To: Members of the United States Senate

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Subject: The Abortion on Demand Until Birth Act (also called the Women's Health Protection Act)

On February 28, the Senate rejected H.R. 3755, the so-called Women's Health Protection Act, by a vote of 46-48, and rightly so. The bill would be better titled the Abortion on Demand Until Birth Act, since it eviscerates common-sense pro-life laws nationwide and creates a federal right to carry out abortions for any reason throughout pregnancy.

Leader Schumer has now filed cloture on a nearly identical bill, S. 4132, and a cloture vote is expected this week. This is the same extreme bill, just without the findings and purpose section.

Like H.R. 3755, S. 4132 ignores the 71% of Americans who support protections for the unborn at least after the first trimester and instead enshrines a right to perform painful abortion throughout pregnancy. Not only that, but S. 4132 goes much further than *Roe* by overturning popular common-sense laws previously upheld by the Supreme court under *Roe* like informed consent laws and health and safety regulations.

To be clear, the problem with S. 4132 is not that it is a federal bill on abortion. The problem is it enshrines a virtually unlimited right for the abortion industry to carry out painful late-term abortions. This stands in stark contrast to compassionate common-sense protections for babies in the womb with beating hearts at six weeks and who can feel pain at least by 15 weeks.

Background

As states are increasingly moving to humanize the law through legislation that acknowledges the unique human characteristics of unborn children, the Abortion on Demand Until Birth Act does the opposite. It ignores the science and enshrines the outdated ideas that led to the *Roe v. Wade* decision nearly fifty years ago.

Gone are the days when the abortion industry could hide behind the myth that a child in the womb is just a "blob of tissue." Today's science shows:

- At 6 weeks:
  - Unborn babies in the womb have a heartbeat of about 100 beats per minute.
  - Blood vessels are forming into the circulatory system.
  - The brain and spinal cord are beginning to develop.
- By 10 weeks:
  - Babies have arms and legs, fingers and toes.

    - The baby can kick and will jump if startled.
    - Their pain receptors have been developing for weeks (week 7).
- At 15 weeks, babies:
    - Have fully developed hearts – pumping 26 quarts of blood per day.

As legislatures follow the science and protect the most fragile humans, the abortion lobby fears the courts may do the same in the Mississippi late-term abortion case *Dobbs v. Jackson Women's Health Organization,* heard by the Supreme Court in December. At issue is a Mississippi law protecting unborn children at 15 weeks. A ruling is expected this term, before the end of June 2022. In this landmark case the court is considering whether "all pre-viability prohibitions on elective abortions are unconstitutional."

If the court were to lift the viability standard entirely, it would be the responsibility of federal and state lawmakers to determine the parameters under which abortion is, or is not, permitted. Desperate to lock down their abortion agenda after years of reliance on unelected judges who maintained the so-called right to abortion, the abortion lobby created the Abortion on Demand Until Birth Act to strip state lawmakers of the power to legislate regarding abortion, instead creating a national standard of unfettered abortion. But they didn't stop there. This bill not only prevents enforcement of recent laws protecting unborn children before viability, but also overturns longstanding commonsense laws upheld by the Supreme Court such as informed consent and waiting periods.

The abortion lobby knows that science is not on their side, and neither is the public:

- 65% of Americans think states should make abortion laws.
- 65% of Americans say abortion should be illegal in the second trimester.
- 80% of Americans say abortion should be illegal in the third trimester.

Polling released in January shows that 71% of Americans – including 70% of Independents and 49% of Democrats – want abortion to be limited, at most, to the first three months of pregnancy.

For more information about public opinion and abortion, please see www.sba-list.org/polling.

Analysis of S. 4132

Overview

The Women's Health Protection Act is more aptly titled the Abortion on Demand Until Birth Act. Look no further than the text of the bill that reads "A bill to… protect a health care provider's ability to provide abortion services."

While S. 4132 drops the findings and purpose statement found in H.R. 3755, the operative text remains the same – going further than codifying the extreme *Roe* doctrine of abortion until birth by making it a positive right, and then as part of that right, overriding current pro-life laws and preventing future protections. Federal laws on abortion should offer greater protection for unborn children, not enshrine a right for the abortion industry to carry out painful late-term abortions.

Prohibited Pro-Life Laws

Section 3(a) declares, "A health care provider has a statutory right under this Act to provide abortion services, and may provide abortion services, and that provider's patient has a corresponding right to receive such services without any of the following limitations or requirements…" A list of specifically prohibited types of pro-life laws follows, including policies that have been upheld by the Supreme Court under the *Roe* doctrine, like informed consent and waiting period laws.

Two provisions (sections 3(a)(4) and (5)) block laws protecting against telemedicine abortion and/or mail-order abortion pills. This ignores the risks to women of unsafe do-it-yourself abortions without seeing a doctor first. Because the bill prohibits states from enacting effective laws that "single out" abortion or abortionists (section 3(b)(2)), any law addressing the unique dangers associated with mail-order abortion would be blocked.

In section 3(a)(8), the Abortion on Demand Until Birth Act would also enshrine the outdated viability standard currently slated for consideration by the Supreme Court, by blocking "a prohibition on abortion at a point or points in time prior to fetal viability, including a prohibition or restriction on a particular abortion procedure."

