

Attachment—Additional Questions for the Record

**Subcommittee on Health
Hearing on
“Protecting Women’s Access to Reproductive Health Care”
February 12, 2020**

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Question by the Honorable Morgan Griffith (R-VA)

1. Virginia state legislators have been looking closely at abortion in recent years (passage of Senate Bill 733 this year, and the introduction of Delegate Kathy Tran’s House Bill 2491 last year). One of the proposals that has been considered would allow an abortion to be performed even after contractions have started. H.R. 2975 prohibits restrictions “on abortion after fetal viability when, in the good-faith medical judgment of the treating health care provider, continuation of the pregnancy would pose a risk to the pregnant patient’s life or health.”
 - a. Under this legislation, could an emotional or mental health reason for discontinuing the pregnancy after fetal viability constitute a risk to the pregnant patient’s life or health?
 - b. In other words, could H.R. 2975 allow someone to obtain a late-term abortion, potentially when contractions have started, for mental health or emotional reasons?

Answer

In my opinion, H.R. 2975 would allow a woman to obtain a late-term abortion, potentially when contractions have started, for mental health or emotional reasons. H.R. 2975 §4(a)(9) forbids “[a] prohibition on abortion after fetal viability when, in the good-faith medical judgment of the treating health care provider, continuation of the pregnancy would pose a risk to

the pregnant patient’s life or health.”¹ While Section 3 of the proposed act defines a variety of terms, it contains no definition of the word “health.” Similarly, no provision of the bill defines “health exception,” a phrase commonly used when referring to circumstances permitting abortions that would otherwise be prohibited by law. The lack of clarity on the meaning of “health” and the standard of judicial review established under Section 4(b) of the proposed Act would require a court to provide the broadest permissible interpretation of the word, thus allowing late-term abortion for mental health or emotional reasons even when contractions had started.

Reasoning

The Supreme Court of the United States has addressed the meaning of a “health exception” in abortion laws most notably in two cases: *Doe v. Bolton*, 410 U.S. 179 (1973) and *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992). In *Doe v. Bolton*, the Court rejected a claim that court-ordered modifications of a Georgia abortion statute rendered the statute unconstitutionally vague. The modified statute allowed performance of abortions “when based upon [the doctor’s] best clinical judgment that an abortion is necessary.” 410 U.S. at 191. The Court adopted the district court’s interpretation that the modified statute allowed abortions when the clinical judgment was based on “all factors—physical, emotional, psychological, familial, and the woman’s age—relevant to the wellbeing of the patient.” It noted that “[a]ll these factors may relate to health.” 410 U.S. at 192.²

¹ For purposes of this opinion, I have assumed that “late-term abortion” means “abortion after fetal viability.” Viability is defined as “the point in a pregnancy at which, in the good-faith medical judgment of the treating health care provider, based on the particular facts of the case before the health care provider, there is a reasonable likelihood of sustained fetal survival outside the uterus with or without artificial support.”

² While the Court does not limit its opinion to previability abortions, it is important to note that Mary Doe, the name plaintiff in the case, was nine-weeks pregnant at the time the complaint was filed. 410 U.S. at 185.

Under the *Doe v. Bolton* interpretation of “health”, performance of a late-term abortion for mental health or emotional reasons after contractions have started must be legally permitted.

However, a narrower definition of health was upheld as constitutional in *Planned Parenthood of Southeastern Pennsylvania v. Casey*. At issue was a Pennsylvania medical emergency statute that permitted abortions to be performed, notwithstanding failure to comply with other statutory requirements, such as parental consent for minors seeking abortions and a required waiting period between the woman’s decision to obtain an abortion and the performance of the abortion. The exception at issue provided: “‘Medical emergency.’ That condition which, on the basis of the physician's good faith clinical judgment, so complicates the medical condition of a pregnant woman as to necessitate the immediate abortion of her pregnancy to avert her death or for which a delay will *create serious risk of substantial and irreversible impairment of a major bodily function.*” 505 U.S. at 903 (providing text of 18 PA. CONS. STAT. § 3203 (1990)) (emphasis added)). The Court adopted the district court’s description of this provision as “intended by the Pennsylvania legislature to assure that compliance with its abortion regulations would not in any way pose a significant threat to the life or health of a woman.” 505 U.S. at 880. Many states have incorporated this narrower definition of “health” in their statutes and regulations related to abortion since 1992.

If the “life or health” exception contained in H.R. 2975 §4(a)(9) is properly read to utilize the more narrow exception of *Planned Parenthood v. Casey*, states could continue to prohibit all late-term abortions, except those necessary to avert a patient’s death or avoid serious risk of substantial and irreversible impairment of a major bodily function.” Therefore a state could prohibit performance of a late-term abortion for mental health or emotional reasons after contractions have started.

A court confronting the question of whether the health exception in H.R. 2975 §4(a)(9) should be construed to include all the factors of *Doe v. Bolton* or the more limited criteria of *Planned Parenthood v. Casey* would be required to liberally construe the bill's language and employ heightened scrutiny as describe in Section 4(b)(2). In order to prevail a state wanting to limit post-viability abortions to cases where the abortion is necessary to avert a patient's death or avoid serious risk of substantial and irreversible impairment of major bodily function" would have to show that the limitation "significantly advances" "the safety of abortion services" and "the health of patients" in the least restrictive manner possible.

Recognizing H.R. 2975's potential to expand abortion access to every stage of pregnancy, for almost any reason, is not merely an alarmist interpretation. Instead, such a reading is entirely consistent with the statements of the act's advocates. In their review of H.R. 2975, the Center for Reproductive Rights commended the proposed act's rejection of gestation-based regulations.³ Similarly, the Guttmacher Institute has endorsed the act in an article which called for the repeal of all gestational limits on abortion, including those that limit access after viability.⁴ While these articles focus on "20-week bans," the authors broadly condemn all gestational limitations passed by the states.

The failure of H.R. 2975 to define "health", in light of the bill's requirement of liberal construction, make it highly probable that H.R. 2975 would require states to permit post-viability

³ While it may only be a small number of women who face these kinds of unconstitutional gestational limits (less than 2% of abortions in the United States occur after twenty weeks⁵⁰), for each and every one of them, the ability to make these personal and private decisions without the meddling of politicians is essential.

Restoring Our Rights: The Women's Health Protection Act, THE CENTER FOR REPRODUCTIVE RIGHTS 13 (2017), <https://reproductiverights.org/document/restoring-our-rights-the-womens-health-protection-act>.

⁴ Megan K. Donovan, *Gestational Age Bans: Harmful at Any Stage of Pregnancy*, THE GUTTMACHER INSTITUTE (Jan 9, 2020), <https://www.guttmacher.org/gpr/2020/01/gestational-age-bans-harmful-any-stage-pregnancy>.

abortion, for the mental and emotional health of the woman, even after a woman has begun experiencing contractions.