TESTIMONY OF PRISCILLA J. SMITH, ASSOCIATE RESEARCH SCHOLAR IN LAW,
SENIOR FELLOW AND DIRECTOR, PROGRAM FOR THE STUDY OF
REPRODUCTIVE JUSTICE,
YALE LAW SCHOOL

BEFORE THE UNITED STATES HOUSE OF REPRESENTATIVES
COMMITTEE ON THE JUDICIARY

WASHINGTON, D.C.
SEPTEMBER 9, 2015

Good morning Chairman Goodlatte and Ranking Member Conyers and Distinguished Members of the Committee:

I am an Associate Research Scholar in Law at Yale Law School where I direct the Program for the Study of Reproductive Justice. I am testifying today in my personal capacity and do not purport to represent any institutional views of Yale Law School. I received my law degree from Yale Law School in 1991; my B.A. from Yale College in 1984; and currently conduct research and writing on constitutional privacy concerns, First and Fourth Amendment issues, with a focus on reproductive rights and privacy law. Prior to joining the legal academy, I litigated numerous cases in federal and state courts and presented arguments in state supreme courts in Florida and Wisconsin and in the U.S. Supreme Court twice, in *Ferguson v. City of Charleston*, 531 U.S. 67 (2000), and in *Gonzales v. Carhart*, 550 U.S. 124 (2007).

Thank you for this opportunity to testify here today about this latest attack on Planned Parenthood and the reproductive health care it provides to women and men throughout this country.

The ostensible reason for this hearing is to investigate allegations that Planned Parenthood violated federal law concerning fetal tissue donation based on videos released by an organization of anti-abortion advocates. There also appear to be allegations that Planned Parenthood physicians may be violating the Partial Birth Abortion Ban Act of 2003, 18 U.S.C. § 1531, also based on statements in these same videos. I have reviewed the federal fetal tissue donation laws and have a thorough knowledge of the federal "partial-birth abortion" statute, as well as the United States Supreme Court's interpretation of that law adopted in *Gonzales v. Carhart*, 550 U.S. 124 (2007), as I was lead counsel for plaintiffs in that case.

It is my opinion based on a review of the federal laws at issue and these videos, that there is simply no evidence in these misleadingly edited videos of a violation of either of these laws. I will comment here on the tapes, the two federal laws at issue, the larger context in which this campaign against Planned Parenthood occurs, and then finally on the disastrous impact that defunding Planned Parenthood would have, including the likely result that it would significantly increase the number of abortions.

I. The Tapes Are Unreliable Because They Have Been Distorted and Misleadingly Edited

For three years, members of an anti-abortion group appear to have conducted an undercover operation that consisted of fabricating a company called Biomax Procurement Services and falsely representing the company as a legitimate tissue procurement organization in order to gain access to Planned Parenthood conferences and staff. PP Letter (August 27, 2015) at 7. They then surreptitiously taped interactions with staff members, apparently trying to entrap them, to induce them to say they would sell fetal tissue for a profit in violation of federal law. Ultimately though, despite three long years of undercover work, this group has failed to lure Planned Parenthood into the trap.

The failure of anti-abortion advocates to entrap Planned Parenthood officials is all the more remarkable given that the videos have been heavily edited to distort and misrepresent the conversations that occurred. A team of forensic experts have examined the tapes and found that *both* the short videos as well as the videos that were claimed to be "full footage" videos were edited "so as to misrepresent statements" made by Planned Parenthood officials. In their report provided to this Committee, the experts state, "[t]he short videos significantly distort and misrepresent the conversations depicted in the full footage videos." Forensic Analysis of CMP Videos at 8 (August 25, 2015), submitted to Committee, (August 27, 2015). The short videos contain "edited conversations where some spoken words are eliminated and some spoken words are added out of context," from other parts of the tape. Id. at 2.

