



Testimony of Dana Sussman
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before the United States Senate Judiciary Committee
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Thank you for the opportunity to submit this testimony to the Senate Judiciary Committee and for convening today's hearing to explore the devastating impact of the Supreme Court's decision in *Dobbs v. Jackson Women's Health Organization*. National Advocates for Pregnant Women is a non-partisan legal advocacy organization dedicated to the health and welfare of pregnant people and their families. Our testimony draws on over 20 years of experience defending the rights of pregnant and parenting people who have faced criminalization and other deprivations of liberty because of pregnancy.

While not every woman will become pregnant or give birth, the overwhelming majority of women will.¹ By the time they are in their 40s, approximately 85% of American women will have become pregnant and experienced at least one birth, 33% will have experienced a pregnancy loss, and approximately 25% will have had an abortion. These experiences are overlapping and not exclusive.² For example, 59% of the women under age 35—and 89% of the women over 35—who have abortions are already mothers.³

The protections established by the Supreme Court's decisions in *Roe* and *Casey* were central to the dignity, personhood, and well-being of all six million people who become pregnant annually in the United States, including the four million who continue their pregnancies to term and the one million who have the dishearteningly common experience of pregnancy loss.⁴ Nonetheless, since 1973, National Advocates for Pregnant Women has documented more than 1,700 instances of women being arrested, prosecuted, convicted, detained, or forced to undergo medical interventions that would not have occurred but for their status as pregnant people whose rights state actors assumed could be subordinated in the interest of fetal protection.⁵ Across every State, state actors, including police and prosecutors, health-care and child-welfare workers, and judges have, relying on interests in "unborn life," deprived pregnant women of virtually every constitutional right, including the right to life.

¹ Although the term "women" is used here and elsewhere, people of all gender identities may become pregnant and seek abortion care. *See Reprod. Health Servs. v. Strange*, 3 F.4th 1240, 1246 n.2 (11th Cir. 2021).

² *See* NAPW, *Pregnancies and Pregnancy Outcomes in the United States* (Sept. 2021), [bit.ly/pregnancyoutcomes2](https://www.nationaladvocatesforpregnantwomen.org/wp-content/uploads/2021/09/FINAL_1600cases-Factsheet.docx.pdf).

³ *Id.*

⁴ *Id.*

⁵ NAPW, *Arrests and Deprivations of Liberty of Pregnant Women, 1973-2020* (Sept. 2021), https://www.nationaladvocatesforpregnantwomen.org/wp-content/uploads/2021/09/FINAL_1600cases-Factsheet.docx.pdf.

Women have been arrested, prosecuted, and detained on the theory that, by becoming pregnant, otherwise legal acts or omissions, health conditions, and decisions permissible to non-pregnant people may be treated as crimes. Similarly, pregnancy has provided the basis for compelled medical procedures and treatments that cannot be imposed on parents, siblings, and cousins to save their relative's life. As in all systems that police and punish people in this country, those who have faced pregnancy-related rights deprivations are overwhelmingly poor, and disproportionately people of color,⁶ who also face significantly higher rates of maternal mortality and morbidity. Such government actions have relied on interpretations of criminal statutes that make no mention of pregnancy or pregnant women. Prosecutors in numerous states have also used laws designed to reach attackers of pregnant women as a basis for proceeding against the woman herself.⁷ Those laws have been relied upon to justify arresting and prosecuting pregnant women who experienced miscarriages and stillbirths, although most arrests involved births of healthy babies with no adverse pregnancy outcome reported.

In Iowa, a pregnant woman who fell down a flight of stairs was reported to the police after seeking help at a hospital. She was arrested for “attempted fetal homicide.”⁸ A Tennessee woman who sought to avoid a sheriff's pursuit was charged with evading arrest and felony reckless endangerment because she was pregnant.⁹ An Alabama woman who lost a pregnancy as a result of being shot in the stomach during an altercation, was charged with manslaughter, in an indictment alleging she “did intentionally cause the death of [her unborn baby] by initiating a fight knowing she was five months pregnant.”¹⁰ In South Carolina, a woman who was eight months pregnant attempted suicide by jumping out of a window. Despite suffering severe injuries, she survived, but was arrested and jailed for homicide by child abuse.¹¹ An Oklahoma judge took “custody” of a pregnant woman's fetus to prevent her release from jail, and set a bail amount eight times that for the putative father arrested on an identical charge.¹² Alabama prosecutors have charged nearly 600 women under the State's “chemical endangerment” law—on the theory that the unborn, from the moment of fertilization, are children; and being pregnant and using any amount of any controlled substance is the same as bringing a child to a

⁶ Paltrow & Flavin, *Arrests of and Forced Interventions on Pregnant Women in the United States, 1973–2005: Implications for Women's Legal Status and Public Health*, 38 J. HEALTH POLITICS, POL. & L. 299 (2013).

