



Written Statement of the American Civil Liberties Union

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Committee on the Judiciary
Subcommittee on the Constitution and Civil Justice

Hearing on: H.R. 1797
“Pain-Capable Unborn Child Protection Act”

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On behalf of the American Civil Liberties Union (ACLU), a non-partisan organization with more than a half million members, countless additional activists and supporters, and 53 affiliates nationwide, dedicated to protecting the principles of freedom and equality set forth in the Constitution and in our nation's civil rights laws, we thank you for giving us the opportunity to submit this statement for the record on the so-called Pain-Capable Unborn Child Protection Act, H.R. 1797, which would ban abortion care starting at 20 weeks.

The ACLU has a long history of defending reproductive freedom. The ACLU has participated in nearly every critical case concerning reproductive rights to reach the Supreme Court, and we routinely advocate in Congress and state legislatures for policies that promote access to reproductive health care. H.R. 1797 is part of a wave of ever-more extreme legislation attempting to restrict a woman's right to make her own decision about whether or not to continue a pregnancy. We have seen state after state try to take these decisions away from women and their families; H.R. 1797 would do the same.¹ We oppose H.R. 1797 because it interferes in a woman's most personal, private medical decisions and violates fundamental constitutional precepts.

Every pregnancy is different. For many women and families, it is a joyous event. However, none of us can presume to know what complications may arise during a pregnancy, or all the circumstances surrounding a personal, medical decision to continue or to end a pregnancy. This is an inherently private decision that must be made by a woman and her family, not the government, and the United States Supreme Court has long recognized as much. In *Roe v. Wade*, the Court held that: (1) a state may never ban abortion prior to fetal viability—that is, before the fetus could survive outside the woman's body; and (2) a state may ban abortion after viability only if there are adequate exceptions to protect a woman's life *and* health.² These principles have been repeatedly reaffirmed for four decades,³ as well they should. A woman should not be denied basic health care or the ability to make the best decision given her own circumstances just because some disagree with it. H.R. 1797 flouts these basic constitutional rules.

¹ Although as introduced, H.R. 1797 applies only to the District of Columbia, Rep. Franks (R-AZ) has announced his intention to amend the bill to apply nationwide. See *GOP congressman wants to ban US abortions after 20 weeks of pregnancy*, WASH. POST, May 17, 2013, available at http://www.washingtonpost.com/local/gop-congressman-wants-to-ban-us-abortions-after-20-weeks-of-pregnancy/2013/05/17/8547db5e-bf32-11e2-b537-ab47f0325f7c_story.html.

² 410 U.S. 113, 163-64 (1973).

³ *Gonzales v. Carhart*, 550 U.S. 124, 145 (2007) ("It must be stated at the outset and with clarity that *Roe*'s essential holding, the holding we reaffirm, has three parts. First is a recognition of the right of the woman to choose to have an abortion before viability and to obtain it without undue interference from the State. Before viability, the State's interests are not strong enough to support a prohibition of abortion or the imposition of a substantial obstacle to the woman's effective right to elect the procedure.") (internal quotations and citation omitted); see also *Planned Parenthood v. Casey*, 505 U.S. 833, 871 (1992) (plurality opinion) ("The woman's right to terminate her pregnancy before viability is the most central principle of *Roe v. Wade*. It is a rule of law and a component of liberty we cannot renounce.").

In conflict with law, in disregard of medical science, and for reasons unrelated to viability, H.R. 1797 unilaterally takes away a woman’s decision-making ability before viability and fails to provide protection for a woman’s health. Banning abortions starting at 20 weeks—which is a pre-viability stage of pregnancy—directly contradicts longstanding precedent holding that a woman should “be free from unwarranted governmental intrusion” when deciding whether to continue or terminate a pre-viability pregnancy.⁴

The Supreme Court has long made it clear that a legislature cannot declare any one element—“be it weeks of gestation or fetal weight or any other single factor—as the determinant” of viability.⁵ Similarly here, the government cannot draw a line at a set number of weeks to prohibit abortion care. Thus, a ban on abortion starting at 20 weeks is “per se unconstitutional,”⁶ regardless of the legislature’s justification for it. A similar 20-week provision enacted by the Utah legislature was struck down years ago as unconstitutional by the United States Court of Appeals for the 10th Circuit because it “unduly burden[ed] a woman’s right to choose to abort a nonviable fetus.”⁷ More recently, courts have preliminarily or permanently enjoined similar bans in Arizona (20 weeks), Georgia (20 weeks), Idaho (20 weeks), and Arkansas (12 weeks).⁸ This week, the United States Court of Appeals for the 9th Circuit struck down a 20 week ban, holding that the U.S. Supreme Court has been “unalterably clear” that “a woman has a constitutional right to choose to terminate her pregnancy before the fetus is viable.”⁹

H.R. 1797 provides only a single, exceedingly narrow exception to its ban: where the abortion is “necessary to save the life of a pregnant woman whose life is endangered by a physical disorder, physical illness, or physical injury.”¹⁰ H.R. 1797 bans abortions necessary to protect a woman’s health, no matter how severe the situation. Many things can go wrong during a pregnancy and a woman’s health could be at risk in ways that we cannot predict. Women may suffer blindness, kidney failure, or permanent infertility because they were denied the care they need by this bill. H.R. 1797 would force a woman and her doctor to wait until her condition was terminal to finally act to protect her health, but by then it may be too late. This restriction is not only cruel, it is blatantly unconstitutional. It is longstanding precedent that restrictions on even

⁴ *Casey*, 505 U.S. at 851.

