brought us into alignment with nations around the world who have always addressed the issue through the political process (most of whom restrict elective abortion between 10 and 14 weeks of pregnancy).

After nearly fifty years of being deprived of the authority to meaningfully govern ourselves in this domain, the current political and legal landscape is widely varied, complicated, and changing. But American federalism allows for pluralism on vexed questions. Some states have extended basic protections to the unborn. Others have moved to eliminate any limits, and some - including this body - have declined to enact laws requiring equal protection for *newborns* who survive abortions.

I would like to respectfully make four suggestions for good governance in this difficult area.

First, it is important to be clear about the complexity of the matter and to give full weight to all the elements at issue. It is not simply a variation of the health care debate (only seven percent of OB/GYNs in private practice provide abortions). Nor is it reducible simply to the values of equality or bodily autonomy of women facing serious burdens on their health and future. Rather, the issue challenges us to consider how these goods stand in relation to the life of the unborn child – a whole, living, distinct member of the human species who, if all goes well, will move herself along the trajectory of development from embryo to fetus to newborn, provided she has the necessary support and sustenance in her mother’s womb – the first place of belonging

for every human being. She is not a trespassing stranger; she is the biological child of this particular mother and father.

Our public debate is impoverished when those who support abortion rights fail to acknowledge this reality. On the other hand, our discourse suffers when pro-life officials fail to address the sometimes crushing burdens of unwanted pregnancy and parenthood. To govern ourselves wisely, justly, and humanely, we must begin by articulating the problem in its full complexity, without question begging or refusing to consider every interest at stake.

Second, our lawmakers must be clear about what limits, if any, they will countenance on elective abortion. There are ten thousand late term (that is, post-viability) abortions in America every year – more than six times the number of annual gun homicides for children and teens. At least 148 U.S. clinics provide them. Social science evidence and the statements of late term abortion practitioners such as Warren Hern suggest that these are frequently not limited to cases involving health risks to mothers or a diagnosis of fetal abnormality.

Third, we must fairly and accurately characterize the legal landscape. Every state in America allows abortion to save a mother's life and the vast majority allow it for lesser health risks.

Texas' law allows abortions where in a physician's "reasonable medical judgment," a mother has a life-threatening condition that could cause substantial bodily impairment. This is a well familiar standard that operates in multiple legal contexts including abortion. The Texas Medical Board is developing clinical guidelines in this area.

Texas just passed a bipartisan law clarifying that previable premature rupture of membranes falls under the health exception and treating an ectopic pregnancy is not an "abortion." Miscarriage management is not restricted. The Texas Supreme Court just affirmed that serious health risks need not be imminent to justify abortion and that any clinician who says so is "simply wrong in that legal assessment."

Some recent media stories involve women seeking abortions because their *unborn child* received a heartbreaking diagnosis of disability or terminal illness. Texas does not authorize abortions solely because of an unborn baby's disability or poor prognosis.

Texas also extended postpartum Medicaid coverage from six months to one year, allocated \$165 million to support mothers, babies, and families, and passed a recent maternal mental health law.

Fourth, I invite members to reimagine the human context in which the question of abortion arises. Instead of a zero-sum conflict among strangers over the permissible use of lethal force, think of it as a crisis facing a mother and her child. Then ask how we can work together across our differences to come to their aid not just during pregnancy, but throughout life's journey.