COMMITTEE ON
ENERGY & COMMERCE
CHAIRMAN FRANK PALLONE, JR.

MEMORANDUM

February 7, 2020

To: Subcommittee on Health Members and Staff

Fr: Committee on Energy and Commerce Staff

Re: Hearing on "Protecting Women's Access to Reproductive Health Care"

On **Wednesday, February 12, 2020, at 10 a.m. in the John D. Dingell Room, 2123 of the Rayburn House Office Building**, the Subcommittee on Health will hold a legislative hearing entitled, "Protecting Women's Access to Reproductive Health Care."

I. BACKGROUND

A. Evolution of Abortion Jurisprudence

In 1973, the U.S. Supreme Court (the Court) concluded in the landmark case *Roe v. Wade* that a woman's right to terminate her pregnancy is protected under the U.S. Constitution.[1] This ruling was accompanied by the companion decision of *Doe v. Bolton*, which held that a state may not unduly restrict that right through regulation.[2] Both cases rested on the conclusion that the Fourteenth Amendment protects rights "implicit in the concept of ordered liberty,"[3] which includes matters related to the family, procreation, contraception, and the decision whether to bring a pregnancy to term.[4] *Roe* also established that the earliest that a state's interest in potential life may constitutionally override a woman's right to abortion is at fetal viability, subject to exceptions for the life or health of the woman.[5]

In the 1992 decision *Planned Parenthood v. Casey*, the Court reaffirmed the "essential holding" of *Roe* that "subsequent to viability, the State in promoting its interest in the potentiality of human life may, if it chooses, regulate, and even proscribe, abortion except where it is

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[1] *Roe v. Wade*, 410 U.S. 113 (1973).

[2] *Doe v. Bolton*, 410 U.S. 179 (1973).

[3] *See* note 1.

[4] Congressional Research Service, *Abortion: Judicial History and Legislative Response* (updated September 9, 2019) (fas.org/sgp/crs/misc/RL33467.pdf).

[5] Congressional Research Service, *Reviewing Recently Enacted State Abortion Laws and Resulting Litigation* (September 6, 2019) (fas.org/sgp/crs/misc/LSB10346.pdf).

necessary, in appropriate medical judgment, for the preservation of the life or health of the mother."[6] *Casey* pronounced that, before viability, the government has a certain ability to regulate abortion, so long as it is not an undue burden on the right to an abortion.[7]

In 2016, the Court applied *Casey* and held unconstitutional two Texas abortion restrictions: one requiring any physician performing an abortion to have admitting privileges at a hospital within 30 miles from the location where the abortion is being performed, and the second requiring that abortion facilities adhere to the same standards as an ambulatory surgical center.[8] *Whole Woman's Health* applied the undue burden test and emphasized that courts must "balanc[e] the burdens imposed by an abortion regulation against its benefits."[9] The Court sustained the trial court's finding that that these targeted restrictions on abortion providers had few, if any, health benefits for women and held that they unduly burdened the right to abortion.[10]

While there have been a number of cases since *Roe* and *Doe* seeking to challenge or strike down the original rulings, the underlying judicial principle of those cases still stands: the right to seek an abortion is protected under the U.S. Constitution.

B. State Actions

States have enacted a patchwork of laws that restrict abortion. Since the beginning of 2019, at least 17 states have enacted laws and other restrictions to regulate abortions based on a number of factors, including a fetus' gestational age, detection of a fetal heartbeat, other specified fetal characteristics, or the method of abortion.[11] Prior to that, between 2010 and 2016, the collective 50 states enacted a total of 338 new abortion restrictions.[12]

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[6] *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992).

[7] *Id*.

