Supplemental Statement of the Honorable Steve Cohen for the Hearing on H.R. 490, the "Heartbeat Protection Act of 2017" Before the Subcommittee on the Constitution and Civil Justice

Wednesday, November 1, 2017

I want to take a moment to clarify the remarks I made before the hearing was abruptly concluded.

I was stunned and deeply offended when one of the witnesses accused me of being "disingenuous." While she and I do not agree on a woman's right to choose, I believe her comment diverted attention from an otherwise principled discussion of that legal right, and questioned my veracity without provocation.

While I felt sure that I knew the meaning of "disingenuous," to be certain that I was not misunderstanding her use of it, I looked up the definition while patiently waiting for my next opportunity to speak. All the definitions I found for "disingenuous" included a lack of sincerity, dishonesty, deceit, and lying.

Differences of opinions on issues are both expected and welcome at Congressional hearings. That is how the legislative process works. Personally impugning a participant's truthfulness, however, is not part of that process, and should not be tolerated. Never, in all the time I have been privileged to serve in Congress, have I seen this allowed to occur.

The reason I responded in a strong manner was that the witness was questioning my honesty, and that is something that I take very seriously. I have not previously experienced my honesty being questioned by either a witness or a colleague during a committee hearing.

When I responded my intention was to note that perhaps the witness's lack of knowledge about my record of public service was behind the use of the term, as opposed to any malice on the part of the witness.

I am proud of my record of work on behalf of my constituents. I strive every single day to make my district better, including working on issues of infant mortality from my first days in Congress. The issues of sex education, contraception, prenatal care, nutrition, education, opportunity and health care are complex, interwoven and should be addressed without shame or recrimination. I believe women should be free to have control over their lives and their health care, as is their legal right.

Heartbeat Protection Act of 2017 (H.R.490): Another Attack on Women's Constitutional Rights

Testimony Presented by

Ilyse G. Hogue
President
NARAL Pro-Choice America

On Behalf of

NARAL Pro-Choice Arizona
NARAL Pro-Choice California
NARAL Pro-Choice Colorado
NARAL Pro-Choice Connecticut
NARAL Pro-Choice Georgia
Illinois Choice Action Team
NARAL Pro-Choice Iowa

Members of the House Judiciary Subcommittee on the Constitution and Civil Justice: I am honored to submit this testimony.

Today you are considering the Heartbeat Protection Act (H.R.490), introduced by Rep. Steve King (R-IA). This bill is an outright ban on abortion care, with no exception to protect a woman's health or in cases of rape, incest, or fetal anomaly. It would criminalize doctors for providing abortion care—subjecting them to fines and up to five years in prison. By banning abortion anytime a fetal heartbeat is detectable, this measure would ban abortion as early as six weeks—before most women even know they are pregnant. This legislation exposes the anti-choice movement's true disregard for the health and wellbeing of women; it would not reduce the need for abortion and could, in fact, cause more women to seek out dangerous solutions out of desperation.

Abortion bans like H.R.490 ignore the long-established legal standard of viability, and instead are intended as a direct challenge to the Supreme Court's ruling in *Roe v. Wade*—in an effort to outlaw abortion in this country. For these reasons and many others, NARAL Pro-Choice America opposes the King legislation and other similar pre-viability abortion bans.

The King Bill Is Part of a Coordinated, Extremist Effort to Eliminate Legal Abortion Altogether

Less than one month ago, Republican leadership moved a 20-week abortion ban directly to the House floor for a vote—rather than focus on any number of urgent and pressing policy matters, including the humanitarian needs of hurricane-ravaged Puerto Rico, the reauthorization of the Children's Health Insurance Program, or a common-sense solution to the largest mass shooting in modern history. Instead, as reflected by the debate and press coverage around the 20-week ban, that legislation was simply one step forward in a thinly-veiled strategy to outlaw abortion altogether; today's hearing on the King bill is the next step in that process. Supporters of this bill, including the sponsor himself, tout that such a ban would "eliminate a large, large share of the abortions - 90% or better - of the abortions in America."[1] Proponents of this legislation have also bragged that this legislation's co-sponsorship makes it the most strongly supported piece of "pro-life" legislation before Congress.[2]

This extremist strategy is so outside the mainstream that even anti-choice advocacy groups are divided in their support for so-called heartbeat bans. To be clear, anti-choice groups are unified in their desire to ban abortion, but they are divided on this particular strategy for achieving that goal. Some anti-abortion groups encourage radical measures such as this legislation and see it as path toward overturning the standard of *Roe*, while others acknowledge that these bans are a

again is on record stating, "I know everyone is swept up in Trump mania, but we have to be realistic...When you overreach, you lose. The courts can be very vicious to you...If the court was 7-2 pro-life I would say, let's do a ban at conception. Lord willing, it will flip."[11]

