

Testimony of Professor Michele Bratcher Goodwin  
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Before the Senate Judiciary Committee  
On the Women's Health Protection Act (WHPA)

Committee Chairman Durbin, Committee Ranking Member Grassley, Subcommittee Chairman Blumenthal, Subcommittee Ranking Member Cruz, and distinguished members of the Senate Judiciary Committee and Subcommittee on the Constitution, thank you for inviting me to participate in today's hearing on the Women's Health Protection Act (WHPA). I join you and fellow witnesses today to explain the importance of this proposed legislation and urge its adoption.

My name is Michele Bratcher Goodwin. I am a Chancellor's Professor at the University of California, Irvine and the Founding Director of the Center for Biotechnology & Global Health Policy. I write and teach in the areas of constitutional law and tort law, and bioethics, biotechnology, and health law. 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, most recently, *Policing The Womb: Invisible Women and The Criminalization of Motherhood*. Over the past twenty years, I have written about health inequities and disparities, and 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, and Asia.

Today, I am here to speak about the Women's Health Protection Act and preserving *Roe v. Wade*. Preserving *Roe* is not a lofty academic matter, but one of great urgency. A woman is fourteen times more likely to die in childbirth than by having an abortion.<sup>1</sup> In states most aggressively legislating against abortion rights, the maternal mortality rates are devastatingly high and reflect glaring racial disparities. This is a critical aspect of the new Jane Crow.

*A. Women's Health Protection Act: An Important Step In Healthcare*

The Women's Health Protection Act deserves your attention and support. It would "establish federal statutory abortion rights for providers and patients against [] restrictions and bans."<sup>2</sup> Were the law to be enacted, it could trigger the repeal or striking down harmful laws that infringe on abortion access whose purpose and effect is to make it difficult for pregnant persons to access care. This specifically includes requirements for multiple, medically unnecessary in-person visits, requirements that doctors provide their patients with medically inaccurate information, requirements that providers perform medically unnecessary tests and procedures, and unnecessary

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<sup>1</sup> 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).

<sup>2</sup> Elizabeth Nash & Lauren Cross, *2021 Is On Track to Become the Most Devastating Antiabortion State Legislative Session in Decades*, Guttmacher Institute, June 14, 2021, <https://www.guttmacher.org/article/2021/04/2021-track-become-most-devastating-antiabortion-state-legislative-session-decades>.

building requirements for abortion providers that have the purpose and effect of shutting down clinics that provide abortion services.<sup>3</sup>

With respect to other restrictions that states might invent in the future, WHPA describes criteria for determining whether a restriction violates the statute by impermissibly singling out and impeding access to abortion. Further, the bill creates an enforcement mechanism through public and private rights of action, similar to civil rights and anti-discrimination laws. This mechanism allows the U.S. Attorney General or a private individual (such as the clinician or patient) to challenge violations of WHPA in court.<sup>4</sup>

Under Section 5 of the Fourteenth Amendment, Congress has the authority to enact legislation when state laws infringe upon or deny the exercise of constitutionally protected rights. This is a role familiar to Congress. This is the action Congress took when it enacted the Voting Rights Act of 1965 to protect the right to vote under the Fourteenth and Fifteenth Amendments.<sup>5</sup> Congress expressly exercised its Section 5 authority to protect women’s constitutional right to access abortion services and health care providers’ ability to provide abortion services when it enacted the Freedom of Access to Clinic Entrances Act in 1994.<sup>6</sup>

Congress also has authority under the Commerce Clause to protect access to abortion. Abortion services are, like other health care, a form of commercial and economic activity and there is an interstate market for these services. Abortion restrictions substantially affect interstate commerce in numerous ways. Congress expressly relied on the Commerce Clause to protect access to clinics when it enacted the Freedom of Access to Clinic Entrances Act, and this is a separate and sufficient basis of authority for Congress to pass WHPA even independent of the Fourteenth Amendment.<sup>7</sup>

For the reasons articulated in my testimony, WHPA will protect pregnant persons from bans and medically unnecessary TRAP laws that present an undue burden and substantial obstacle for people seeking to end a pregnancy. Finally, the law defends the principle that abortion is health

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<sup>3</sup> *Protecting Women’s Access to Reproductive Health Care: Hearing Before the Subcommittee on Health, H. Committee on Energy and Commerce*, 116th Cong. 1 (Feb. 12, 2020) (opening statement of Chairman Frank Pallone, Jr.), available at [https://energycommerce.house.gov/sites/democrats.energycommerce.house.gov/files/documents/2020.2.12.PALLONE.%20WHPA%20Hearing.HE\\_.pdf](https://energycommerce.house.gov/sites/democrats.energycommerce.house.gov/files/documents/2020.2.12.PALLONE.%20WHPA%20Hearing.HE_.pdf).