The tapes in other words change the order in which statements were made, to alter the meaning of the dialogue. For example, when one Planned Parenthood official talks about "diversifying the revenue stream" for her clinic, the dialogue was edited to make it appear she was referring to the reimbursement costs for fetal tissue donation. The full video shows she was actually discussing expanding the services available to patients. Id. at 9. Another officials' discussion of the real costs involved in collecting tissue for donation is edited out of the video entirely.

The techniques used here are similar to those used to splice together statements and words uttered by world leaders that make it appear that they are singing pop songs. *See, e.g.,* *https://www.youtube.com/watch? v=hX*

1YVzdnpEc. It is not surprising then that the forensic experts found that the manipulation of these videos means "they have no evidentiary value in a legal context." In fact, it is impossible to draw any reliable conclusions from these videos.

Given the many misrepresentations made by those who manufactured these videos, a lawsuit has been filed against the group behind this scheme—which calls itself the Center for Medical Progress—as well as against the individuals involved, alleging violations of federal and state laws for activities similar to those at issue here but targeting members of the National Abortion Federation.[1] The Judge granted a Temporary Restraining Order in that case, preventing release of further videos or deceptively obtained information,[2] and the individual responsible for manufacturing the videos has indicated he will invoke his Fifth Amendment right to refrain from self-incrimination rather than respond to discovery requests in the case.[3] To my knowledge, the full unedited versions of the tapes recorded by members of this anti-abortion group have not yet been released or made available to this Committee, despite calls by PP and others to do so.

II. Fetal Tissue Research – Federal Statute and Ethical Concerns

While the federal fetal tissue statute at issue bans profit-making from the donation of fetal tissue, it specifically *allows* those who donate tissue to recoup "reasonable" reimbursements for costs. *Compare* 42 U.S.C.A. § 289g-2(a) ("[i]t shall be unlawful for any person to knowingly acquire, receive, or otherwise transfer any human fetal tissue for valuable consideration . . .") *with* 42 U.S.C.A. § 289g-2(e)(3)(defining "valuable consideration" to *exclude* "reasonable payments associated with the transportation, implantation, processing, preservation, quality control, or storage of human fetal tissue."). The fetal tissue provisions were adopted with broad bipartisan support in 1993, passing by a vote of 93-4 in the

---

[1] *See* Nat'l Abortion Federation v. Center for Medical Progress, et al., No. 15-cv-03522-WHO, Civil Minutes, (Aug. 21, 2015) (NAF v. CMP Civil Minutes"), *available at* http://5aa1b2xfmfh2e2mk03kk8rsx.wpengine.netdna-cdn.com/wp-content/uploads/2015-08-21-78-Civil-Minutes.pdf.

[2] Nat'l Abortion Federation v. Center for Medical Progress, et al., No. 15-cv-03522-WHO, Order Keeping TRO In Effect Until Resolution of Request for Preliminary Injunction (Aaug.3, 2015), *available at* http://prochoice.org/media/Order_Extending_TRO.pdf.

[3] NAF v. CMP Civil Minutes at 3.

Senate for example. *See* https://www.congress.gov/bill/103rd-congress/senate-bill/1/text.

The videos misrepresent the terms of the federal fetal tissue statute by citing the first portion of the statute outlawing the "transfer [of] any human fetal tissue for valuable consideration . . .," 42 U.S.C.A. § 289g-2(a), without including the statutory section providing that "valuable consideration" does not include "reasonable" payments reimbursing costs. It then leaves the misleading impression that Planned Parenthood is violating the law by juxtaposing the text of the ban on "valuable consideration" with a discussion of financial reimbursement for fetal tissue donation, without mentioning the allowance for reasonable reimbursements.[4] Planned Parenthood states that any "[a]ffiliates involved with fetal tissue research comply with the requirement that any reimbursement associated with fetal tissue donation must be reimbursement for actual expenses," and nothing in the videos contradicts that statement. Letter from Cecile Richards, President, Planned Parenthood Federation of America to The Honorable John Boehner, Speaker, U.S. House of Representatives, et al (August 27, 2015).[5] In fact, the longer versions of the videos include multiple explicit statements declining any payment beyond reimbursement for costs.

