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Abortion - Partial Birth Legal

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Testimony Before
the Committee on the Judiciary
United States Senate

on

H.R. 1833

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Mr. Chairman, and Members of the Committee:

Thank you for inviting me to testify on H.R. 1833, a bill that would ban what it calls "partial-birth abortions." Due to circumstances arising from the lapse in agency appropriations, I was unable to appear at the hearing and am limited to submitting this abbreviated written testimony.

Let me state at the outset that the President strongly believes that abortion should be safe, legal and rare. He also opposes abortions during the third trimester, except in cases where needed to protect the life or health of the woman. Indeed, while Governor of Arkansas, he signed into law a bill that barred third trimester abortions except where needed for the life or health of the woman or, in certain rare circumstances, for minors. Such restrictions are permitted under Roe v. Wade[1] and its progeny.

H.R. 1833 goes beyond such restrictions. It would criminalize all performance of procedures described as "partial-birth abortion," now used to perform certain second- and

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[1] 410 U.S. 113 (1973).

third-trimester abortions. The criminal prohibition is complete; the bill contains no exceptions. Instead, the bill would provide an affirmative defense for doctors who could bear the burden of proving that they reasonably believed "partial-birth abortion" was the only means of saving a woman's life.

This legislation is inconsistent with the constitutional standards established in Roe v. Wade and recently reaffirmed in Planned Parenthood v. Casey.[2] Most significantly, the bill fails to provide adequately for preservation of a woman's life and health. As both Roe and Casey make clear, even in the post-viability period, when the government's interest in regulating abortion is at its weightiest, that interest must yield not only to preservation of a woman's life but also to preservation of her health.[3]

The constitutionally required protection for women's health has two distinct components, both of which must be accommodated by any exception to the bill under consideration. First, the government may not deny access to abortion, even in the post-viability period, to a woman whose life or health is threatened by pregnancy.[4] Second, and apparently overlooked here, the government may not regulate access to abortion in a manner that effectively "require[s] the mother to bear an increased medical risk" in order to serve a state interest.[5]

In Thornburgh v. American College of Obstetricians and Gynecologists, for instance, the Court invalidated a "choice of method" restriction requiring that doctors use the abortion

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[2] 112 S. Ct. 2791 (1992).

[3] Roe, 410 U.S. at 164-65; Casey, 112 S. Ct. at 2804, 2821.

[4] Casey, 112 S. Ct. at 2804, 2821.

[5] Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S. 747, 769 (1986).

procedure most protective of fetal life unless it would pose a "significantly greater medical risk" to the woman. With the exception limited to medical risks that qualified as "significant," the Court reasoned, the provision as a whole continued to mandate an impermissible degree of "'trade-off' between a woman's health and fetal survival." In plainest terms, the provision was facially unconstitutional because it "failed to require that maternal health be the physician's paramount consideration."[6]

Casey, with its continued emphasis on the importance of protecting women's health, simply does not call into question this fundamental principle. Were there any doubt on that score, it should be resolved by the very recent Tenth Circuit decision considering a "choice of method" provision in the post-Casey regime. The provision at issue in Jane L. v. Bangerter required doctors performing post-viability abortions to use the procedure most protective of fetal life unless it would cause "grave damage to the woman's medical health." Relying on Thornburgh, the Tenth Circuit invalidated the provision, and expressly held that the relevant principle from Thornburgh was not "discredited" by Casey:

> The importance of maternal health is a unifying thread that runs from Roe to Thornburgh and then to Casey. In fact, defendants [elsewhere] concede that Thornburgh's admonition that a woman's health must be the paramount concern remains vital in the wake of Casey. The Utah choice of method provisions violate this consistent strain of abortion jurisprudence.[7]

The same "consistent strain of abortion jurisprudence" is implicated by the legislation at issue here. Doctors who perform the procedure in question reportedly believe that it poses the fewest medical risks for women in the late stages of pregnancy. It therefore is likely that

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[6] Id. at 768-69.

[7] 61 F.3d 1493, 1502-04 (10th Cir. 1995) (citation omitted).

in a large fraction of the very few cases in which the procedure actually is used, it is the technique most protective of the woman's health. A prohibition on the method, in the absence of an adequate exception covering such cases, would relegate women's health to a secondary concern, subordinate to state regulatory interests, and hence violate the well-established constitutional principle running from Roe to Casey.

What some have termed an "exception" to H.R. 1833 does not begin to meet this concern. First, of course, the provision in question -- what would be section 1531(e) -- covers only cases in which partial-birth abortion is necessary to preserve a woman's life, and does not reach cases in which health is at issue. Second, the provision is not really an exception at all. Instead, the provision creates an affirmative defense, so that a doctor facing criminal charges must carry the burden of proving, by a preponderance of the evidence, both that pregnancy threatened the life of the woman and that the method in question was the only one that could save the woman's life. By exposing doctors to the risk of criminal sanction regardless of the circumstances under which they perform the outlawed procedure, the statute would have a chilling effect on doctors' willingness to perform even those abortions necessary to save women's lives. Providing an affirmative defense, under which doctors rather than the government bears the burden of proof, does not provide adequately for the lives and health of pregnant women.

Finally, the bill, in addition to failing to protect women's health, may otherwise impose an "undue burden" on the ability of women to obtain pre-viability abortions.[8] Under

[8] Casey, 112 S. Ct. at 2819-21.

the legal analysis applied in Casey, the government may not place "a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus."[9]

By way of an example, consider the breadth of the bill's definition of the outlawed procedure. The scope of that term and the unfamiliarity of the concept of "partial-birth abortion" are such that doctors who perform second-trimester abortions by any method cannot be certain that their procedures fall outside the scope of the criminal prohibition. As a recent newspaper article reported, one group of doctors considering the legislation was "unable to agree on what the law would cover -- but did agree that it posed a threat to anyone who did second-trimester abortions."[10] Given this uncertainty, and the threat of criminal prosecution, doctors might well decide to forgo the performance of second-trimester abortions altogether. In that event, the practical effect of the bill would be to limit severely the availability of all second-trimester abortions, imposing an "undue burden" on women seeking previability abortions.

The procedure -- or procedures -- that would be banned by H.R. 1833 are performed primarily at or after 20 weeks in the gestational period. Abortions that are performed at this point, when a woman's health or life is threatened, are tragically sad events, occurring under circumstances where the Supreme Court has said the decision must be left to the woman and her doctor, rather than government regulators. The proposed imposition of criminal penalties in such cases both would pose a real risk to women's lives and health and would violate the Constitution.

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[9] Id. at 2820.

[10] Tamar Lewin, Wider Impact is Foreseen for Bill to Ban Type of Abortion, New York Times, Nov. 6, 1995, at B7.