<sup>4</sup> See also *Protecting Women’s Access to Reproductive Health Care: Hearing Before the Subcommittee on Health, H. Committee on Energy and Commerce*, 116th Cong. 10 (Feb. 12, 2020) (statement of Nancy Northup, President and CEO, Center for Reproductive Rights), available at <https://docs.house.gov/meetings/IF/IF14/20200212/110504/HHRG-116-IF14-Bio-NorthupN-20200212.pdf>.

<sup>5</sup> *Id.*. See also Rachel Suppe, *A Right in Theory but Not in Practice: Voter Discrimination and TRAP Laws as Barriers to Exercising a Constitutional Right*, 23 AM. U.J. GENDER SOC. POL’Y & L. 107, 132 (2014).

<sup>6</sup> H.R. 2975, 116th Cong. § 2(19) (2019).

<sup>7</sup> See, e.g., *Norton v. Ashcroft*, 298 F.3d 547, 555-59 (4th Cir. 2002) (holding that Congress’s authority over interstate commerce sustained the Freedom of Access to Clinic Entrances Act, and describing “national market for abortion services,” “travel interstate” by patients and providers, and providers’ “purchase [of] medicine, medical supplies, surgical instruments and other necessary medical products, often from other States” (quoting S. Rep. No. 103-117, at 31 (1993))); Elizabeth Witwer et al., *Abortion service delivery in clinics by state policy climate in 2017*, CONTRACEPTION (2020), doi.org/10.1016/j.conx.2020.100043 (clinics charge average of approximately \$550 for an abortion at 10 weeks, and price varies with stage of pregnancy); Christina A. Cassidy, *Women seek abortions out of state amid restrictions*, ASSOCIATED PRESS, Sept. 8, 2019, (“[A]t least 276,000 women terminated their pregnancies outside their home state between 2012 and 2017. . . . Nationwide, women who traveled from another state received at least 44,860 abortions in 2017, the most recent year available, according to the AP analysis of data from 41 states. That’s about 10% of all reported procedures that year.”).

care, a valuable step at a time when abortion care remains stigmatized. Enacting WHPA will be a substantial improvement in the wake of unrelenting attacks on reproductive health and rights.

Enacting WHPA will also be a step towards furthering justice. The challenges to reproductive health, rights, and justice in the U.S. are longstanding and manifold.<sup>8</sup> Forced and coerced sterilization,<sup>9</sup> lack of sex education in high schools, criminal prosecutions and sanctions against poor pregnant women,<sup>10</sup> and high maternal mortality are part of our landscape and history. Reproductive justice means, among other things, recognizing that abortion care is essential to bodily autonomy and to health, security, and well-being for oneself and one's family. A failure to integrate this framework harms poor women, and among them, women of color in particular.

### *B. Contemporary Challenges and Risks To Reproductive Health, Rights & Justice*

Despite the promise of *Whole Woman's Health v. Hellerstedt*,<sup>11</sup> a 2016 case that struck down two unconstitutional Texas abortion provisions, states continue to impose serious barriers to women's reproductive autonomy by enacting targeted regulations of abortion providers (TRAP laws) that erroneously claim to protect and promote women's health.

For example, in 2017, only months after the Supreme Court struck down ambulatory surgical center requirements as a condition of a clinic's licensure to provide abortions in *Whole Woman's Health*, Minnesota state legislators sponsored an almost identical bill before that state's legislature, also claiming that it protected women's health.<sup>12</sup>

However, in Minnesota, according to state data, complications associated with an abortion are less than 0.01%.<sup>13</sup> In my written and public testimony before the Minnesota State Legislature Committee on Judiciary and Public Safety Finance and Policy, I emphasized this. A woman in Minnesota is more likely to die from gun death, domestic violence, drug poisoning, homicide, and childbirth than from an abortion. Firearms are the second leading cause of brain injury deaths in

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<sup>8</sup> See, e.g., Jessica Silver-Greenberg & Natalie Kitroeff, *Miscarrying at Work: The Physical Toll of Pregnancy Discrimination*, N.Y. TIMES, Oct. 21, 2018; Natalie Kitroeff & Jessica Silver-Greenberg, *Pregnancy Discrimination Is Rampant Inside America's Biggest Companies*, N.Y. TIMES, June 15, 2018. See also *Young v. United Parcel Serv.*, 135 S. Ct. 1338 (2015) (holding that a plaintiff alleging the denial of accommodations under the Pregnancy Discrimination Act may show that she sought accommodation, that the employer refused to accommodate her, and that the employer did not accommodate others similar in their inability or ability at work. The employer may seek to justify its refusal to accommodate.).