⁷ Michelle Goldberg, *When Miscarriage is Manslaughter*, N.Y. TIMES, Oct. 18, 2021, <https://www.nytimes.com/2021/10/18/opinion/poolaw-miscarriage.html>

⁸ Michelle Goodwin, *POLICING THE WOMB: INVISIBLE WOMEN AND THE CRIMINALIZATION OF MOTHERHOOD*, 86-87 (2020).

⁹ Affidavit of Complaint, *State v. Kohr*, No. 14W5022 (General Sessions Ct. Nov. 12, 2014).

¹⁰ Crossley, *Reproducing Dignity: Race, Disability, and Reproductive Controls*, 54 U.C. DAVIS L. REV. 195, 198-203 (2020).

¹¹ Foster, *Woman faces charge of killing unborn child during August suicide attempt*, THE HERALD (Feb. 21, 2009), <https://www.heraldonline.com/news/local/article12250463.html>.

¹² *In re Unborn Child of Starks*, 18 P.3d 342 (2001).

methamphetamine lab. Among those prosecuted were women who took a controlled substance pursuant to a valid prescription; who used marijuana to address severe epilepsy (as an alternative to prescribed medications known to cause fetal damage); and who ingested half a valium tablet when panicked by threatened violence from an ex-boyfriend.¹³ In Mississippi, a woman was charged with second-degree murder for experiencing a stillbirth.¹⁴ Prosecutors have charged other women in the state who experienced stillbirths with depraved-heart homicide and culpable-negligence manslaughter.¹⁵ In Wisconsin, a pregnant woman's alcohol consumption and cigarette smoking were cited as grounds for a charge of attempted first-degree intentional homicide.¹⁶ In Utah, a woman who delivered twins, one of whom was stillborn, was charged with fetal homicide, based on health care providers' belief that the stillbirth might have been avoided had she accepted their recommendation and not delayed undergoing cesarean surgery.¹⁷ In Indiana, a woman who was approximately 33 weeks pregnant attempted suicide. She survived and did everything she could to ensure that her baby did; the baby was born alive but did not survive. She was charged with murder and feticide and incarcerated without bail for more than a year.¹⁸ Not just pregnant women's physical liberty is at stake, but their right to life: a Washington, D.C. judge ordered a pregnant woman to undergo cesarean surgery without her consent knowing that the operation might kill the woman. Neither she nor her baby survived.¹⁹

Even when state laws explicitly prohibit its use against a pregnant woman herself, prosecutors persist. For example, a Missouri "personhood" provision directs that it may not be applied "against a woman for indirectly harming her unborn child by failing to properly care for herself," Mo. Rev. Stat. § 1.205.4, has not prevented prosecutors from repeatedly using it to justify charging scores of pregnant women, including one who admitted to using marijuana once while pregnant and another who drank alcohol.²⁰ And in California, despite court rulings over many decades rejecting the use of the State's criminal code to prosecute women in relationship to pregnancy outcomes, a prosecutor recently charged two women who experienced pregnancy losses—blamed, without scientific basis, on the use of methamphetamine—with violating the State's feticide law. To be clear, there is simply no medical or scientific evidence that

¹³ Martin, *Take a Valium, Lose Your Kid, Go to Jail*, PROPUBLICA (Sept. 23, 2015), <https://www.propublica.org/article/when-the-womb-is-a-crimescene>.

¹⁴ See Philips, *Infant Death Case Heading Back to Grand Jury*, STARKVILLE DAILY NEWS, May 8, 2019, https://www.starkvilledailynews.com/infant-death-case-heading-back-to-grand-jury/article_cf99bcb0-71cc-11e9-963aeb5dc5052c92.html; GOODWIN at 34-45.

¹⁵ *State v. Buckhalter*, 119 So. 3d 1015 (2013).

¹⁶ Complaint, Nos. 96-F-368, 96-CF-525 (Wis. Cir. Ct. Racine County, Sept. 18, 1996).

¹⁷ *State v. Rowland*, No. 041901649 (Dist. Ct. 3d Apr. 7, 2004).

¹⁸ GOODWIN at 32-34.

¹⁹ *Id.* at 92-96.

