

TESTIMONY OF PRISCILLA J. SMITH, CLINICAL LECTURER IN LAW,  
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  
SUBCOMMITTEE ON THE CONSTITUTION AND CIVIL JUSTICE

WASHINGTON, D.C.  
NOVEMBER 1, 2017

Members of the House Judiciary Subcommittee on the Constitution and Civil Justice:

I am honored to submit this testimony. I am a Clinical Lecturer in Law and Associate Research Scholar at Yale Law School where I direct the Program for the Study of Reproductive Justice and teach the Reproductive Rights and Justice Project clinical course. 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 First, Fourth, and Fourteenth Amendment issues, with a focus on reproductive rights, rights to liberty and equality, 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 the Heartbeat Protection Act (H.R. 490). The bill would ban abortions from the time that a heartbeat can be detected in an embryo, which occurs as early as the fifth-to-sixth week of pregnancy, as dated from the first day of the woman's last menstrual period (LMP). This is before most women even realize they are pregnant and before they have any symptoms of pregnancy, such as morning sickness. For example, in my two pregnancies, both of which I carried to term, I did not become sick until much later into the pregnancy. Therefore, the bill amounts to a near total ban on abortion that would apply throughout the entire United States and without exception for women pregnant as a result of rape, or incest, or for women whose pregnancy threatens their health.

### **I. H.R. 490 Unconstitutionally Bans Pre-Viability Abortions.**

H.R. 490 is flatly unconstitutional prior to viability. The Supreme Court has held that, before viability, the state may not "begin limiting women's access to abortion for reasons unrelated to maternal health." *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2320 (2016); *Planned Parenthood of Se. Pennsylvania v. Casey*, 505 U.S. 833, 879 (1992) (plurality op.) ("Regardless of whether exceptions are made for particular circumstances, a State may not prohibit any woman from making the ultimate decision to

terminate her pregnancy before viability.”). State laws similar to H.R. 490 were struck down by federal courts in North Dakota and Arkansas. *Edwards v. Beck*, 786 F.3d 1113, 1116–17 (8th Cir. 2015), *aff’g Edwards v. Beck*, 8 F. Supp. 3d 1091, 1095–97 (E.D. Ark. 2014); *MKB Mgmt. Corp. v. Stenehjem*, 795 F.3d 768 (8th Cir. 2015), *aff’g MKB Mgmt. Corp. v. Burdick*, 16 F. Supp. 3d 1059, 1069–75 (D.N.D. 2014).

H.R. 490 does not even attempt to establish that a fetus is viable when it has a heartbeat, nor could it. The Court has repeatedly reaffirmed that viability of the fetus is “the time at which there is a realistic possibility of maintaining and nourishing a life outside the womb, so that the independent existence of the second life can in reason and all fairness be the object of state protection.” *Planned Parenthood of Se. Pennsylvania v. Casey*, 505 U.S. 833, 870 (1992) (citing *Roe v. Wade*, 410 U.S. 113, 163 (1973)). There is simply no possibility of viability in the first trimester or throughout much of the second-trimester of pregnancy. A delivery prior to 20 weeks of gestation is not yet even considered anywhere near the limit of viability. ACOG/Society for Maternal-Fetal Medicine (“SMFM”), *Perivable Birth*, 213 Am. J. of Obstetrics & Gynecology 604, 604 (2015), *available at* [http://www.ajog.org/article/S0002-9378\(15\)00905-9/pdf](http://www.ajog.org/article/S0002-9378(15)00905-9/pdf).

In any event, the Supreme Court has stressed that it is not the proper function of legislatures or courts to place viability at a specific point in the gestation period. As the Court has recognized,

The time when viability is achieved may vary with each pregnancy, and the determination of whether a particular fetus is viable is, and must be, a matter for the judgment of the responsible attending physician.

*Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52, 64–65 (1976); *accord Jane L. v. Bangert*, 102 F.3d 1112, 1115–18 (10th Cir. 1996) (striking down law establishing irrebuttable presumption of viability at twenty-weeks); *Isaacson v. Horne*, 716 F.3d 1213, 1225 (9th Cir. 2013) (same). This ban applies well before the twenty-fourth week of pregnancy—that is, long before the viability of the fetus; before there is any possibility that it could sustain a separate existence from the woman.

## **II. The Presence or Absence of a Heartbeat Is Irrelevant to Any Conceivable Government Interest in the Health of a Fetus or a Woman.**

The presence or absence of a heartbeat is a medically arbitrary point at which to determine when life begins. The emergence of a fetal heartbeat is not a proxy for fetal viability. At the point at which a fetus has a detectable pulse, however, it lacks many of the most essential features of the human body that permit a human being to stay alive. Fetuses do not even develop functioning lungs until the 26<sup>th</sup> week of pregnancy. Mayo Clinic Staff, *Fetal Development: The 2nd Trimester* (July 08, 2017), <https://www.mayoclinic.org/healthy-lifestyle/pregnancy-week-by-week/in-depth/fetal-development/art-20046151?pg=2>.

Additionally, barring women from obtaining abortions because of the presence of a fetal heartbeat advances no government interest in protecting fetal health or a woman's health. Thus, even in light of the Supreme Court's acknowledgment that the government does have an interest in protecting a woman's health and the interest in potential life, this bill remains unconstitutional. *Casey*, 505 U.S. at 878 (explaining that the State may only take measures to promote the State's interest in potential life "to ensure that the woman's choice is informed").

## **III. H.R. 490 Is Unconstitutional To The Extent It Fails to Provide Adequate Exceptions To Protect The Life or Health of a Woman**

H.R. 490's exception to its blanket ban—permitting a woman to obtain an abortion in certain instances—is unconstitutionally narrow. The Supreme Court has held that, even after viability, the government may not restrict abortion "where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother." *Casey*, 505 U.S. at 879 (plurality op.) (internal quotation mark omitted). That exception places no restriction on the nature of the threat to the woman's health, nor its source. H.R. 490 provides an exception only for an abortion "that is necessary to save the life of a mother whose life is endangered by a physical disorder, physical illness, or physical injury, including a life-endangering physical condition caused by or arising from the pregnancy itself, but not including psychological or emotional conditions." The Constitution does not permit the government to force a woman to become a quadriplegic or suffer countless other indignities to serve its interest in fetal life.

#### **IV. H.R. 490 Violates the Balance the Court Has Struck Between Women’s Liberty Interests and Valid Governmental Regulatory Interests.**

For the reasons above, there can be no real dispute that H.R. 490 is blatantly unconstitutional. As everyone on this Committee knows, the bill flies in the face of over forty years of Supreme Court precedent holding that the Right to Liberty guaranteed to all Americans by the Due Process Clause of the Fourteenth Amendment applies equally to women, and protects a woman’s right to terminate her pregnancy prior to the viability of the fetus. The Court first announced this right in a 7-2 decision, *Roe v. Wade*,<sup>1</sup> but the Court has repeatedly reaffirmed the abortion right time and time again in decisions joined by Justices appointed by Republicans and Democrats alike.<sup>2</sup> Indeed, a total of 15 Justices, including 9 Republican appointees, have voted to recognize that the Constitution protects the right to abortion, and only 5 Justices have voted to deny the right. Over and over again, the Supreme Court has reaffirmed *Roe*’s “essential holding.” *Casey*, 505 U.S. at 846.<sup>3</sup>

*Casey*—the Supreme Court’s foundational contemporary articulation of the abortion right—“struck a balance” between protecting “the woman’s exercise of the right to choose” and the ability of the state to “express profound respect for the life of the unborn.” *Casey*, 505 U.S. at 877; *see also Gonzales v. Carhart*, 550 U.S. at 146. It achieved this balance by setting limitations on the methods the state can use to serve a valid governmental interest in protecting a woman’s health and in promoting the potential life of the fetus. Those limitations preserve the woman’s liberty interest. H.R. 490 fails to respect those limitations.