<sup>9</sup> See, e.g., Jorge Rivas, *California Prisons Caught Sterilizing Female Inmates Without Approval*, ABC NEWS, Jul. 8, 2013, [https://abcnews.go.com/ABC\\_Univision/doctors-california-prisons-sterilized-female-inmates-authorizations/story?id=19610110](https://abcnews.go.com/ABC_Univision/doctors-california-prisons-sterilized-female-inmates-authorizations/story?id=19610110); Derek Hawkins, *Tennessee Judge, Under Fire, Pulls Offer To Trade Shorter Jail Sentences For Vasectomies*, WASH. POST, Jul. 28, 2017, [https://www.washingtonpost.com/news/morning-mix/wp/2017/07/28/tennessee-judge-under-fire-pulls-offer-to-trade-shorter-jail-sentences-for-vasectomies/?noredirect=on&utm\\_term=.c4782cfa4d21](https://www.washingtonpost.com/news/morning-mix/wp/2017/07/28/tennessee-judge-under-fire-pulls-offer-to-trade-shorter-jail-sentences-for-vasectomies/?noredirect=on&utm_term=.c4782cfa4d21); Andy Sher, *Tennessee Judge Ends Controversial Sentence Reduction Program For Inmates Choosing Birth Control*, TIMES FREE PRESS, Jul. 28, 2017, <https://www.timesfreepress.com/news/local/story/2017/jul/28/tennessee-judge-ends-sentence-reductiprogram/440713/>.

<sup>10</sup> See, e.g., AMNESTY INT'L, CRIMINALIZING PREGNANCY: POLICING PREGNANT WOMEN WHO USE DRUGS IN THE USA (2017), <https://www.amnesty.org/download/Documents/AMR5162032017ENGLISH.pdf>.

<sup>11</sup> *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016).

<sup>12</sup> SF 704/HF 812 (2017).

<sup>13</sup> MINN. DEP'T OF HEALTH, INDUCED ABORTIONS IN MINNESOTA JANUARY - DECEMBER 2019: REPORT TO THE LEGISLATURE (2020) <https://www.health.state.mn.us/data/mchs/pubs/abrpt/docs/2019abrpt.pdf>.

Minnesota.<sup>14</sup> A woman is more likely to die from a urinary tract infection during pregnancy than an abortion.<sup>15</sup>

Litigating TRAP legislation exacts an enormous financial toll on reproductive health, rights, and justice organizations. Furthermore, for as long as unconstitutional TRAP barriers exist in a state, pregnant people are deprived of their constitutional rights. Even though the Minnesota legislation did not advance into law, Louisiana's admitting privileges law, also identical to a Texas restriction struck down in *Whole Woman's Health*, required years of litigation up to the Supreme Court, resulting in last year's decision in *June Medical Services v. Russo*.<sup>16</sup> Louisiana's law, like Texas's law, was struck down in a 5-4 opinion, with Chief Justice John Roberts concurring in the judgment.

*June Medical* reflected the ongoing challenge to abortion rights generally, and specifically, those that are masked by legislation that purports to protect pregnant women. Since 2010, legislators have passed hundreds of laws that claim to reasonably relate to the protection of pregnant women, including medically unnecessary ultrasounds, waiting periods, and medically inaccurate counseling, as well as laws that single out abortion and relate to facilities and impose strict requirements and restrictions on clinicians. Particularly worrisome are the mandated counseling requirements, which force doctors to provide inaccurate information to their pregnant patients, including disproved information that abortion causes mental illness, cancer, and infertility. Medical advocacy organizations including the American Cancer Society and the American College of Obstetricians and Gynecologists refute such claims.

The stakes were high in *June Medical* and remain so, especially as the anti-abortion strategy has shifted to include intensifying regulations targeting abortion providers, including nurses, doctors, and clinics. This strategy—imposing numerous constraints on the providers—is another means to undercut abortion access. These laws mandate conditions related to the facility (size, location, equipment), board certifications, transfer agreements with local hospitals, requirements that certain abortions be performed in hospitals, and more. As a tactical matter in the effort to eliminate abortion rights, this strategy aims to avoid the claim that the abortion provision targets the pregnant person and undermines the abortion right. Thus, the strategy tries to avoid triggering the protections of personal liberty in *Roe v. Wade*<sup>17</sup> and *Planned Parenthood v. Casey*.<sup>18</sup>

The United States is being planted thick with laws that single out abortion for medically unnecessary restrictions and have the purpose and effect of making it tremendously burdensome to effectuate the decision not to carry a pregnancy to term. Denials of abortion are associated with lasting negative financial security and other outcomes for women and children.<sup>19</sup> And states with

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<sup>14</sup> Jeff Hargarten, *Tallying Gun Deaths: One Minnesotan Killed Every Day by Firearms*, MINNPOST, Jan. 8, 2013, <https://www.minnpost.com/politics-policy/2013/01/tallying-gun-deaths-one-minnesotan-killed-every-day-firearms/>.