²⁰ See *State v. K.L.*, No. 03CR113048 (Cir. Ct. Chariton County Dec. 13, 2004); *State v. Lohnstein*, No. 0611-CR08757, Opp. to Mot. to Dismiss (Cir. Ct. St. Charles County Oct. 17, 2007); *State v. Wade*, 232 S.W.3d 663, 665 (Mo. App. 2007) (rejecting State's reliance on Section 1205 for prosecution of a woman based on pregnancy).

methamphetamine causes fetal demise. It simply does not. But, nonetheless, women have been prosecuted notwithstanding statutory text which expressly forbids the prosecution of a formerly pregnant woman for any “act [that] was ... consented to by the mother of the fetus.” Cal. Pen. Code § 187(b). One woman poorly advised by her lawyer, pled guilty to manslaughter of her fetus, even though that law explicitly precludes a manslaughter charge for the loss of a fetus and in any event does not apply to pregnancy or fetuses, even for third-party assailants. She was sentenced to eleven years in prison for experiencing a pregnancy loss. After serving four years, her plea was held to be unconstitutional and the prosecutor finally dismissed the underlying murder charge in May of this year.²¹ A second, Chelsea Becker, spent 16 months in jail before the feticide charge was dismissed.²² Ms. Becker, our client, has shared the following about her experience facing a murder charge for pregnancy loss:

My name is Chelsea Becker. I was incarcerated in Kings County jail in California for more than a year, from November 6, 2019 until March 10, 2021, while I was awaiting trial for first degree murder, after experiencing a stillbirth while addicted to methamphetamine. Experiencing the loss of my baby—alone—caused a lot of trauma for me and while I was in custody I was unable to receive the proper counseling to help me with the grief process. Even with the counselors at the jail, I was afraid anything I might have said to any of them would be used against me in court, so I suffered alone. While I was in jail, my youngest living son, whom I had custody of up until this time, had been taken into CPS and was later adopted. If the hospital had never involved law enforcement due to this stillbirth happening, I would still have custody of my son. I later learned that methamphetamine had nothing do to with my stillbirth and that existing California law never permitted my prosecution in the first place. The charge wasn't dismissed until May, 2021, and by then the adoption had been finalized months prior. My experience with the justice system was detrimental to my mental health, and I feel that both I and my living child were failed deeply. I hope that in the future, no woman will ever be prosecuted for losing a pregnancy.

Despite these horrific prosecutions and rights deprivations, when challenged, courts nationwide, up until this point, have often recognized the unlawfulness of these state actions—but not before extraordinary and irreparable harm is inflicted on individuals, families, and the well-being of other women threatened with prosecution. This body of experience demonstrates that the protections established in *Roe* and *Casey* were critical to not just the rights of people who seek

²¹ Attorney General Bonta Issues Statement on Dismissal of Murder Charge Against Adora Perez for Loss of Pregnancy, May 9, 2022, <https://oag.ca.gov/news/press-releases/attorney-general-bonta-issues-statement-dismissal-murder-charge-against-adora>

²² Wigglesworth, *Judge dismisses murder charge against Central Valley woman whose baby was stillborn*, L.A. TIMES, May 20, 2021, <https://www.latimes.com/california/story/2021-05-20/murder-charge-dropped-against-woman-who-sufferedstillbirth>.

abortions, but to all pregnant people. Until now, courts in all but three States have rebuffed coercive measures, often on grounds that closely track *Casey*'s condemnation of exercising "dominion" over pregnant women's lives.

Roe and *Casey* rested fundamentally on an understanding of pregnant women's personhood under the Fourteenth Amendment. The *Dobbs* decision overturning them repudiates that principle. Each State now has as a matter of constitutional law, carte blanche to announce, and enforce, fetal interests "competitive with the constitutional rights of pregnant women." *Planned Parenthood S.E. Pa. v. Casey*, 505 U.S. 833, 914 n.2 (Stevens, J. concurring). Pregnant people can now be subordinated to a special class of persons entitled to "full and independent legal status under the Constitution." 505 U.S. at 897. Criminal punishments and civil detentions imposed on pregnant people because of their pregnancies need only be "reviewed"—i.e., rubber stamped—for "rational basis." Very little is holding prosecutors back from considering each of the roughly five million annual pregnancies that are not terminated by abortion—and every new day of those pregnancies—as a potential crime or justification for state intervention.

Without the protections of *Roe* and *Casey*, prosecutors—who have sought punishment on theories that giving birth to a healthy baby who had been subject to a perceived risk of harm in utero is felony "child abuse" or that experiencing a pregnancy loss is murder—will not hesitate to bring the full weight of their power to bear against women who seek abortions or are suspected of doing so. When pregnancy and all its potential outcomes may be treated as crimes, when activities that pose potential or even perceived risks of fetal harm are subject to prosecution or other punitive state action, and when candid communication with health-care providers is treated as inculpatory evidence, pregnant people and their families will suffer irreparably.