First, the ban imposed by H.R. 490 fails to promote the State’s interest in fetal life through a permissible *means*. Under *Casey*, “the means chosen by the State to further the interest in potential life must be calculated to inform the woman’s free choice, not hinder it.” 505 U.S. at 877. H.R. 490’s ban eliminates all choice—it could hardly be said, therefore, to be calculated to “inform the woman’s choice.”

---

<sup>1</sup> 410 U.S. 113 (1973).

<sup>2</sup> *See, e.g., Whole Woman’s Health v. Hellerstedt*, 136 S. Ct. 2292, 2309 (2016); *Gonzales v. Carhart*, 550 U.S. 124, 146 (2007); *Planned Parenthood of Se. Pennsylvania v. Casey*, 505 U.S. 833, 846 (1992); *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747 (1986); *Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416 (1983).

<sup>3</sup> *See also Whole Woman’s Health*, 136 S. Ct. at 2309; *Gonzales v. Carhart*, 550 U.S. at 146; *Stenberg v. Carhart*, 530 U.S. 914, 921 (2000); *Roe*, 410 U.S. at 164.

Second, the ban imposed by H.R. 490 fails because it would place too great an obstacle in the path of a woman who seeks an abortion. Under *Casey*, the Court held that even if an abortion regulation furthers a valid state interest in potential life or health, it is still impermissible if it has the purpose or effect of imposing an “undue burden” on the woman’s decision, placing a substantial obstacle in her path. 505 U.S. at 877, 878; *see also Whole Woman’s Health*, 136 S. Ct. at 2299. A ban on previability abortions such as H.R. 490 is a *per se* undue burden and thus is unconstitutional. *See, e.g., Gonzales v. Carhart*, 550 U.S. at 146.

#### **IV. More Generally, *Roe v. Wade* and *Planned Parenthood v. Casey* Are Part of a Continuum of Cases Delineating the Right to Liberty Guaranteed by the Fourteenth Amendment’s Due Process Clause.**

Despite being under constant attack from anti-abortion advocates, at the time the Supreme Court decided *Roe v. Wade*, most Americans considered it relatively unremarkable. *Roe* was a 7-2 decision and the logical next step in what Justice Harlan referred to as a “rational continuum” of cases delineating the scope of the individual right to liberty protected by the Due Process Clause of the Fourteenth Amendment. *Poe v. Ullman*, 367 U.S. 497, 543 (1961) (Harlan, J., dissenting from dismissal on jurisdictional grounds).

##### **A. *Roe v. Wade* Recognized Women’s Equal Rights to Liberty Under the Constitution.**

In the plurality decision in *Casey*, three Republican-appointed Justices discuss the liberty interest the court recognized in *Roe*, noting that *Roe*’s recognition of that interest, “fits comfortably within the framework of the Court’s prior decisions, . . . the holdings of which are ‘not a series of isolated points,’ but mark a ‘rational continuum.’” *Casey*, 505 U.S. at 859 (quoting *Ullman*, 367 U.S. at 543 (Harlan, J., dissenting)). Indeed, as another court noted, the impact of pregnancy, birth and child-rearing on women is “of a far greater degree of significance and personal intimacy than the right[s] . . . protected in” previous cases recognizing a family’s Due Process liberty right to control its children’s education. *Abele v. Markle*, 351 F. Supp. 224, 227 (D. Conn. 1972), *vacated sub nom. Markle v. Abele*, 410 U.S. 951 (1973). The Court similarly recognized the paramount interests of

the woman in *Roe*, as did the plurality in *Casey*. See *Roe*, 410 U.S. at 152-53; *Casey*, 505 U.S. at 852.<sup>4</sup>

This liberty interest has only grown since *Roe*, which was decided just as modern notions of women's equality were gaining mainstream acceptance. As the Court noted in 1992 in *Casey*, in rejecting a spousal notification requirement, “[a] State may not give to a man the kind of dominion over his wife that parents exercise over their children.” *Casey*, 505 U.S. at 898. As the Court noted,

for two decades of economic and social developments, people have organized intimate relationships and made choices that define their views of themselves and their places in society, in reliance on the availability of abortion in the event that contraception should fail. The ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives.