<sup>15</sup> Geneva Pittman, *Abortion Safer than Giving Birth: Study*, REUTERS (Jan. 23, 2012), <https://www.reuters.com/article/us-abortion/abortion-safer-than-giving-birth-study-idUSTRE80M2BS20120123>.

<sup>16</sup> *June Medical Services, LLC v. Russo*, 140 S. Ct. 2103 (2020).

<sup>17</sup> *Roe v. Wade*, 410 U.S. 113 (1973).

<sup>18</sup> *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992).

<sup>19</sup> ANSIRH, *The Harms of Denying a Woman a Wanted Abortion: Findings from the Turnaway Study*, <https://sixrepro.org/wp-content/uploads/2020/10/The-Harms-of-Denying-a-Woman-a-Wanted-Abortion-Findings-from-the-Turnaway-Study.pdf>.

more abortion restrictions have higher maternal mortality<sup>20</sup> and fewer supportive policies for women and children.<sup>21</sup> This context surrounding abortion restrictions matters. It bears on the credibility of claims by states pushing the right to abortion out of reach that their laws are designed to further women’s health rather than “designed to strike at the right itself.”<sup>22</sup> And it matters immensely to people who are pregnant. The United States leads all high economy or “developed nations” in maternal mortality. According to Central Intelligence data, the United States ranks between 50-55<sup>th</sup> in the world in terms of maternal mortality.<sup>23</sup> Countries with lower maternal mortality rates include Saudi Arabia and formerly war-torn nations like Bosnia.

Of course, appropriate measures need to be put in place to improve the quality of care that women receive. However, the problem runs much deeper than the availability and access to medical technology. These are the problems that result from dangerous social policies, strategic deployment of misinformation, entrenched sexist attitudes, lack of political will by those with the capacity and power to act, and willful political motivations that undermine women’s autonomy and the rights of pregnant people.

Disproportionately, the women who die during their pregnancies or shortly after birth are Black and Latina. The rates of death of poor Black mothers are glaringly acute and even worse in states like Mississippi, Texas, and Louisiana where few or only one abortion clinic remains.<sup>24</sup>

In Mississippi, it is near 188 times more dangerous for a Black woman to give birth than it is for them to have an abortion.<sup>25</sup> In Louisiana, it is roughly 57 times more dangerous for someone to give birth than it is for them to have an abortion.<sup>26</sup> From 2011 to 2016, Black mothers were 4.1 times as likely to die as white mothers in Louisiana.<sup>27</sup> Finally, Texas has been referred to as the deadliest place in the developed world for a woman to be pregnant.<sup>28</sup> A comparison of pregnancy

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<sup>20</sup> Amy N. Addante, *The association between state-level abortion restrictions and maternal mortality in the United States, 1995-2017*, CONTRACEPTION (Mar. 26, 2021), <https://doi.org/10.1016/j.contraception.2021.03.018>.

<sup>21</sup> Center for Repro. Rights & Ibis Repro. Health, *Evaluating Priorities* (2021), <https://evaluatingpriorities.org/>.

<sup>22</sup> *Casey*, 505 U.S. at 874.

<sup>23</sup> *World Factbook: Maternal Mortality Rate*, CENTRAL INTELLIGENCE AGENCY, <https://www.cia.gov/the-world-factbook/field/maternal-mortality-rate/country-comparison>.

<sup>24</sup> Marian F. MacDorman et al., *Is the United States Maternal Mortality Rate Increasing? Disentangling Trends from Measurement Issues*, 128 OBSTETRICS & GYNECOLOGY 447 (2016).

<sup>25</sup> In Mississippi, between 2013-2016, the pregnancy-related mortality ratio for Black women was 51.9 deaths per 100,000 live births, nearly three times the White ratio of 18.9. The national legal induced abortion case-fatality rate for 2013–2017 was 0.44 legal induced abortion-related deaths per 100,000 reported legal abortions. MISS. STATE DEP’T OF HEALTH, MISS. MATERNAL MORTALITY REPORT 2013-2016 (Apr. 2019), <https://msdh.ms.gov/msdhsite/static/resources/8127.pdf>; Katherine Kortzmit et al., *Abortion Surveillance—United States, 2018*, 69 MMWR SURVEILLANCE SUMMARIES 1 (Nov. 2020), <https://www.cdc.gov/mmwr/volumes/69/ss/pdfs/ss6907a1-H.pdf>.

