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United States Senate Committee on the Judiciary

Testimony of

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March 20, 2024

Good afternoon, Chairman Durbin and Senator Graham, and thank you for inviting me to testify before you 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 most nations around the world who have always addressed the issue through the political branches (most of whom restrict purely 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 a work in progress. But our system of federalism allows for divergent approaches to vexed questions. Some states have enacted strict limits on abortion whereas others have dramatically increased access. Voters have supported abortion rights in every state referendum since *Dobbs*, going so far in Montana as to reject a proposed law protecting newborns who survive abortions. A similar proposal was rejected by this body.

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

First, it is important to be clear about the complexity of the issue. It is not simply a variation of the health care debate, or even reducible to the important 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.

Our public debate is impoverished when those who support abortion rights fail to acknowledge, much less respond to this reality. On the other hand, our discourse suffers when pro-life elected officials fail to acknowledge and seek to alleviate the sometimes crushing burdens of unwanted pregnancy and parenthood. To govern ourselves wisely, justly, and humanely, we must begin by articulating the problem before us in its full complexity, without question begging.

Second, we must fairly and accurately characterize the legal landscape. Here too, we have fallen short. A recent Alabama case has been widely misdescribed as a theocratic power grab heralding the demise of IVF. In fact, the victorious plaintiffs there were IVF patients suing a clinic for the negligent destruction of their frozen embryos, using a statute that already allowed such claims for the death of embryos in the womb. The decision did not depend on and had nothing to do with *Dobbs*. In response, the conservative legislature and governor moved immediately to grant blanket civil and criminal immunity to IVF clinics for such misconduct.

Popular accounts of women in Texas being denied life-saving medical care are similarly lacking. Texas abortion law allows exceptions to protect a mother's life or prevent her substantial bodily impairment. But many of these cases involved women seeking abortions because their *unborn child* was the one to receive a heartbreaking diagnosis of disability or terminal illness. Texas does not authorize abortions solely because of an unborn baby's disability or poor prognosis.

Regarding risks to mothers, Texas just passed a bipartisan law stating that previable premature rupture of membranes and reaffirming that ectopic pregnancies fall under the health exception. The same goes for miscarriage management. The Texas Supreme Court just clarified that serious health risks need not be imminent to justify abortion. And the "reasonable medical judgment" standard for clinicians invoking such exceptions has been in place without issue since the passage of Texas' 20-week abortion ban in 2013. Since then, there have been 238 abortions performed at 20 weeks or later with zero prosecutions. This week the Texas Medical Board will meet to develop clinical guidelines in this area.

Finally, I would invite the members to reimagine the framing of 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 instead 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.