Pre-Viability Bans Are Blatantly Unconstitutional

The Supreme Court has long held that a woman has the undeniable right to choose to terminate her pregnancy until the point of fetal viability. Under this standard, states may regulate abortion care, but not ban it before viability.[12] Pre-viability gestational bans, like this King bill and the Franks 20-week ban (H.R.36) brazenly challenge the Supreme Court's standards and deliberately attempt to push the ban earlier and earlier into a woman's pregnancy, until ultimately abortion is illegal for all women. H.R.490 is just the latest in a long-line of unconstitutional attacks.

By criminalizing abortion services as soon as a fetal heartbeat is detectable, the King bill essentially bans abortion beginning at six-week's gestation,[13] long before the fetus reaches viability[14] and before many women even know they are pregnant. When courts have reviewed similar pre-viability bans including prohibitions beginning at six and 12-week's gestation, over and over, they have ruled such bans unconstitutional based on the viability standard, and the U.S. Supreme Court has refused requests to overturn these decisions.[15]

In one such case, challenging a North Dakota law very similar to H.R.490, the trial court stated unambiguously that a "ban on abortions at the time when a 'heartbeat' has been detected—essentially banning all abortions as early as six weeks of pregnancy—cannot withstand a constitutional challenge."[16] The court's decision was based not just on the precedent set forth in *Roe*, but also in the "litany of cases that have followed."[17] During trial, the state's witness revealed the true strategy behind the policy—eventually to redefine the viability standard to begin at conception (basing their argument on an embryo's existence outside the womb during an IVF procedure).[18] The trial court rightfully points out that this definition of viability comports with neither the Supreme Court's nor the medical establishment's definition—"viability is the time that life can be sustained on a continuous basis outside the womb without having to be returned to the womb for proper development."[19] It is this point in a pregnancy, this definition of viability before which the Supreme Court "has spoken and has unequivocally said no state may deprive a woman of the choice to terminate her pregnancy."[20]

Thus, the intent of the King bill is clear: to reverse a precedent that has protected women's reproductive rights for over four decades. Rep. King has essentially said as much, declaring that

Abortion Restrictions are Unpopular

There is a litany of reasons to oppose H.R.490, and not least of which is that Congressional efforts to ban abortion are wildly unpopular. Americans trust women to make the most important decisions about when, where, and how to start a family—without political interference. This trust only grows when people learn that women seeking abortion care are making the best decision for themselves and their families. Critical decisions like these must be made in doctor's offices, and not in statehouses across the country, and certainly not in the halls of Congress. Seven in 10 Americans support legal access to abortion, and the groups and politicians behind these bans make no secret that their core objective is to ban all abortion, no matter what the circumstances—be it a sexual assault, a fetal anomaly, or simply the woman's choice.

If these politicians were truly concerned with reducing the need for abortion, they would support greater access to contraceptives, fight for comprehensive sexual education, work for commonsense measures that support working families, and fiercely protect women's access to prenatal care and children's access to comprehensive healthcare. Alas, supporters of this legislation do none of these things, and instead only work to advance an extremist political and ideological agenda—no matter the cost to women and families.

Conclusion

Rep. King's bill is an obvious attempt to deny women their constitutional right to abortion and is a clear attempt to lure the Supreme Court into discarding the protections established in *Roe v. Wade*. Abortion bans like H.R.490 completely disregard the real-life circumstances of women and their families. Rather than sending this country back to a desperate time when women were forced to seek out dangerous solutions on their own, Congress should be expanding access to the full range of reproductive healthcare, including safe, accessible abortion and contraception. For these reasons, NARAL Pro-Choice America strongly opposes H.R.490 and urges lawmakers to reject this harmful proposal.

[20] *MKB Mgmt.*,16 F.Supp.3d at 1075.

[21] *Roe*, 410 U.S. at 118-119 n.2.

[22] *See, e.g.*, DEL. CODE ANN., tit. 24, §§ 1790-1793.

[23] Willard Cates, Jr. et al, *Comment: The Public Health Impact of Legal Abortion: 30 Years Later*, 35 PERSP. ON SEXUAL & REPROD. HEALTH 25 (2003); Willard Cates Jr., *Legal Abortion: The Public Health Record*, 215 SCIENCE 1586 (1982); Richard Schwarz, SEPTIC ABORTION 7 (1968).