In addition to causing confusion over the statute's requirements, the videos have raised questions, though, about the ethics of the use of fetal tissue in medical research. Similar concerns were raised in the mid-late 1980s and early 1990s. In response, during the Administration of President Reagan, the National Institutes of Health convened a Research Panel to consider the ethics of fetal tissue donation. The panel was chaired by Arlin Adams, a retired federal judge opposed to abortion. The panel's decision approving fetal tissue research was near unanimous (19-2). All but two members of a Reagan appointed commission recommended separating moral

[4] Americans United for Life duplicates this misrepresentation in its fact sheet, *Legal Response to Planned Parenthood Abortion Profiteering* at 2, where it cites to 42 U.S.C. S 289g-2(a), fails to note that reimbursement for "reasonable payments associated with" tissue donation are specifically authorized under 42 U.S.C. S. 289g-2(e)(3), and then argues that the practice of receiving any "compensation" for fetal tissue violates federal law.

[5] Planned Parenthood has indicated that "only two of 50 Planned Parenthood affiliates are currently involved with fetal tissue research." Letter from Cecile Richards, President, Planned Parenthood Federation of America to The Honorable John Boehner, Speaker, U.S. House of Representatives, et al (August 27, 2015).

views on abortion from moral views on tissue research because 1) the abortions were legal and would happen anyway; 2) fetal tissue was thus available; and 3) strong medical advances from fetal tissue research were possible and important and could save lives. They based their decision on the requirement that safeguards would be put in place to insure that none of the relevant actors would have incentives to change their behavior. The Panel reported its fundamental finding as follows:

> A decisive majority of the panel found that it was acceptable public policy to support transplant research with fetal tissue either because the source of the tissue posed no moral problem or because the immorality of its source could be ethically isolated from the morality of its use in research. Considerations supporting this decision were the fact that these abortions would occur regardless of their use in research, that neither the researcher nor the recipient would have any role in inducing or performing the abortion, and that a woman's abortion decision would be insulated from inducement to abort to provide tissue for transplant research and therapy. Accordingly, the panel found it essential that abortion decisions and procedures be kept separate from considerations of fetal tissue procurement and use in research and therapy. In keeping with that separation, it is essential that there be no offer of financial incentives or personal gain to encourage abortion or donation of fetal tissue.[6]

Of the 21 Research Panel members, one of the two dissenters, and none of the other 19 members of the panel, is testifying here today.[7]

Fetal tissue research has provided innumerable medical benefits and has saved lives. Indeed, scientists have been conducting research using fetal tissue and fetal cell lines since the 1930s; it was work with fetal cell lines that led to the development of the polio vaccine. Fetal tissue is obtained, only after fully informed consent of the pregnant woman, consent that is obtained only after the woman has separately come to the decision to terminate her pregnancy. As the Assistant Secretary for Legislation at the

---

[6] Report of the Human Fetal Tissue Transplantation Research Panel Volume I at 23 (December 1988).

[7] Mr. Bopp's dissenting statement joined by one other committee member, id. at 37, is linked inextricably to his opposition to the act of abortion itself and his apparent skepticism about the benefits of fetal tissue research itself. It did not hold sway in the Reagan or Ford Administration's and it should not hold sway today.

Department of Health and Human Services (HHS) recently reported to the Senate:

> fetal tissue is an important resource for researchers studying retinal degeneration, pregnancy loss, human development disorders, and early brain development, with relevance to autism and schizophrenia. Research conducted with fetal tissue continues to be a critical resource for important efforts such as research on degerative eye disease, human developmental disorders such as Down syndrome, and infectious diseases, among a host of other diseases.[8]

Because this is a scientific and ethical issue, if it is to be reassessed, it should be addressed by leading scientists and ethicists, just as it was assessed by the bipartisan commission in 1988.