<sup>26</sup> *Maternal Mortality by State, 2018*, CTRS. FOR DISEASE CONTROL AND PREVENTION, <https://www.cdc.gov/nchs/maternal-mortality/MMR-2018-State-Data-508.pdf>; Kortzmit et al., *supra* note 25.

<sup>27</sup> Lynn Kieltyka et al., LOUISIANA MATERNAL MORTALITY REVIEW REPORT 2011-2016 (Aug. 2018), [https://ldh.la.gov/assets/oph/Center-PHCH/Center-PH/maternal/2011-2016\\_MMR\\_Report\\_FINAL.pdf](https://ldh.la.gov/assets/oph/Center-PHCH/Center-PH/maternal/2011-2016_MMR_Report_FINAL.pdf).

<sup>28</sup> Sophie Novack, *Texas’ Maternal Mortality Rate: Worst in Developed World, Shrugged off By Lawmakers*, TEX. OBSERVER (June 5, 2017), <https://www.texasobserver.org/texas-worst-maternal-mortality-rate-developed-world-lawmakers-priorities/>; Katha Pollitt, *The Story Behind the Maternal Mortality Rate in Texas Is Even Sadder Than We Realize*, NATION (Sept. 8, 2016), <https://www.thenation.com/article/the-story-behind-the-maternal-mortality-rate-in-texas-is-even-sadder-than-we-realize/>; Marian F. MacDorman, et al., *Is the United States Maternal Mortality Rate Increasing? Disentangling Trends from Measurement Issues*, 128 OBSTETRICS & GYNECOLOGY 447 (2016).

related deaths in Texas to induced abortion-case fatalities reveals how dangerous it is for states to coerce people to remain pregnant when they would otherwise choose to have an abortion. In Texas:

- There are 18.5 pregnancy-related deaths per every 100,000 live births.<sup>29</sup>
- The national legal induced abortion case-fatality rate for 2013–2017 was 0.44 legal induced abortion-related deaths per 100,000 reported legal abortions.<sup>30</sup>
- It is roughly 42 times more dangerous for someone to give birth in Texas than it is for them to have an abortion.

These conditions are only aggravated for Black and Latina women. Recent Texas legislation signed into law by Governor Greg Abbott bans abortion at around six weeks after a person’s last menstrual period—a time in which a person may be unaware of pregnancy. The law states private citizens may sue an abortion provider or anyone that aids a pregnant patient in obtaining an abortion. This includes financial assistance. How chilling given the well-documented backdrop of targeted harassment and shootings of abortion providers, and bombings of clinics where abortions take place.

More antiabortion laws will not solve this problem. Rather, they reveal a lack of concern for the health, safety, and dignity of poor women and pregnant individuals. Consider the 15-week Mississippi abortion ban—a ban with no exceptions in cases of rape and incest—that will be heard by the United States Supreme Court. Mississippi lawmakers claim the legislation protects women.

In his opinion granting an injunction against the law, Judge Carlton Reeves wrote, “this Court concludes that the Mississippi Legislature’s professed interest in ‘women’s health’ is pure gaslighting.”<sup>31</sup> Judge Reeves observed, “in its legislative findings justifying the need for this legislation, the Legislature cites *Casey* yet defies *Casey*’s core holding. The State ‘ranks as the state with the most [medical] challenges for women, infants, and children’ but is silent on expanding Medicaid.”<sup>32</sup> Judge Reeves stated that “legislation like H.B. 1510 is closer to the old Mississippi—the Mississippi bent on controlling women and minorities. The Mississippi that, just a few decades ago, barred women from serving on juries ‘so they may continue their service as mothers, wives, and homemakers.’”<sup>33</sup>

Only a few decades ago, Fannie Lou Hamer bravely exposed the “Mississippi appendectomy,” a term used to describe the process in which Black girls and women were coercively sterilized. As Judge Reeves wrote, “Fannie Lou Hamer’s reporting” informed the nation about a dirty secret in Mississippi—that it “sterilized six out of ten black women in Sunflower County at the local hospital—against their will.”<sup>34</sup>

In other words, abortion laws enacted today cannot be divorced from history nor the conditions undergirding women’s lives in the present. For women of color, this includes unequal wages, disproportionately living in poverty and relatedly near environmental pollution, poor housing

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<sup>29</sup> *Maternal Mortality by State, 2018*, *supra* note 26.

<sup>30</sup> Kortsmid et al., *supra* note 25.

<sup>31</sup> *Jackson Women’s Health Org. v. Currier*, 349 F.Supp.3d 536, 540 n.22 (S.D. Miss. 2018).

<sup>32</sup> *Id.*

<sup>33</sup> *Id.* (citing *State v. Hall*, 187 So.2d 861, 863 (Miss. 1966)).