[24] Walter Dellinger & Gene B. Sperling, *Abortion and the Supreme Court: The Retreat from* Roe v. Wade, 138 U. PA. L. REV. 83, 117 (Nov. 1989).

[25] The estimated number of deaths per year from illegal abortion services (e.g. 5,000) has been derived from the findings of several studies. The following is a summary of these studies: "Difficulty as it is to accumulate statistics in this area, a surprising similarity has been noted in various studies independently made within the last thirty years. If general trend observed is accepted, without becoming sidetracked in disputes over exact numbers of methodology, we must consider the probability that more than one million criminal abortions will have been performed in the United States in 1962, and more than five thousand women may have died as a direct result." Zad Leavey & Jerome M. Krummer, *Criminal Abortion: Human Hardship and Unyielding Laws*, 35 S. CAL. L. REV. 124 (1962) (citing to Gebhard, et al, PREGNANCY, BIRTH AND ABORTION 136-137 (1958); Frederick Taussig, ABORTION SPONTANEOUS AND INDUCED: MEDICAL AND SOCIAL ASPECTS 25 (1936); Marie Kopp, BIRTH CONTROL IN PRACTICE 222 (1934); Stix, *A Study of Pregnancy Wastage*, 13 MILBANK MEMORIAL FUND QUARTERLY 347, 355 (1935); MODEL PENAL CODE § 207.11, comment, p. 147 (Tent. Draft No. 9, 1959.). "It has been estimated that as many as 5,000 American women die each year as a direct result of criminal abortion. The figure of 5,000 may be a minimum estimate." Richard Schwarz, SEPTIC ABORTION 7 (1968) (citing to Taussig, 23-28, which discusses the original mathematical formula used for determining that somewhere between 8,000 and 10,000 women died each year from illegal abortion.).; "One recent study at the University of California's School of Public Health estimated 5,000 to 10,000 abortion deaths annually." Lawrence Lader, ABORTION 3 (1966) (also citing to Edwin M. Gold et al, *Therapeutic Abortions in New York City: A Twenty-Year Review*, in New York Dept. of Health, Bureau of Records and Statistics (1963), which discussed Dr. Christopher Tietze's estimate of nearly 8,000 deaths from illegal abortion annually in the United States. The estimate was based on the number of illegal abortions in New York City, the only major municipality keeping abortion statistics.); "[M]ore than five thousand women may have died as a direct result [of criminal abortion in the United States in 1962]." Zad Leavy & Jerome M. Kummer, *Criminal Abortion: Human Hardship and Unyielding Laws*, 35 S. CAL. L. REV. 123, 124 (1962); "Taussig and others have concluded that the abortion death rate during the late 1920s was about 1.2% and amounted to over 8,000 deaths per year." Russell S. Fisher, *Criminal Abortion, in* Harold Rosen, THERAPEUTIC ABORTION, MEDICAL PSYCHIATRIC, LEGAL, ANTHROPOLOGICAL, AND RELIGIOUS CONSIDERATIONS 8 (1954).

[26] Phillip G. Stubblefield & David A. Grimes, *Septic Abortion*, 331 NEW ENG. J. MED. 310 (1994).

[27] Laurie D. Elam-Evans et al., Centers for Disease Control & Prevention, *Abortion Surveillance – United States, 1999*, 51 MORBIDITY & MORTALITY WEEKLY REP. 1, 28, tbl. 19 (2002).

[28] Council on Scientific Affairs, American Medical Association, *Induced Termination of Pregnancy Before and After* Roe v Wade*: Trends in the Mortality and Morbidity of Women*, 268 JAMA 3231, 3232 (1992).

[29] *Casey*, 505 U.S. at 928 (Blackmun, J., concurring and dissenting).

[30] *Casey*, 505 U.S. at 856.

November 1, 2017

Dear Members of the Judiciary,

We write to you as organizations strongly opposed to. to H.R. 490, the so-called "Heartbeat Protection Act of 2017", sponsored by Representative Steve King (R-IA) that would impose an unconstitutional and dangerous limitation on abortion. A woman has the right to make her own personal, private decisions about her health and medical care. This legislation is part of a long line of attacks on women's health agenda being pushed by anti-reproductive health members of Congress who are out of touch with voters.

If enacted, H.R. 490 would require a mandatory ultrasound test and would prohibit a woman from getting an abortion as early as 6 weeks[1] which is a time when most women do not even know they are pregnant. In particular, for communities already lacking access to regular, culturally competent medical care, such as people of color, young people, LGBTQ people, low-income people or those in rural communities, this bill would put abortion care completely out of reach. These communities need, and deserve, improved access to the full spectrum of reproductive health care, including abortion care, but this bill would only further restrict their agency over their reproductive health. In addition, H.R. 490 does not make mention of any exception for women that are victims of rape or incest, which enhances the cruel and insensitive nature of this bill. This bill is taking away a woman's right to make her own medical decisions based on her physician's medical advice and what is right for her and her family.

