

Testimony of Carol Tobias

President

National Right to Life Committee

Before the Committee on the Judiciary,

United States Senate

on S. 1696, the “Women’s Health Protection Act”

July 15, 2014

TESTIMONY OF CAROL TOBIAS, S. 1696, PAGE 2

Mr. Chairman<sup>1</sup>, distinguished members of the Committee on the Judiciary, I am Carol Tobias. I am the president of the National Right to Life Committee (NRLC). NRLC is a nationwide federation of 50 affiliated state-level right-to-life organizations. We are the nation's oldest and largest pro-life organization.

I welcome this opportunity to testify today in opposition to S. 1696.<sup>2</sup> I would note at the outset that we find the formal title or marketing label, "Women's Health Protection Act," to be highly misleading. The bill is really about just one thing: It seeks to strip away from elected lawmakers the ability to provide even the most minimal protections for unborn children, at any stage of their pre-natal development. While the proposal is so sweeping and extreme that it would be difficult to capture its full scope in any short title, calling the bill the "Abortion Without Limits Until Birth Act" would be more in line with truth-in-advertising standards.

We have heard a great deal of rhetoric from certain advocates of this legislation who claim to speak for the women of America. Yet if we look at objective polling data on various facets of abortion policy, these advocates do not speak for *most* women in America. Indeed, on some important issues that are

directly impacted by this legislation, advocates for this legislation speak for a fairly small minority of women.

We have even heard claims that this legislation is necessary to counter a “war on women.” To millions of American women, such demagoguery is profoundly offensive, and I count myself among them. Our concepts of female autonomy and equality do not require us to deny the human dignity or the intrinsic right to life of our unborn children.

Even the doctrine of the original *Roe v. Wade* ruling never showed such an utter disregard or disrespect for pre-born members of the human family, as we find reflected in this bill. In its 1980 ruling in *Harris v. McRae*, upholding the Hyde Amendment, the U.S. Supreme Court said this:

***Abortion is inherently different from other medical procedures, because no other procedure involves the purposeful termination of a potential life.***<sup>3</sup>

The great majority of Americans do not believe that abortion is just another “medical procedure,” or that removing an unborn child is equivalent to removal of a malignant tumor. The elected representatives of the people have chosen, in many jurisdictions, to enact laws that are based in whole or in part on recognition

TESTIMONY OF CAROL TOBIAS, S. 1696, PAGE 4

that abortion is *different*, precisely because every abortion stops a beating heart.

Throughout the text of S. 1696, the unborn child is a non-entity, a completely invisible being – yet only a small minority of Americans embrace the ideology that an unborn human is merely a blob of tissue. Even many Americans who self-identify as “pro-choice” struggle with the abortion issue, because they see it as a conflict of rights. There are many people who, while not fully sharing our view that the unborn child should be directly protected in law, nevertheless favor laws to ensure that the pregnant woman has the opportunity to view state-of-the-art imagery of her child, that she has a period for reflection before an abortion, that she receives full information about the resources available to her if she chooses to carry the baby to term, and other laws that take into account the gravity of what most Americans recognize as a life-and-death decision.

In contrast, the drafters of S. 1696 apparently believe that any woman who is considering abortion must be shielded from any imagery or information that may cause her to change her mind.

Under S. 1696, abortion would indeed be “inherently different” from other “medical procedures,” but now in a new, inverted, and perverse sense. Under S. 1696, elective abortion would become the procedure that must always be facilitated, never delayed, never impeded to the slightest degree. The practices of

TESTIMONY OF CAROL TOBIAS, S. 1696, PAGE 5

the abortion industry, or any segment of that industry, or even of an individual practitioner, would be granted extraordinary immunity from constraints or accountability. Each abortionist would become, in effect, a legislature onto himself or herself.