III. Partial-Birth Abortion Ban Act of 2003

Recently, claims have circulated that the video tapes provide probable cause to believe that Planned Parenthood has violated the Partial-Birth Abortion Ban Act of 2003, upheld by the Supreme Court in *Gonzales v. Carhart*, 550 U.S. 124 (2007). There is much discussion of the use of the term "intact," and indeed the word "intact" is repeated ominously in the videos, spliced together from a number of different uses by the interviewees and interviewers, and often in a context where it is unclear whether the speaker is referring to an intact tissue specimen or an intact fetus.

The problem here is that "intactness" of the fetus doesn't matter one way or the other under the Partial-Birth Abortion statute. Rather, as interpreted and explained by the U.S. Supreme Court, the relevant fact for determining if a physician has performed a so-called "partial-birth abortion" under the statute is whether the physician had the intent "at the outset" of the

---

[8] Letter from Jim R. Esquea, Ass't Sec. for Legislation, HHS to Senators Ernst and Blunt (Aug. 14, 2015) at 1. *See also, e.g.,* AP, *What you need to know about how fetal tissue is used for research*, USA TODAY (July 29, 2015), http://www.usatoday.com/story/news/nation-now/2015/07/29/fetal-tissue-research-planned-parenthood/30839625/; Nathalia Holt, *The Case for Fetal-Cell Research,* New York Times (July 30, 2015), http://www.nytimes.com/2015/07/30/opinion/the-case-for-fetal-cell-research.html?_r=0.

procedure, *Gonzales,* 550 U.S. at 151, to undertake two distinct steps. First, the physician must "vaginally delive[r] a *living* fetus" up to certain "'anatomical 'landmarks' " specified in the statute. Id (emphasis added). As Justice Kennedy wrote, "[t] he Act does not restrict an abortion procedure involving the delivery of an expired fetus." *Gonzales*, 550 U.S. at 147 (quoting from § 1531(b)(1)(A)). Second, to fall within the Act, the physician must also have had the intent at the outset of the procedure to perform a separate step *at this point* that causes fetal demise. *Id*. at 148 (quoting § 1531(b)(1)(B)). As Justice Kennedy wrote, "[f]or purposes of criminal liability, the overt act causing the fetus' death must be separate from delivery. And the overt act must occur after the delivery to an anatomical landmark." *Id*. There is simply no evidence in these videos that the physicians at Planned Parenthood intend to perform these two distinct steps. Perhaps the confusion is understandable because a centerpiece of the advocacy for the Partial Birth Abortion Act of 2003 focused on procedures involving intact fetuses. And it is true that an intact D&E where the physician had the intent at the outset of the procedure to perform these two steps on a *living* fetus would violate the Act. But intactness itself is neither sufficient, nor perhaps even required, to establish a violation of the Act. *Id*. at 151.

IV. Another Attack on Access to Abortion

These tapes are part of an ongoing decades-long campaign to attack Planned Parenthood and other providers of abortion, to deprive women of their fundamental constitutional right access abortion and other essential reproductive health care, and ultimately to reverse *Roe v. Wade* and *Planned Parenthood v. Casey*. In those cases, the Supreme Court recognized that the right to abortion not only to protects women's health and lives, but also protects their equal status in society. As the Court has recognized, having control over the timing and spacing of childbearing and childrearing enables and affirms forms of social participation, most fundamentally, "the ability of women to participate equally in the economic and social life of the Nation." Casey, 505 U.S. 833, 856 (1992). As Justice Ginsburg put it, the right to abortion preserves "a woman's autonomy to determine her life's course, and thus to enjoy equal citizenship stature." Gonzales v. Carhart, 550 U.S. 124, 172 (Ginsburg, J., dissenting).