The ban would criminalize the provision delivery of critically-needed and constitutionally protected care, requiring health care providers to pay a fine or face a sentence up to five years just for providing such care to patients. Such a ban would both interfere with and obstruct the provider-patient relationship, the sanctity of which is a cornerstone of medical care in our country. The American College of Obstetricians and Gynecologists, the nation's leading association of medical experts on women's health, has come out in strong opposition to H.R. 490, citing the serious threat these laws pose to women's health and because such bans are not based on sound science[2].

H.R. 490 requires medical professionals to pay a fine or face up to five years in jail for performing an abortion after a heartbeat has been detected. This inherently allows Congress to interfere in the doctor patient relationship often to the detriment of women seeking reproductive care. As medical providers and public health organizations, we know the dangers that occur when politicians interfere in these deeply personal medical decisions and tie doctor's hands. The majority of American voters share the consensus that the government should not interfere in what is viewed as a private decision that a woman makes with her doctor.[3]

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[1] https://www.acog.org/Patients/FAQs/Prenatal-Development-How-Your-Baby-Grows-During-Pregnancy

[2] https://www.acog.org/About-ACOG/News-Room/Statements/2017/ACOG-Opposes-Fetal-Heartbeat-Legislation-Restricting-Womens-Legal-Right-to-Abortion

[3] http://www.vox.com/a/abortion-decision-statistics-opinions

Union for Reform Judaism
Feminist Majority
Women's Equality Center
National Latina Institute for Reproductive Health
URGE: Unite for Reproductive & Gender Equity
National Health Law Program
Human Rights Campaign
Planned Parenthood Federation of America
Catholics for Choice
National Organization for Women
National Women's Law Center

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[i] http://www.npr.org/sections/thetwo-way/2016/12/07/504663799/ohio-legislature-moves-to-ban-abortion-as-early-as-6-weeks-after-conception

AMERICAN ACADEMY OF FAMILY PHYSICIANS
STRONG MEDICINE FOR AMERICA

November 1, 2017

The Honorable Steve King
Member of Congress
U.S. House of Representatives
Washington, DC 20515

The Honorable Trent Franks
Member of Congress
U.S. House of Representatives
Washington, DC 20515

Dear Representatives King and Franks,

On behalf of the American Academy of Family Physicians (AAFP), I am writing to express concerns regarding the *Heartbeat Protection Act of 2017* (H.R. 490).

AAFP policy strongly supports the practice of evidence-based medicine and the rights of all patients to access necessary care independent of government interference. The *Heartbeat Protection Act* would violate this policy in multiple ways. The proposal would outlaw abortion except under narrow circumstances by prohibiting a termination if there has been a determination "according to standard medical practice" that a fetus has a "heartbeat." This requirement would subject individuals to unnecessary ultrasound procedures, forbid abortions as early as six weeks, and violate the constitutional rights of women. By excluding any exceptions for rape or incest, HR 490 also fails to protect vulnerable girls and women. Physicians also would be subject to harsh fines or potential imprisonment for violations.

The *Heartbeat Protection Act* imposes standards that are not based on scientific research about fetal development. Cardiac activity may be present early in the gestational period, before most women know that they are pregnant, but its existence does not correspond to a viable pregnancy or a developed fetal heart. Imposing this standard simply restricts women's access to care and supersedes a doctor's ability to practice medicine according to his/her judgement. Requiring doctors to perform unnecessary ultrasounds and arbitrarily prohibiting abortions during this time in the gestational period contradicts longstanding medical guidelines, violates the doctor-patient relationship, and infringes on physician medical ethics.

Again, we are deeply concerned because there is neither a medical, health, safety, nor ethical justification for the *Heartbeat Protection Act*. For more information, please contact Sonya Clay, Government Relations Representative, at 202-232-9033 or sclay@aafp.org.