*Casey*, 505 at 856; *id.* at 858 (holding that even the “husband’s interest in the life of the child his wife is carrying does not permit the State to empower him with this troubling degree of authority over his wife.”). Twenty-five years have elapsed since *Casey*, a full four plus decades since *Roe*, during which approximately two generations of women have been able to control their reproductive lives facilitating their equal participation as citizens of our Republic. As Justice Ginsburg put it:

[Women’s] ability to realize their full potential, the Court recognized, is intimately connected to “their ability to control their reproductive lives.” *Id.* Thus, legal challenges to undue restrictions on abortion procedures do not seek to vindicate some generalized notion of privacy; rather, they center on a woman’s autonomy to determine her life’s course, and thus to enjoy equal citizenship stature.

*Gonzales v. Carhart*, 550 U.S. at 171–72 (Ginsburg, J., dissenting) (quoting *Casey*, 505 U.S. 856) (citing Reva Siegel, *Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal*

---

<sup>4</sup> *Casey*, 505 U.S. at 852 (“[The woman’s] suffering is too intimate and personal for the State to insist, without more, upon its own vision of the woman’s role, however dominant that vision has been in the course of our history and our culture. The destiny of the woman must be shaped to a large extent on her own conception of her spiritual imperatives and her place in society.”)

*Protection*, 44 Stan. L. Rev. 261 (1992); & Sylvia A. Law, *Rethinking Sex and the Constitution*, 132 U. Pa. L. Rev. 955, 1002–1028 (1984)).

Statistics bear out the importance of access to abortion for women’s success. For example, women who are able to obtain a wanted abortion are more likely to have “a positive future outlook and achieve their aspirational life plans.”<sup>5</sup> Women who were denied an abortion were three times more likely to be living below the federal poverty line two years later than those who were able to obtain the abortion.<sup>6</sup> Having an abortion is also associated with a reduction in physical violence from the man involved in the pregnancy over time, while being denied access to an abortion is not.<sup>7</sup> Finally, women who are able to obtain a wanted abortion have similar or lower levels of depression and anxiety compared to women who could not obtain a wanted abortion.<sup>8</sup>

### **B. Women’s Right to Abortion Stands at the Intersection of Two Lines of Decisions that Pre-Date and Post-Date *Roe*.**

Moreover, as the three Republican-appointed Justices writing the plurality decision in *Casey* noted, the woman’s right to an abortion announced in *Roe* was firmly grounded in the Constitution and “stands at an intersection of two lines of decisions,” that both predated and continued after *Roe*. *Casey*, 505 U.S. at 857.

The first line of cases is that recognizing “protection accorded to the liberty relating to intimate relationships, the family, and decisions about whether or not to beget or bear a child.” *Id.* Those cases include: *Griswold v. Connecticut*, 381 U.S. 479 (1965) (protecting right of married couples to

---

<sup>5</sup> D. Upadhyay, M.A. Biggs, & D.G. Foster, *The Effect of Abortion on Having and Achieving Aspirational One-year Plans*, 15 BMC Women’s Health (2015).

<sup>6</sup> *Two Sides of the Same Coin: Integrating Economic and Reproductive Justice*, Reproductive Health Technologies Project (Aug. 2015), <http://rhtp.org/wp-content/uploads/2016/08/Two-Sides-of-the-Same-Coin-Integrating-Economic-and-Reproductive-Justice.pdf>.

<sup>7</sup> Roberts, Sarah CM, et al., *Risk of Violence from the Man Involved in the Pregnancy after Receiving or Being Denied an Abortion*, 12 BMC Med. (2014), <https://doi.org/10.1186/s12916-014-0144-z>.