[8] *Whole Woman's Health v. Hellerstedt*, 579 U.S. __ (2016). Ambulatory surgical center requirements required by Texas law HB 2 included regulating, among other things, detailed specifications relating to the size of the nursing staff, building dimensions, and other building requirements. The facilities regulated under HB 2 were required to have a full surgical suite with an operating room that has a "clear floor area of at least 240 square feet" in which the minimum clear dimension between built-in cabinets, counters, and shelves shall be 14 feet." Additionally, surgical centers must meet numerous other spatial requirements including specific corridor widths as well as advanced heating, ventilation, and air conditioning systems. (*Hellerstedt* opinion, 28-29).

[9] *Id*.

[10] *Whole Woman's Health v. Hellerstedt*, 579 U.S. __ (2016).

[11] *See* note 5; Guttmacher Institute, *State Policy Trends 2019: A Wave of Abortion Bans, But Some States Are Fighting Back* (December 10, 2019) (www.guttmacher.org/article/2019/12/state-policy-trends-2019-wave-abortion-bans-some-states-are-fighting-back).

[12] The Guttmacher Institute, *Policy Trends in the States: 2016* (January 6, 2017) (www.guttmacher.org/article/2017/01/policy-trends-states-2016#fn0a).

Arkansas and Utah have passed laws that prohibit abortion once the fetus reaches a gestational age of 18 weeks, and a Missouri ban comes into effect at a gestational age of eight weeks.[13] Kentucky, Georgia, Louisiana, Mississippi, and Ohio have all passed laws that ban abortion as early as six weeks into a pregnancy, and Alabama has banned abortion at any gestational age.[14] With the exception of Louisiana, each of these state laws are being challenged and currently not in effect pending judicial review. [15] Similar laws have been struck down in Arkansas, Arizona, Idaho, and Nebraska by two different appellate courts, both of which cited the *Casey* decision reaffirming *Roe's* viability standard.[16]

Some states have also banned certain methods used to terminate a pregnancy. Last year, both Indiana and North Dakota passed laws banning standard dilation and evacuation (D&E), which is the standard of care for abortions after around 15 weeks of pregnancy.[17] In the past, courts have invalidated similar laws. In *West Alabama Women's Center v. Willamson*, for example, the Eleventh Circuit ruled that Alabama's ban on this method was unconstitutional under the undue burden test.[18]

Kentucky, Missouri, Arkansas, and Utah enacted laws in 2019 that prohibit abortion if the woman is seeking the procedure due to a fetal diagnosis of Down Syndrome, and the Kentucky and Missouri laws also prohibit seeking an abortion on the basis of the fetus' race or predicted sex.[19] Kentucky also banned abortion based on diagnosis of genetic anomaly.[20] The bans in Arkansas and Kentucky have been blocked from going into effect during ongoing legal proceedings.[21] The Utah ban will only go into effect if *Roe* is overturned, and the Missouri ban

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[13] Guttmacher Institute, *State Policy Trends 2019: A Wave of Abortion Bans, But Some States Are Fighting Back* (December 10, 2019) (www.guttmacher.org/article/2019 /12/state-policy-trends-2019-wave-abortion-bans-some-states-are-fighting-back).

[14] *Id.*

[15] *See* EMW Women's Surgical Ctr., P.S.C. v. Beshear, No. 3:19-CV-178-DJH, 2019 WL 1233575 (W.D. Ky. Mar. 15, 2019); SisterSong Women of Color Reprod. Justice Collective v. Kemp, 410 F. Supp. 3d 1327 (N.D. Ga. 2019); Jackson Women's Health Org. v. Dobbs, 379 F. Supp. 3d 549 (S.D. Miss. 2019); Preterm-Cleveland v. Yost, 394 F. Supp. 3d 796 (S.D. Ohio 2019); Robinson v. Marshall, No. 2:19CV365-MHT, 2019 WL 5556198 (M.D. Ala. Oct. 29, 2019).

[16] *See* note 13.