We are currently experience a resurgence in the campaign to restrict access to abortions. An unprecedented number of state-level abortion

restrictions were enacted from 2010-2015, a total of 282 new abortion restrictions, with devastating results. *See also* Guttmacher Institute, *News in Context: Law Affecting Reproductive Health and Rights: State Trends at Midyear, 2015* (July 1, 2015); Guttmacher Institute, *News in Context: In Just the Last Four Years, States Have Enacted 231 Abortion Restrictions* (Jan. 5, 2015); Heather D. Boonstra and Elizabeth Nash, *A Surge of State Abortion Restrictions Puts Providers—And the Women They Serve—in the Crosshairs,* 17 GUTTMACHER POLICY REVIEW 9 (Winter 2014). Mississippi and North Dakota have one abortion provider each, and the number of clinics in Texas has decreased approximately one-half as a result of new restrictions, leaving large swaths of the state unserved. The result of these new restrictions, and it appears their purpose as well, is to close clinics, and put women's ability to choose safe abortions in greater peril than at any time since the Roe decision; for many women, abortions are realistically unattainable.

The anti-abortion advocates involved in manufacturing these videos are, like others before them, going further than these state legislators, turning their backs on legal advocacy efforts. When they can't convince the polity, some advocates have resorted to violence, illegal clinic blockades, harassment of patients, and now the creation of falsified videos. They are fighting abortion by any means necessary, including by deceiving the public and outright lawbreaking.

V. Impact on Non-Abortion services.

Finally, there is an extreme mismatch between the concerns expressed over fetal tissue donation procedures and defunding the critical, *non-abortion related* health care services provided by Planned Parenthood. As HHS officials have emphasized recently, no federal funding supports abortions or health benefits coverage that includes abortions, except for abortions in cases of rape, incest, or when the life of the woman is endangered.[9] Instead, the only federal funds provided to Planned Parenthood cover "services such as annual wellness exams, cancer screenings, contraception," and the testing and treatment of sexually-transmitted diseases.[10]

[9] Letter from Jim R. Esquea, Ass't Sec. for Legislation, HHS to Senators Ernst and Blunt (Aug. 14, 2015) at 2-3.
[10] Id. at 3.

Opponents of Planned Parenthood attempt to keep the focus here on abortion by arguing that defunding contraception and other vital women's health care services, like pap smears and annual pelvic and breast cancer screenings, is necessary because money is "fungible." They argue that any support for Planned Parenthood that supports these non-abortion services also supports the abortion services Planned Parenthood provides. But this claim is inconsistent with federal law. For example, in the Establishment Clause area, federal money is not considered fungible in the way suggested. Indeed, if it were, it would be unconstitutional to fund the secular activities of religious non-profits because funding *secular* activities would be seen as supporting the non-profits' *religious* activities. *See Hunt v. McNair*, 413 U.S. 734, 743, 93 S.Ct. 2868, 2874, 37 L.Ed.2d 923 (1973) (rejecting argument that funding secular services results in support for religious services).

For nearly 100 years, beginning long before *Roe v. Wade*, Planned Parenthood has been a provider of essential health care for millions of people. One in five women in the U.S. has visited a Planned Parenthood health center; these centers provide care that helps women prevent an estimated 516,000 unintended pregnancies and 217,000 abortions every year.[11] Overall, last year, Planned Parenthood provided birth control, lifesaving cancer screenings, STD testing and treatment, and other services to 2.7 million patients, and sex education to 1.5 million people.[12] Because of the compassionate and high quality health care provided by Planned Parenthood clinics, they are held in high esteem in every state in the nation. An NBC-WSJ poll found that Planned Parenthood has a significantly higher favorability rating than any other group or individual tested; a poll from Hart research found that 64% of voters, including 72% of Independents, disagree with attempts to defund Planned Parenthood.[13] Part of the assault on abortion and women's ability to continue pregnancy has turned against one of the most important and beloved providers of health care in the nation that

---

[11] Planned Parenthood Federation of America, *This is Who We Are* (updated July 2015)

[12] Id.