<sup>34</sup> *Id.* (citing Rickie Solinger, *WAKE UP LITTLE SUSIE* 57 (1992)).



conditions, segregated schooling, targeted immigration surveillance, voter suppression, high maternal mortality rates, and devastating rates of infant mortality.<sup>35</sup>

This is not simply a problem in Texas, Mississippi, and Louisiana. This is an American problem affecting women across the nation. Since January of this year, “there have been 561 abortion restrictions, including 165 abortion bans, introduced across 47 states (all counts current as of June 7, 2021).”<sup>36</sup> Over 80 “of those restrictions have been enacted across 16 states, including 10 bans.”<sup>37</sup>

That is, in recent years, antiabortion lawmakers have legislated against reproductive health with an outsized authority contrary to public opinion and public health, and in ways that are both condescending and dangerous. Missouri enacted a spate of “extreme abortion restrictions” in 2019, including an abortion law that made no exceptions for rape or incest. State Representative Barry Hovis then informed lawmakers that most rapes are “he-said-she-said” and mostly “consensual.”<sup>38</sup> An Oklahoma lawmaker “defends pregnancy from rape and incest as ‘beauty from ashes.’”<sup>39</sup> Even saving or preserving the life of the pregnant person does not matter to some. A representative from Ohio, John Becker, introduced legislation that provided for the so-called reimplantation of an embryo or fetus after ectopic pregnancy even though such a procedure does not exist.<sup>40</sup> Clearly, women’s health and safety are only incidental to what really matters: control.

Consider Mississippi. Antiabortion laws such as the Mississippi 15-week abortion ban reveal significant racial blind spots within the states where such laws are enacted. For example, Mississippi lawmakers could learn a great deal from the Mississippi Department of Health (MDH). The MDH’s most recent investigation of maternal health and mortality, the Mississippi Maternal Mortality Report,<sup>41</sup> found that Black women accounted for “nearly 80% of pregnancy-related cardiac deaths.”<sup>42</sup> However, Mississippi Attorney General Lynn Fitch recently stated that “the Mississippi Legislature enacted this law . . . to promote women’s health and preserve the dignity and sanctity of life.”<sup>43</sup>

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<sup>35</sup> Danielle M. Ely & Anne K. Driscoll, *Infant Mortality in the United States, 2018: Data From the Period Linked Birth/Infant Death File*, 69 NAT’L VITAL STATISTICS REPORTS 1 (July 2020), <https://www.cdc.gov/nchs/data/nvsr/nvsr69/NVSR-69-7-508.pdf>.

<sup>36</sup> Nash & Cross, *supra* note 2.

<sup>37</sup> *Id.*

<sup>38</sup> Arwa Mahdawi, ‘Consensual Rape’ and ‘Re-implantation’: The Times Lawmakers ‘Misspoke’ on Abortion, *GUARDIAN* (May 18, 2019), <https://www.theguardian.com/world/2019/may/17/consensual-and-re-implantation-the-times-lawmakers-misspoke-on-abortion>; see also Emily Wax-Thibodeaux, *In Alabama-Where Lawmakers Banned Abortion for Rape Victims-Rapists’ Parental Rights Are Protected*, *WASH. POST*, [https://www.washingtonpost.com/national/in-alabama--where-lawmakers-banned-abortion-for-rape-victims--rapists-parental-rights-are-protected/2019/06/09/6d2aa5de-831b-11e9-933d-7501070ee669\\_story.html](https://www.washingtonpost.com/national/in-alabama--where-lawmakers-banned-abortion-for-rape-victims--rapists-parental-rights-are-protected/2019/06/09/6d2aa5de-831b-11e9-933d-7501070ee669_story.html).

<sup>39</sup> Kristine Phillips, *Oklahoma Lawmaker Defends Pregnancy from Rape and Incest as “Beauty from Ashes,”* *WASH. POST* (Mar. 25, 2017), <https://www.washingtonpost.com/news/acts-of-faith/wp/2017/03/25/oklahoma-lawmaker-defends-pregnancy-from-rape-and-incest-as-beauty-from-ashes/>.

<sup>40</sup> Kayla Epstein, *A Sponsor of An Ohio Abortion Bill Thinks You Can Reimplant Ectopic Pregnancies. You Can’t*, *WASH. POST* (May 10, 2019), <https://www.washingtonpost.com/health/2019/05/10/sponsor-an-ohio-abortion-bill-thinks-you-can-reimplant-ectopic-pregnancies-you-cant/>.

<sup>41</sup> MISSISSIPPI MATERNAL MORTALITY REPORT, *supra* note 25.