Sincerely,

John Meigs, Jr., MD,
FAAFP Board Chair

ACOG
THE AMERICAN CONGRESS OF OBSTETRICIANS AND GYNECOLOGISTS

ACOG Opposes Fetal Heartbeat Legislation Restricting Women's Legal Right to Abortion

January 18, 2017

Washington, DC – Thomas Gellhaus, MD, president of The American Congress of Obstetricians and Gynecologists (ACOG), today released the following statement:

"ACOG strongly opposes U.S. House of Representatives bill, H.R. 490, banning abortion after the detection of the fetal heartbeat, which occurs as early as six weeks gestation, measured from the woman's last menstrual period (LMP). This bill is both unconstitutional and unnecessary political interference in the practice of medicine. As long ago as 1973 and as recently as 2016, the United States Supreme Court has affirmed that women have a Constitutional right to abortion prior to fetal viability. This bill bans abortion long before the point of viability. Whether a fetus is viable is a medical determination and occurs much later in pregnancy. This bill violates the Constitution, will serve as outright ban on abortion for most women, and will prohibit health care providers from providing ethical, necessary care to their patients.

"Safe, legal abortion is a necessary component of women's health care. Many factors might influence or necessitate a woman's decision to have an abortion, including contraceptive failure, barriers to contraceptive use and access, fetal anomalies, illness during pregnancy, and more. Women often are unaware they are pregnant prior to six weeks LMP, and surgical abortion before six weeks may be difficult or impossible due to limitations on ultrasound imaging so early in pregnancy. Moreover, complications that threaten the woman's health and serious fetal anomalies cannot be detected until later in pregnancy. Decreasing women's access to abortion will likely increase negative health outcomes and complications, including maternal and infant mortality. It turns back the clock to the time before Roe v. Wade; a time where women seeking to terminate a pregnancy were forced to resort to self-induced and back alley abortions, which often resulted in serious complications and death. We cannot afford to take women's health care back in time.

"ACOG is also deeply concerned about how the criminalization of abortion after six weeks gestation will affect ob-gyns' ability to make ethical and professional decisions in the best interest of their patients. Under the bill, when a patient's health is threatened by pregnancy, the physician will be forced to wait to terminate the pregnancy until the patient's condition so deteriorates that her life is in jeopardy. As a result, physicians who follow the law may risk negligence claims from the patients. And, physicians who act in the best interests of their patients by providing medically necessary care will face criminal sanctions. This places physicians in an impossible position between the law and providing evidence-based, individualized, and medically necessary care to their patients.

"ACOG urges the House of Representatives to reject H.R. 490, and any future political interference in the practice of medicine. Shared decision making between patients and physicians must continue to rely on science, best practices, and individual needs to determine appropriate medical care without political interference."

CATHOLICS
FOR
CHOICE

IN GOOD CONSCIENCE

November 1, 2017

US House of Representatives
Committee on the Judiciary, Subcommittee on the Constitution and Civil Justice
2237 Rayburn House Office Building
Washington, DC 20515

Re: Opposition for the record on HR 490, the Heartbeat Protection Act of 2017

Dear Chairman King, Ranking Member Cohen and Members of the Subcommittee,

For more than 40 years, Catholics for Choice has served as a voice for Catholics who believe that our tradition supports a woman's moral and legal right to follow her conscience on matters of personal decision-making, including decisions about abortion. Throughout the world, we strive to be an expression of Catholicism as it is lived by ordinary people. As Catholics, we are called by our faith to follow our conscience in moral decisions and to respect the rights of others to do the same. We represent the majority of the 70 million Catholics in the United States who support access to reproductive health services. Six in ten Catholics believe abortion can be a moral choice and more than eight in ten Catholics support legal abortion in some cases.

I write because we are gravely concerned about the bill you are considering today, HR 490, which would be disastrous for women. HR 490 would ban abortion as early as six weeks in a callous attempt to prevent women from making their own decisions about whether to continue a pregnancy. Instead of respecting women's consciences, as our Catholic faith compels us to do, HR 490 would allow politicians to decide when and whether a woman can access abortion care. We support women in their reproductive decision making because each woman is a moral agent who deserves dignity and respect. We believe that it is neither our role—nor the government's—to stand in judgment or interfere with a woman making this decision for herself and her family, based on her conscience.

Bans on abortion based on an arbitrary gestational limit, such as HR 490, strip women of their conscience, autonomy and moral agency. These bans are quite simply wrong. Only women can know the circumstances of their lives well enough to make the decision that is best for them. It is critical that every woman has as much time as she needs to make the best decision for herself and her family in consultation with her doctor and without the fear of arbitrary time restrictions.

Our Catholic faith also charges us to honor religious freedom, a cherished principle of our American democracy. Catholics celebrate the value of a pluralistic, secular democracy where each person is free to believe as she wills but where no religion or belief system is allowed to be imposed on everyone else.

1436 U Street NW, Suite 301 • Washington, DC 20009 • tel 202-986-6093 • fax 202-332-7995
cfc@catholicsforchoice.org • catholicsforchoice.org