[13] *How the Public Views Planned Parenthood and the NRA*, http://www.nbcnews.com/meet-the-press/how-public-views-planned-parenthood-nra-n403451; Hart Research poll, http://ppfa.pr-optout.com/ViewAttachment.aspx?EID=mr9WXYw4u2IxYnni1dBRVmATB6iy5hQttN1zB1l9Wwk%3d.

serves a significant number of low-income people without access to other quality care.

These attacks on abortion, and Planned Parenthood and the contraceptive services and other vital women's health care services it provides, has led some to ask whether this is the 1950s or the 1890s, a reference to times when birth control was unavailable. Sen. Elizabeth Warren (D-MA), Floor Speech (Aug. 3, 2105). Despite much evidence to the contrary, I say no; we are living in a *somewhat* more enlightened age. For example, in Burwell v. Hobby Lobby Stores,[14] five Justices concluded that the government has a compelling interest in ensuring access to affordable contraception.[15] Most recently, in his dissent from the denial for rehearing en banc in *Priests for Life, et al., v. United States Dep't of Health and Human Srvcs.*, Judge Kavanaugh of the United States Court of Appeals for the DC Circuit recently wrote, "[i]t is not difficult to comprehend why a majority of the Justices in *Hobby Lobby* (Justice Kennedy plus the four dissenters) would suggest that the Government has a compelling interest in facilitating women's access to contraception." *Priests for Life, et al., v. United States Dep't of Health and Human Srvcs.*, No. 13-5368, slip op. at 18 (May 20, 2015) (denying petition for rehearing *en banc*) (J. Kavanaugh dissenting). After all, as Judge Kavanaugh explained:

> About 50% of all pregnancies in the United States are unintended. The large number of unintended pregnancies causes significant social and economic costs. To alleviate those costs, the Federal Government has long sought to reduce the number of unintended pregnancies, including through the Affordable Care Act by making contraceptives more cheaply and widely

[14] 134 S. Ct. 2751 (2014) (holding application of federal regulations requiring certain employers to include contraceptive coverage as part of the insurance they provide to their female employees violated the Religious Freedom Restoration Act because they were not narrowly tailored).

[15] *Hobby Lobby*, 134 S. Ct. at 2785-86, slip op. at 2 (Kennedy, J., concurring); *id.* at 2799-2801, slip op. at 23-27 (Ginsburg, J., dissenting)); *see also id.* at 2779-80, slip op. at 39-40 (majority opinion). *See also* Priests for Life DC Cir Kavanaugh slip op. at 17-18 ("Justice Kennedy strongly suggested in his *Hobby Lobby* concurring opinion – which appears to be controlling de facto if not also de jure on this particular issue – that the Government generally has a compelling interest in facilitating access to contraception for women employees") (citing *Hobby Lobby*, 134 S. Ct. at 2785-86, slip op. at 2 (Kennedy, J., concurring); *see also id.* at 2779-80, slip op. at 39-40 (majority opinion); *id.* at 2799-2801, slip op. at 23-27 (Ginsburg, J., dissenting)).

> available. It is commonly accepted that reducing the number of unintended pregnancies would further women's health, advance women's personal and professional opportunities, reduce the number of abortions, and help break a cycle of poverty that persists when women who cannot afford or obtain contraception become pregnant unintentionally at a young age. In light of the numerous benefits that would follow from reducing the number of unintended pregnancies, *it comes as no surprise* that Justice Kennedy's opinion expressly referred to a "compelling" governmental interest in facilitating women's access to contraception.

Id. Judge Kavanaugh went on to stress "When Congress takes away this funding they enhance this cycle and increase the number of abortions." Id., slip op. at 18. The "horrible" irony of defunding Planned Parenthood because of opposition to abortion is that defunding will result in a significant increase in unintended pregnancies and thus an increase in abortions.