<sup>42</sup> *Id.*

<sup>43</sup> Lawrence Hurley, *U.S. Supreme Court Takes Up Major Challenge To Abortion Rights*, *REUTERS*, May 17, 2021, <https://www.reuters.com/world/us/us-supreme-court-takes-up-case-that-could-limit-abortion-rights-2021-05-17/>.

But, whose lives and dignity matter to Mississippi lawmakers?

Abortion bans are not about protecting the health of pregnant people or saving women's lives. Coercing women to remain pregnant does not keep them safe. Instead, it can be deadly. The World Health Organization (WHO) compares the safety of legal abortions to penicillin shots.<sup>44</sup>

This is a call to action for Congress. WHPA will protect the rights of millions of people and shield them from the harms posed by antiabortion provisions enacted in recent years that impose medically unnecessary requirements, “reason” bans, gestational bans, trigger bans, and restrictions on clinics and providers. Congress has broad powers to enact WHPA and the Supreme Court could not “void such a law without collapsing the scholarly and judicial consensus about the reach of government power.”<sup>45</sup>

Before I conclude, I turn to our history. As Julie A. Matthei's important work, *An Economic History of Women in America*, underscores, “the key to understanding woman's present and future position . . . lies in history.”<sup>46</sup>

### *C. Historical Underpinnings*

In 1851, Sojourner Truth delivered a speech best known as “Ain't I A Woman?” to a crowded audience at the Women's Convention in Akron, Ohio. At the time, slavery remained in full force, a vibrant enterprise that fueled the American economy. Various laws protected that system, including the Fugitive Slave Act, which resulted in the abduction of “free” Black children, women, and men as well as those who had miraculously escaped to northern cities like Boston or Philadelphia. Bounty hunters then sold their prey to Southern plantation owners.

These laws denied Black people basic legal protections, including the ability to challenge being kidnapped and bartered off; they had no standing in court and were not entitled to be heard by magistrates or judges. Ms. Truth condemned this disgraceful enterprise, which thrived off not only uncompensated labor, but also physical and psychological terror. Most will remember Ms. Truth's oration for its vivid descriptions regarding physical labor; Black women were forced to plough, plant, herd, and build—just as men. Yet far too little attention centers on her condemnation of the system that made sexual and reproductive chattel of Black women, and then cruelly sold off Black children. This was human trafficking in the American form, and it lasted for decades that folded into centuries.

Ms. Truth pleaded, “I have borne 13 children, and seen most all sold off to slavery, and when I cried out with my mother's grief, none but Jesus heard me! And ain't I a woman?” Senators, 170 years later, I sit before you to remind you that the relevance of Ms. Truth's plea endures. The ink remains wet on that famous oration. Ms. Truth's speech remains a timeless appeal, because Black women continue to struggle against efforts to deny them reproductive autonomy and independence, including that guaranteed by the Constitution. The full content of the speech takes

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<sup>44</sup> WORLD HEALTH ORG., SAFE ABORTION: TECHNICAL AND POLICY GUIDANCE FOR HEALTH SYSTEMS 49 (2d ed. 2012).

<sup>45</sup> Neal Kumar Katyal, *The Supreme Court May Toss Roe. But Congress Can Still Preserve Abortion Rights*, Washington Post, June 7, 2021, <https://www.washingtonpost.com/outlook/2021/06/07/roe-abortion-congress-mississippi/>.

<sup>46</sup> Julie A. Matthei, *AN ECONOMIC HISTORY OF WOMEN IN AMERICA* 3 (1982).



up concerns of slavery, abolition, class, and equality among women. And these issues typically find purchase in the retelling of the speech often to the exclusion of the appeal she makes advocating for Black women's human dignity and rights related to reproduction and mothering.

However, the picture that I paint for you is on a canvas that unravels beyond the reaches of slavery and into the 20<sup>th</sup> and 21<sup>st</sup> centuries. Women's reproduction has been the euphemistic football of legislative politics. The notorious 1927 Supreme Court case, *Buck v. Bell* (an 8-1 decision), which legalized and catalyzed the domestic eugenics movement further illustrates my point.<sup>47</sup> In that case, the Court upheld Virginia's eugenics law. The subject of the litigation, Carrie Buck, had been raped by her employer's nephew and later sentenced to the Virginia Colony of Epileptics and Feeble Minded where even children were coercively, surgically sterilized. Carrie was sixteen at the time of the assault.