The bill defines viability 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" (Sec. 2(7)).

While most Americans associate viability with a gestational age of about 22 weeks, this bill would give abortionists – who have a much more pliable definition of viability –full discretion to determine viability.

The abortion industry's view of viability was demonstrated by the testimony of Dr. Colleen McNicholas, Chief Medical Officer for Planned Parenthood for the St. Louis Region and Southwest Missouri, during her testimony before the Oversight and Government Reform Committee in November 2019. Asked when she considered an unborn child to be viable, she said, "There is no particular gestational age. There are some pregnancies in which the fetus will never be viable…" Later she affirmed, "My practice includes abortion care through the point of viability and as we previously discussed that could be at any point."

Section 3(a)(8) clearly blocks protections for unborn children at 15 weeks – currently under litigation before the Supreme Court – or at 20 weeks – the age in popular bills restricting painful-late term abortions – or, based on Colleen McNicholas' slippery testimony, at any point in pregnancy. For more information about fetal pain please see this article from the Charlotte Lozier Institute and this Amicus Brief filed in the *Dobbs* case.

Section 3(a)(8) also expressly prohibits states from restricting "a particular abortion procedure," which would include laws against brutally painful dismemberment abortions. (Note: a later

section of the bill allows the federal Partial-Birth Abortion Ban Act to remain in place. However, some state Partial-Birth Abortion Bans could be nullified by S. 4132.)

Section 3(a)(9) further enshrines abortion until birth by blocking "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." This *post-viability* health exception fails to acknowledge the option of delivering the unborn child to preserve his or her life while also addressing the health condition of the mother.

Medical emergency exceptions are sometimes included in state pro-life laws, but those narrowly tailored exceptions are not what the Abortion on Demand Until Birth Act envisions. Instead, it gives full decision-making regarding use of the health exception to the abortion industry, which has a financial interest in conducting the abortion. Neither "health" nor "risk" is defined in the Act, but the Act directs the courts to "liberally construe" provisions of the Act to "effectuate" its "purposes."

The *Doe v. Bolton* decision, issued as the companion to *Roe v. Wade,* set very broad parameters for health exceptions, stating,

> *We agree with the District Court, [that 'the term "health" presented no problem of vagueness'] that the medical judgment may be exercised in the light of all factors -- physical, emotional, psychological, familial, and the woman's age -- relevant to the well-being of the patient. All these factors may relate to health.*

This sweeping health exception is meant to be construed broadly as any psychological, social, or emotional impact whatsoever. In so doing, it has the effect of making abortion available throughout all of pregnancy without any meaningful restriction.

Section 3(a)(11) targets laws connected to the reason for the abortion, creating an impediment to the ability of states to prevent discrimination abortions targeting unborn babies with Down Syndrome or other fetal anomaly diagnoses, or discrimination abortion based on characteristics like sex.

As if the extremism on full display in subsection (a) were not sufficient, the authors added this final catchall in subsection (b):

> *The statutory right specified in subsection (a) shall not be limited or otherwise infringed through… any limitation or requirement that (1) is the same or similar to one or more of the limitations or requirements described in subsection (a); or (2) both—(A) expressly, effectively, implicitly, or as implemented singles out the provision of abortion services, health care providers who provide abortion services, or facilities in which abortion services are provided; and (B) impedes access to abortion services.*

The second part of this subsection is simple. If a law specifically regulates abortion and impedes access to abortion services (i.e. reduces abortion), it is illegal. This is made clear in section 3(c)(2) which lists the following as a factor for determining if a policy impedes access to

abortion services: “Whether the limitation or requirement is reasonably likely to delay or deter some patients in accessing abortion services.”

Preemption and Liberal Construction

In the next sections, it is made clear that the bill will supersede all state laws and all current and future federal laws, including the Religious Freedom Restoration Act, and would be effective immediately. A narrow carveout is applied to allow continued application of a federal law regarding access to clinics, laws on the treatment of insurance and medical coverage of abortion, the Partial-Birth Abortion Ban Act, and state contract law (see section 4(b)).

As if the law were not sweeping enough, section 6 directs the courts to “liberally construe” the statute to “effectuate the purposes of the Act.”

Section 7 gives the Attorney General authority to seek injunctive relief against any pro-life law prohibited by the Act. Individuals, including abortion providers, may also sue for injunctive relief and a prevailing plaintiff may receive reimbursement for the cost of litigation.

Note regarding conscience rights: While forcing physicians, nurses and other health care entities to participate in abortion is not expressly listed as a requirement under the act, sections 3(a) and (b) state “a health care provider has a statutory right to provide abortion services, and may provide abortion services, *and that provider’s patient has a corresponding right to receive such services*...” (emphasis added). This second portion indicates that the provision of abortion would be imposed on pro-life health care providers. The latter is underscored by the rule of liberal construction in section 6. In addition, the bill expressly overrides the Religious Freedom Restoration Act.

Conclusion

The Abortion on Demand Until Birth Act has one purpose – to shore up the abortion industry nationwide by giving them a carte blanche to carry out abortions throughout pregnancy for any reason. As the American people – and perhaps the Supreme Court – see the error of *Roe v. Wade*, the abortion industry has turned to their allies in Congress and the White House to demand support for brutal abortion.