

**RESPONSES TO QUESTIONS FOR THE RECORD FROM SENATOR CHARLES E. GRASSLEY  
HEARING ON “A POST-*ROE* AMERICA: THE LEGAL CONSEQUENCES OF THE  
*DOBBS* DECISION”**

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**Question 1:** During the hearing, Senator Booker asked you: “If Congress were to pass a national abortion ban, would that be something you would support?” You answered and later clarified your answer. Can you elaborate your views on this issue?

**Response:** Congress should protect unborn life to the fullest extent permissible under its constitutionally delegated authority. Using its enumerated powers, Congress has done so on several occasions. For instance, Congress exercised its Spending Clause power to prohibit the use of federal funds for abortions and to protect medical providers who defend life.<sup>1</sup> And Congress utilized its Commerce Clause power to prohibit the barbaric practice of partial-birth abortion.<sup>2</sup>

Congress may use its Commerce Clause power to regulate or even prohibit the interstate shipment of abortion-inducing drugs. Some legal scholars assert that the Fourteenth Amendment additionally empowers Congress to protect human life should States fail to do so.<sup>3</sup> Of course, any bill must be carefully tailored to ensure it does not exceed Congress’s constitutional authority.

Federal legislation seeking to codify the abortion regime established in *Roe* and *Casey*, for instance, would fall outside Congress’s enumerated powers because, under the Commerce Clause, Congress does not have the power to regulate in the absence of commerce.<sup>4</sup> Congress lacks authority under the Fourteenth Amendment to impose such a regime because the Constitution does not confer a right to abortion. And the Commerce Clause does not empower Congress to *mandate* commerce in a way that intrudes into States’ traditional authority to regulate health, welfare, and safety, by overriding state laws aimed at protecting the lives of unborn children.

**Question 2:** What do state abortion regulations look like after *Dobbs*, and what should state legislatures be considering as they craft these laws?

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<sup>1</sup> See, e.g., Hyde Amendment, Pub. L. 116-94, §506(a) *et. seq.*, 133 Stat. 2534, 2606, (2019); Church Amendments, 42 U.S.C. §300a-7 *et. seq.* (2012).

<sup>2</sup> Partial-Birth Abortion Ban Act of 2003, 18 U.S.C. § 1531 (“Any physician who, **in or affecting interstate or foreign commerce**, knowingly performs a partial-birth abortion and thereby kills a human fetus shall be fined under this title or imprisoned not more than 2 years, or both.”) (emphasis added).

<sup>3</sup> See, e.g., Brief for Scholars of Jurisprudence John M. Finnis and Robert P. George as *Amici Curiae* in Support of Petitioners at 4, *Dobbs v. Jackson Women’s Health Org.*, No. 19-1392 (July 29, 2021) (arguing that “unborn children are constitutional persons” guaranteed equal protection and due process by the Fourteenth Amendment).

<sup>4</sup> See, e.g., *Nat’l Fed. of Independent Business v. Sebelius*, 567 U.S. 519, 550 (2012) (“The power to *regulate* commerce presupposes the existence of commercial activity to be regulated.”) (emphasis in original).

**Response:** After *Dobbs*, some States will pursue laws and policies that protect women and their children from the negative and life-altering consequences of abortion. Many will focus on new initiatives that uplift and empower pregnant women facing a variety of challenges, through funding to pregnancy care centers, maternity homes, adoption agencies, and other social-service organizations that walk with a mother and her child during pregnancy and after. Other States, tragically, will adopt laws and policies that harm women and permit unregulated abortion up until the moment of birth for any reason.

With the grave errors of *Roe* and *Casey* reversed, States can also enforce existing life-affirming laws that had been wrongly blocked under these egregious precedents. These laws include longstanding complete protections for unborn life, protections when the unborn child has a heartbeat, protections against discriminatory abortions based on a child’s race, sex, or genetic makeup, and laws ensuring that unborn children are not subjected to pain through dismemberment abortions. These laws are generally permissible under *Dobbs* and reflect the chosen policy of the people of many States through their elected lawmakers.

In crafting life-affirming measures, States should prioritize the important government interests enumerated by the Supreme Court in *Dobbs*, including showing respect for and preserving unborn human life at all stages of development, protecting maternal health and safety, and preserving the integrity of the medical profession.<sup>5</sup> Coupled with emerging medical knowledge on the development of unborn children and growing evidence showing abortion’s harm to women, these interests strongly support state laws promoting a culture of life where mothers and their babies flourish.

**Question 3:** What are the disparate impacts of abortion on communities of color? How will this disparate impact be affected by *Dobbs*? How would this disparate impact be affected if pregnancy centers were unavailable or less available to provide services to women and families?

**Response:** Recent CDC data<sup>6</sup> reveals that Black and Hispanic women accounted for a disproportionate percentage of abortions in 2019:

	% of the Population	% of Abortions	Difference
Black Americans	12.2%	38.4%	<b>+26.2%</b>
Hispanic Americans	18.5%	21.0%	<b>+2.5%</b>
White Americans	60.1%	33.4%	-26.7%

Communities of color – and Black communities in particular – are disproportionately bearing the well-documented medical and other harms inherent in abortion.

The *Dobbs* decision returns questions of how best to protect and promote life to the American people and their elected representatives. State officials can now be more responsive in addressing these disparities. They can create comprehensive programs that offer life-affirming options to all mothers and their children during and after pregnancy. And they can innovate programs that specifically

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<sup>5</sup> *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2284 (2022).

<sup>6</sup> Carole Novielli, *New CDC data shows communities of color are disproportionately targeted for abortion*, LIVEACTION.COM (Dec. 21, 2022), <https://www.liveaction.org/news/cdc-communities-color-targeted-abortion>.

support women in unplanned pregnancies and address the unique needs of communities of color, offering solutions that – unlike abortion – do not result in the widespread deaths of children of color.

Pregnancy centers are a critical part of the existing and future support infrastructure. In 2019 alone, over 2,700 pregnancy centers provided more than 1.85 million people in the United States with free medical services, supplies, and other material resources both during a mother’s pregnancy and after the baby is born – estimated at a value of over \$266 million.<sup>7</sup> Beyond critical supplies like formula, diapers, and clothes, pregnancy centers provide long-term benefits through parenting education, job-skills training, and even post-abortive care. On top of this, tens of thousands of churches, religious organizations, and other non-profits serve vulnerable women and children, as well as those who foster and adopt children.

American women and families greatly benefit from the services provided by pregnancy centers and other faith-based, charitable, and social-service organizations. Ongoing attacks – both physical and political<sup>8</sup> – on pregnancy centers put the life-affirming and supportive work of these centers in jeopardy and compromise the care and support they provide to all women, including women of color.

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<sup>7</sup> Moira Gaul, *Fact Sheet: Pregnancy Centers – Serving Women and Saving Lives (2020 Study)*, CHARLOTTE LOZIER INSTITUTE (July 19, 2021), <https://lozierinstitute.org/fact-sheet-pregnancy-centers-serving-women-and-saving-lives-2020/>.

<sup>8</sup> *See, e.g.*, Stop Anti-Abortion Disinformation Act, S.4469, 117th Congress (2022) (denigrating pregnancy centers and falsely accusing them of disseminating “disinformation”).