Chief Justice Oliver Wendell Holmes—one of the most revered justices to serve on the Court—famously declared, “Three generations of imbeciles are enough.”<sup>48</sup> The opinion is punctuated by Justice Holmes's observation that “[i]t is better for all the world if, instead of waiting to execute degenerate offspring for crime or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind.”<sup>49</sup>

He wrote: “It would be strange if [the Virginia legislature] could not call upon those who already sap the strength of the State for these lesser sacrifices, often not felt to be such by those concerned, in order to prevent our being swamped with incompetence.”<sup>50</sup> In the wake of *Buck v. Bell*, tens of thousands of Americans were coercively sterilized.<sup>51</sup> In North Carolina, 26% of forced sterilizations were forced on children “under age 18” and 60% of all sterilization victims were Black.<sup>52</sup> I highlight two examples. Elaine Riddick, raped as a little girl, did not know until many years later that the state of North Carolina sterilized her at age 14.<sup>53</sup> Similarly in 1974, sisters Mary Alice and Minnie Relf were sterilized at ages 14 and 12 (respectively) in Alabama. Years later, a lawsuit filed by the Southern Poverty Law Center on behalf of the Relf sisters revealed that federally funded programs sterilized 100,000 to 150,000 people each year.<sup>54</sup> Clearly, some of those sterilizations may have been voluntary, but the majority were likely performed under coercive means.

This abbreviated history sets the stage for considering contemporary challenges to reproductive privacy, autonomy, and justice and the importance of the Women's Health Protection Act.

### *Conclusion:*

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<sup>47</sup> *Buck v. Bell*, 274 U.S. 200 (1927).

<sup>48</sup> *Id.*

<sup>49</sup> *Id.* at 207.

<sup>50</sup> *Id.*

<sup>51</sup> See, e.g., Paul A. Lombardo, *Three Generations, No Imbeciles: New Light on Buck v. Bell*, 60 N.Y.U. L. REV. 30 (1985).

<sup>52</sup> Valerie Bauerlein, *North Carolina to Compensate Sterilization Victims*, WALL STREET J. (July 26, 2013), <http://www.wsj.com/articles/SB10001424127887323971204578629943220881914> (“[a]bout 2,000 of the 7,600 who were sterilized were under age 18”).

<sup>53</sup> *Id.*; David Zucchino, *Sterilized by North Carolina, She Felt Raped Once More*, L.A. TIMES (Jan. 25, 2012), <http://articles.latimes.com/2012/jan/25/nation/la-na-forced-sterilization-20120126> [<http://perma.cc/7BPR-3UCM>].

<sup>54</sup> *Sterilization Abuse*, S. POVERTY L. CTR., <http://www.splcenter.org/seeking-justice/case-docket/relf-v-weinberger> [<http://perma.cc/RL7M-WWP7>].

The Women’s Health Protection Act is an important step in protecting healthcare, preserving *Roe v. Wade*, and recognizing the dignity of women and people with the potential to become pregnant. In fact, important lessons remain to be learned from *Roe*. Justice Blackmun’s majority opinion in *Roe* extended to women the Fourteenth Amendment’s promise of liberty. 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 the stigmatization of women. In *Roe*, the Court finally acknowledged the “detriment” that states had long imposed on women when it denied them choices about their reproductive destinies. Justice Blackmun candidly recognized the “specific and direct harm medically diagnosable even in early pregnancy” that some women may endure by being forced by the state to bear children.<sup>55</sup>

For the first time, the Court clearly articulated that motherhood and childbearing could be harmful to women. Further, to force women into those destinies violated their constitutional right to privacy. He wrote, “[m]aternity, or additional offspring, may force upon the woman a distressful life and future.”<sup>56</sup> Justice Blackmun acknowledged important realities such as “mental and physical health may be taxed by child care.”<sup>57</sup>

Those harms continue today and are acutely felt by the most vulnerable members of society. Campaigns to undo the hard-fought rights gained by women to govern their bodies and reproductive health now result in the closing of clinics that perform not only abortion, but also other important women’s reproductive health services. For millions of poor women, they are trapped, living in states where only one abortion clinic remains—such as Missouri, Mississippi, North Dakota, South Dakota, and Wyoming—forced to drive hours, even in life-threatening pregnancies, to arrive at the nearest clinic.<sup>58</sup>

However, Congress has the legal authority and power to intervene. Reproductive justice requires every individual to have the right to make their own decisions about having children regardless of their circumstances and without interference and discrimination. It is time to enact the Women’s Health Protection Act. By passing this legislation, you will protect millions of Americans from harmful abortion restrictions that infringe on rights, burden health, and trample dignity.

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<sup>55</sup> *Id.*

<sup>56</sup> *Id.* at 153.

<sup>57</sup> *Id.*

<sup>58</sup> See Esme Deprez, *U.S. Abortion Rights Fight*, BLOOMBERG NEWS (July 7, 2016), <https://www.bloomberg.com/quicktake/abortion-and-the-decline-of-clinics>.