TO: United States Senate

FROM: Jay Sekulow, Chief Counsel; Jordan Sekulow, Executive Director

RE: Codification of *Roe v. Wade* Likely Unconstitutional Under Draft *Dobbs* Opinion

DATE: May 6, 2022

Executive Summary

Due to the leak of a draft opinion of the Supreme Court of the United States in *Dobbs v. Jackson Women's Health Organization*, written by Justice Alito, that would overrule *Roe v. Wade* and *Planned Parenthood v. Casey*, the Senate will soon be voting—again—on the Women's Health Protection Act, H.R. 3755 ("WHPA"), passed by the House of Representatives on September 21, 2021, by a slim 218-211 vote. The Senate could also consider the Reproductive Choice Act, S. 3713 ("RCA"), introduced as an amendment to the WHPA on February 28, 2022, by Senators Collins and Murkowski.

If either bill is enacted into law, Attorneys General in pro-life states would surely file lawsuits, and **there is a good chance that the bills would be held unconstitutional by the courts.** In short, Congress lacks the authority to enact either bill, and the bills' encroachment upon the states' constitutional authority would violate the Tenth Amendment. None of the three constitutional provisions cited in the WHPA—the Necessary and Proper Clause, Section 5 of the Fourteenth Amendment, and the Commerce Clause—provide authority for the enactment of that bill. (The RCA does not cite any source of authority, but its defenders will rely on the same three provisions.) Depending on the final language of what is enacted, there may also be potential claims

for individual health care workers and/or faith-based health care facilities who have been directly impacted by the legislation, based on the free exercise of religion.

Discussion

The Necessary and Proper Clause does not authorize Congress to enact the WHPA or the RCA. That Clause merely permits "exercises of authority derivative of, and in service to, a granted power," and it does not authorize "a substantial expansion of federal authority." *NFIB v. Sebelius*, 567 U.S. 519, 560 (2012). There is no constitutional provision that authorizes Congress to enact these bills, and their enactment would improperly expand federal authority. That would be contrary to both the Tenth Amendment and the overall framework of the Constitution, which dictate that

> the National Government possesses only limited powers; the States and the people retain the remainder. The States have broad authority to enact legislation for the public good — what we have often called a "police power." . . . The Federal Government, by contrast, has no such authority and "can exercise only the powers granted to it." . . . [L]acking a police power, "Congress cannot punish felonies generally." . . .
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> Perhaps the clearest example of traditional state authority is the punishment of local criminal activity.

Bond v. United States, 572 U.S. 844, 854, 858 (2014) (citations omitted).

Additionally, Section 5 of the Fourteenth Amendment authorizes Congress to enact remedial laws to *enforce* that Amendment's provisions; it does not authorize Congress to *create* rights. If the Supreme Court overrules *Roe* and *Casey*, there would be no constitutional right to abortion for Congress to enforce under Section 5, and state laws that declare abortion to be illegal in all or most circumstances would be fully consistent with the federal Constitution. Congress cannot use its Section 5 powers to create or "readopt" rights. The present situation is similar to when Congress enacted the Religious Freedom Restoration Act ("RFRA") in direct response to the Supreme Court's decision in *Employment Division v. Smith*, 494 U.S. 872 (1990). The Supreme Court held that Section 5 did not authorize Congress to expand constitutional rights or broadly

displace state laws regulating the health and welfare of their citizens. *City of Boerne v. Flores*, 521 U.S. 507 (1997). Similarly, Section 5 does not authorize Congress to statutorily override the Supreme Court's constitutional jurisprudence concerning abortion.

Moreover, the WHPA and RCA are not valid regulations of "Commerce . . . among the several States." U.S. Const. Art. I, § 8, cl. 3. Congress cannot "use the Commerce Clause to completely obliterate the Constitution's distinction between national and local authority"; "the principle that 'the Constitution created a Federal Government of limited powers,' while reserving a generalized police power to the States is deeply ingrained in our constitutional history." *United States v. Morrison*, 529 U.S. 598, 615, 617-18 & n.8 (2000); U.S. Const. Amend. X. "The Constitution . . . withhold[s] from Congress a plenary police power that would authorize enactment of every type of legislation." *United States v. Lopez*, 514 U.S. 549, 566-67 (1995).

There are only three types of activities that Congress may regulate under the Commerce Clause. *Taylor v. United States*, 579 U.S. 301, 306 (2016); *Gonzales v. Raich*, 545 U.S. 1, 16-17 (2005); *Morrison*, 529 U.S. at 608-09; *Lopez*, 514 U.S. at 558. First, "Congress may regulate the use of the channels of interstate commerce." *Lopez*, 514 U.S. at 558. Second, Congress may "regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce." *Id.* Third, Congress may regulate commercial or economic activities that substantially affect interstate commerce, such as "the production, distribution, and consumption of commodities for which there is an established, and lucrative, interstate market." *Raich*, 545 U.S. at 19 & n.29, 25-26; *Lopez*, 514 U.S. at 558-61, 565-66; *Morrison*, 529 U.S. at 610-17.

The WHPA and RCA do not fit within these three categories. Rather, the bills would create a statutory "right" of medical professionals to kill unborn children, even when doing so is a felony under state laws. A law that purports to give broad federal immunity to felons who kill unborn

human beings in violation of state criminal laws is not a regulation of the channels or instrumentalities of interstate commerce, nor is it a regulation of commercial or economic activities that substantially affect interstate commerce. Additionally, the broad language of the proposed bills, like the statutes struck down in *Lopez* and *Morrison*, includes no jurisdictional element that narrows their scope to a discrete, limited set of circumstances that have a direct connection to interstate commerce.

Since the states "possess primary authority for defining and enforcing the criminal law," Congress lacks the authority to broadly "effect[] a 'change in the sensitive relation between federal and state criminal jurisdiction'" by positioning itself as the nation's sole arbiter of whether, and under what circumstances, abortion is lawful or unlawful. *Lopez*, 514 U.S. at 561, n.3. The regulation of crimes against the person, such as murder and assault, "has always been the prime object of the States' police power" except when such activities are "directed at the instrumentalities, channels, or goods involved in interstate commerce." *Morrison*, 529 U.S. at 615-18. As noted in *Lopez* and *Morrison*, the mere fact that conduct regulated by state criminal law (such as abortion) may, in the aggregate, impact interstate commerce does not bring such conduct within Congress' authority to regulate.

State Attorneys General would be in the best position to mount a facial challenge against either bill, as both are unconstitutional encroachments on the principles of federalism that undergird the United States Constitution. Additionally, State Attorneys General may argue that the bills deny equal protection of the law to unborn persons within their states. They could bring this claim not only on behalf of such persons in a *parens patriae* capacity, but also because the bills effectively require state governments to actively deny such persons equal protection of the law.

Additionally, the WHPA, in particular, would jeopardize the conscience rights of health care providers as protected by numerous federal and state laws. In fact, the lack of conscience protections in the WHPA is a reason why Senators Collins and Murkowski have expressed their opposition to that bill.[1] Health care providers, whose conscience rights are violated by operation of the WHPA by state or federal officials, or by their employer, would also be able to mount an as-applied challenge based on the circumstances of the injury at that time. Individuals who establish Article III standing could bring potential First Amendment Free Exercise claims, in addition to raising the above-listed arguments that Congress lacked authority to enact the law.

[1] Sen. Susan Collins, Press Release (Feb. 28, 2022), available at: https://www.collins.senate.gov/newsroom/senators-collins-and-murkowski-introduce-bill-to-codify-supreme-court-decisions-on-reproductive-rights_roe-v-wade-and-planned-parenthood-v-casey.