⁵ *Colautti v. Franklin*, 439 U.S. 379, 388-89 (1979).

⁶ *Isaacson v. Horne*, No. 12-16670, slip. op. at 6 (9th Cir. May 21, 2013).

⁷ *Jane L. v. Bangerter*, 102 F.3d 1112, 1118 (10th Cir. 1996).

⁸ *Isaacson*, No. 12-16670; *Lathrop v. Deal*, No. 2012-cv-224423 (Ga. Super. Ct. Dec. 21, 2012); *McCormack v. Hiedeman*, 2013 WL 823318 (D. Idaho Mar. 6, 2013); Erik Eckholm, *Abortion Law in Arkansas is Blocked by U.S. Judge*, N.Y. TIMES, May 18, 2013, at A10.

⁹ *Isaacson*, No. 12-16670, slip. op. at 6.

¹⁰ District of Columbia Pain-Capable Unborn Child Protection Act, H.R. 1797, 113th Cong. § 3 (2013).

post-viability abortion care must have an exception to preserve a woman's health.¹¹ This is all the more true here where the ban impermissibly applies pre-viability.

In addition to ignoring—indeed, sacrificing—women's health, H.R. 1797 fails to take into consideration the severe or fatal fetal conditions that develop or are detected in mid or later pregnancy. This Subcommittee has heard from Christy Zink, who learned mid-way through her pregnancy that if she carried to term, she would, tragically, give birth to a baby missing half his brain. “The answers were far from easy to hear, but they were clear. There would be no miracle cure. His body had no capacity to repair this anomaly, and medical science could not solve this tragedy.”¹² Christy and her husband considered their situation and made the best decision for their family—to end the pregnancy.

If H.R. 1797 had been in place at that time, Christy could have found herself in the same position as Danielle Deaver. Danielle's water broke months early at 22 weeks. She sped to the hospital, only to be told that her fetus had no chance of survival. If Danielle continued the pregnancy, her baby would be born with undeveloped lungs and no ability to breathe. Danielle and her husband decided to have an abortion, but tragically for Danielle, the state of Nebraska had enacted a ban similar to H.R. 1797, and her doctors were therefore unable to give her the care she needed and so desperately sought. She was forced to sit and wait for 10 days until her body finally expelled the pregnancy. As Danielle said: “There are no words for how awful the 10 days were from the moment my water broke to the day my daughter died. There are no words for the heartbreak that cut deeper every time she moved inside of me for those 10 days.”¹³

H.R. 1797 would impose criminal penalties on physicians who provide their patients with this needed care at a difficult time. “I am horrified to think,” Christy testified, “that the doctors who compassionately but objectively explained to us the prognosis and our options for medical treatment, and the doctor who helped us terminate the pregnancy, would be prosecuted as criminals under this law for providing basic medical care and expertise.”¹⁴ The Subcommittee should reject this attempt to turn politicians into doctors, and expert, compassionate doctors into criminals.

¹¹ *Casey*, 505 U.S. at 879 (a post-viability ban must make an exception where an abortion is “necessary, in appropriate medical judgment, for the preservation of the life *or health*” of the woman) (emphasis added); *see also Roe*, 410 U.S. at 164-65.

¹² *District of Columbia Pain-Capable Unborn Child Protection Act: Hearing Before Subcomm. on Constitution of H. Comm. on Judiciary*, 112th Cong. 77 (2012) (statement of Christy Zink).

¹³ *See* Mathew Hendley, *Nebraska Woman Lets Jan Brewer Know Proposed Abortion Bill Actually Affects People*, PHOENIX NEWS TIMES (April 5, 2012), available at http://blogs.phoenixnewtimes.com/valleyfever/2012/04/nebraska_woman_lets_jan_brewer_1.php.

¹⁴ *District of Columbia Pain-Capable Unborn Child Protection Act: Hearing Before Subcomm. on Constitution of H. Comm. on Judiciary*, 112th Cong. 78 (2012) (statement of Christy Zink).

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For four decades, the U.S. Supreme Court has recognized the irreducible right of every woman to determine the course of her pregnancy before viability. H.R. 1797 would take that right away. It would force some women to carry to term, even where the pregnancy jeopardizes their health or where the fetus has been diagnosed with a severe or lethal anomaly. H.R. 1797 would also force women's hands in the other direction. Some ill women, in the absence of this bill, would try to continue their pregnancies as long as possible to see if their health conditions were manageable or would resolve. If H.R. 1797 were enacted, however, they might feel forced to pre-emptively terminate a difficult pregnancy for fear of losing the ability to protect their health after the 20 week mark if their situation continued to worsen. The same may be true for women whose fetuses have been diagnosed with severe anomalies, which often does not happen until this point in pregnancy. Women in this position might be rushed into making decisions they otherwise would not, but for the fact that the bill would take away their ability to make a decision after 20 weeks.

We may not all agree on abortion, but we can all agree that it is important to support a woman's health, her well-being, and her ability to make the best decisions for herself and her family. H.R. 1797 should be rejected, not just because it is unconstitutional, but because it puts politics above a woman's health. We urge the members of the Subcommittee to oppose this dangerous bill.