<sup>8</sup> D.G. Foster et al., *A Comparison of Depression and Anxiety Symptom Trajectories Between Women Who Had an Abortion and Women Denied One*, 45 Psychological Med. 2073 (2015), <https://doi.org/10.1017/S0033291714003213>; see also Robinson GE, Stotland NL, Russo NF, Lang JA, Occhiogrosso M. Is there an “abortion trauma syndrome”? Critiquing the evidence Harv Rev Psychiatry. 2009;17(4):268–90; Major B, Appelbaum M, Beckman L, Dutton MA, Russo NF, West C. Abortion and mental health: evaluating the evidence. Am Psychol. 2009;64(9):863–90; American Psychological Association Task Force on Mental Health and Abortion (2008). *Report of the APA Task Force on Mental Health and Abortion*. The American Psychological Association: Washington, DC.



access contraception); *Eisenstadt v. Baird*, 405 U.S. 438 (1972) (protection right of individuals to access contraception); *Carey v. Population Services Int'l*, 431 U.S. 678 (1977) (holding “it is clear that among the decisions that an individual may make without unjustified government interference are personal decisions ‘relating to marriage, . . . procreation, . . . contraception, . . . family relationships, . . . and child rearing and education’”) (quoting *Roe v. Wade*, at 152-53 (internal citations omitted)); *Moore v. East Cleveland*, 431 U.S. 494, 488-89 (1977) (housing ordinance violated Due Process Liberty right relating to intimate relationships where it prescribed which categories of relatives could live together as a “family” and made grandmother’s choice to live with grandson a crime).

The second line of cases is that protecting decisional “autonomy and bodily integrity, with doctrinal affinity to cases recognizing limits on governmental power to mandate medical treatment or to bar its rejection.” See *Casey*, 505 U.S. at 857-58 (citing *Cruzan v. Director, Mo. Dept. of Health*, 497 U.S. 261, 278 (1990); *Riggins v. Nevada*, 504 U.S. 127, 135 (1992); *Washington v. Harper*, 494 U.S. 210 (1990); *Rochin v. California*, 342 U.S. 165 (1952); & *Jacobson v. Massachusetts*, 197 U.S. 11, 24-30 (1905)).

## CONCLUSION

I conclude here with a quotation from the *Casey* plurality, written by at least one Justice who was personally opposed to abortion, but nonetheless recognized that in a pluralistic society with complex and differing moral and religious views on the issue, the State should not interfere with a liberty interest as central to an individual’s identity as the circumstances under which one decides to bring a child into the world:<sup>9</sup>

It should be recognized, moreover, that in some critical respects the abortion decision is of the same character as the decision to use contraception, to which *Griswold v. Connecticut*, *Eisenstadt v. Baird*, and *Carey v. Population Services International* afford constitutional

---

<sup>9</sup> See, e.g., *Corporation of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*, 438 U.S. 327, 335 (1987) (holding that under the Establishment Clause, government decisionmakers are prohibited from “abandoning neutrality and acting with the intent of promoting a particular point of view in religious matters.”); *Casey*, 505 U.S. at 851 (preventing women from making their own decision would violate “the right to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.”); see also *Roe*, 410 U.S. at 159.

protection. We have no doubt as to the correctness of those decisions. They support the reasoning in *Roe* relating to the woman's liberty because they involve personal decisions concerning not only the meaning of procreation but also human responsibility and respect for it. As with abortion, reasonable people will have differences of opinion about these matters. One view is based on such reverence for the wonder of creation that any pregnancy ought to be welcomed and carried to full term no matter how difficult it will be to provide for the child and ensure its well-being. Another is that the inability to provide for the nurture and care of the infant is a cruelty to the child and an anguish to the parent. These are intimate views with infinite variations, and their deep, personal character underlay our decisions in *Griswold*, *Eisenstadt*, and *Carey*. The same concerns are present when the woman confronts the reality that, perhaps despite her attempts to avoid it, she has become pregnant.

*Casey*, 505 U.S. at 852-53.