[17] *Id.*

[18] *Id.*

[19] *Id.*

[20] *Id.*

[21] *See* Little Rock Family Planning Servs. v. Rutledge, 398 F. Supp. 3d 330 (E.D. Ark. 2019); EMW Women's Surgical Ctr., P.S.C. v. Beshear, No. 3:19-CV-178-DJH, 2019 WL 1233575 (W.D. Ky. Mar. 15, 2019)

on the basis of race or sex is in effect.[22] Courts have invalidated or enjoined similar laws, holding that they violate the right of women to terminate an unwanted pregnancy before viability as articulated in *Roe* and *Casey* (such as the Seventh Circuit's decision in *Planned Parenthood of Indiana and Kentucky v. Commissioner of the Indiana State Department of Health*, which the U.S. Supreme Court refused to vacate).[23]

C. ***June Medical Services, L.L.C. v. Gee***

In addition to state bans based on abortion before viability or on particular methods of abortion, states have also enacted targeted restrictions on abortion providers. These restrictions include mandating hospital admitting privileges for abortion providers and retrofitting clinics to meet ambulatory surgical center standards, such as those restrictions that were held to be unconstitutional by the Court in *Whole Woman's Health v. Hellerstedt.*[24]

In 2014, Louisiana passed Act 620, which contained an admitting privileges requirement identical to the Texas law overturned in *Whole Woman's Health.*[25] Louisiana's law is the subject of a pending U.S. Supreme Court case, *June Medical Services, L.L.C. v. Gee*, that will be heard by the Court on March 4, 2020.[26]

II. H.R. 2975, THE "WOMEN'S HEALTH PROTECTION ACT OF 2019"

H.R. 2975, the "Women's Health Protection Act of 2019," introduced by Rep. Chu (D-CA), establishes the federal statutory right to access abortion and the federal right of health care providers to perform abortions without medically unnecessary restrictions on the provision of abortion services. The bill states that access to safe, legal abortion services is central to women's ability to participate equally in economic and social life, and that restrictions on abortion do not confer any societal, health, or safety benefits on a patient. It also acknowledges that the U.S. Supreme Court has a history of upholding the right to access safe, legal abortion services, and that this right has been obstructed by states laws throughout the United States for reasons that are not based on medical evidence. In addition, it finds that these restrictions harm women's health by also reducing access to essential health care services such as contraceptive services and screenings for cervical cancer and sexually transmitted diseases.

H.R. 2975 allows health care providers to provide abortion services without limitations or requirements unless these requirements are similarly applied to medically comparable procedures. This ensures that the provision of abortion care is not treated differently or singled

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[22] *See* Reprod. Health Servs. of Planned Parenthood of St. Louis Region, Inc. v. Parson, 389 F. Supp. 3d 631 (W.D. Mo.), modified sub nom. Reprod. Health Servs. of Planned Parenthood of the St. Louis Region, Inc. v. Parson, 408 F. Supp. 3d 1049 (W.D. Mo. 2019).

[23] *See* note 4.

[24] *Whole Woman's Health v. Hellerstedt*, 579 U.S. __ (2016).

[25] Louisiana Act 620, the Unsafe Abortion Protection Act (2014).

[26] June Medical Services LLC v. Gee, 905 F.3d 787 (5th Cir. 2018) *cert. granted,* (U.S. Oct. 4, 2019) (No. 18-1460).

out from other types of health care procedures for reasons other than medical necessity. The bill further prohibits various restrictions on the statutory right to provide and receive abortion services and imposes limits on states' authorities in instances, which include, but are not limited to: a requirement that a health care provider perform tests or medical procedures in connection to the abortion services; a prohibition on abortion prior to the age of viability for both elective and nonelective abortions; a requirement that patients make medically unnecessary in-person visits to any medical entity; and a requirement that a health care provider offer or provide the patient seeking abortion services medically inaccurate information in advance of or during abortion services.

III. WITNESSES

Holly Alvarado
Advocate

Teresa Stanton Collett, J.D.
Professor of Law

Georgette Forney
President of Anglicans for Life
Co-founder of the Silent No More Awareness Campaign

Nancy Northup
President and CEO
Center for Reproductive Rights

Dr. Yashica Robinson
Medical Director
Alabama Women's Center for Reproductive Alternatives