S. 1696 would greatly impede the ability of states to curb the activities of those abortion providers who most frequently injure or kill women, or exploit them in various ways – an area in which many jurisdictions have been unduly lax for decades. Dr. Kermit Gosnell of Philadelphia is only the most notorious recent example of a certain type of abortion provider who flourishes under the aura of political immunity generated by pro-abortion advocacy groups in some jurisdictions. There are many others who have demonstrated repeatedly that they should not be allowed anywhere near pregnant women or their unborn children, some of whom have been operating in multiple states for many years, shielded from real accountability by the timidity of state officials who are wary of offending the abortion industry and the political activist groups that fly cover for that industry. S. 1696 would make matters worse by saddling state and local officials with well-founded fears of federal lawsuits based on the sweeping provisions of the proposed statute.

It is noteworthy that S. 1696 would invalidate at least one of the

TESTIMONY OF CAROL TOBIAS, S. 1696, PAGE 6

Pennsylvania laws under which Gosnell was convicted – a law that limits the circumstances under which abortions can be performed after 24 weeks of gestation – and would also invalidate the requirements for tighter oversight of abortion providers that were enacted in the wake of the Gosnell scandal, which reflected the detailed, damning findings of the grand jury that investigated the history of Gosnell’s activities.<sup>4</sup>

Supporters of S. 1696 say that it is necessary to “remove barriers to constitutionally protected reproductive rights.” But this is not a bill to vindicate constitutional rights. New laws pertaining to abortion are generally quickly blocked by the federal courts, if they actually transgress the constitutional doctrines enunciated by the U.S. Supreme Court. In reality, the central purpose of this bill is precisely to invalidate many state laws, and a significant number of federal laws, that have been upheld by the federal courts, or that are likely to survive federal judicial scrutiny if they are ever challenged.

It is in large part because they have failed to persuade federal courts to invalidate certain types of reasonable laws that they dislike – laws that have broad popular support, and that were enacted through the normal processes of democracy -- that groups such as Planned Parenthood (the nation’s largest abortion provider) and the Center for Reproductive Rights are now demanding that Congress drive

TESTIMONY OF CAROL TOBIAS, S. 1696, PAGE 7

this federal pro-abortion bulldozer from coast to coast, scraping everything flat.

What would the bill knock flat? Limits on abortions after 20 weeks – past the point at which unborn children can experience pain – which are supported by sizeable majorities nationwide, and in multiple polls by 60 percent of women.

Laws limiting abortion even after viability, unless they allow each abortionist to abort based on his assertion that an abortion will preserve emotional “health.”

Laws protecting individuals or private medical institutions from being forced to participate in abortion, which about three-fourths of the American people support, and which the great majority of states have enacted – including Connecticut, Mr.

Chairman. Laws prohibiting the aborting of an unborn child because of the child’s sex, which over 85 percent of the American people support. Laws requiring the providing of information on alternatives to abortion, which 88 percent of the

public supported the last time Gallup asked the question<sup>5</sup> (this would include, for example, a requirement that a woman seeking an abortion be given printed

information describing the legal responsibilities of biological fathers to provide economic support if she decides to carry her child to term). Laws providing

periods for reflection. All these would be among the types of laws that would fall under the prohibitions contained in S. 1696.

The bill would subject any law or government policy that affects the

TESTIMONY OF CAROL TOBIAS, S. 1696, PAGE 8

practice of abortion, even indirectly, to an array of sweeping and often overlapping legal tests, designed to guarantee that almost none will survive.<sup>6 7</sup> Under S. 1696, the general rule would be that any law that specifically regulates abortion would be presumptively invalid, *and the same would be true of any law that is not abortion-specific but has the effect or claimed effect of diminishing access to abortion.*

In theory there is a tiny keyhole to permit a few laws that mention or affect abortion to survive, if a state can convince a judge “by clear and convincing evidence” that the law serves the sole purpose of protecting “the safety of abortion services or the health of women,” and that it is the narrowest means to achieve those ends. S. 1696 is crafted to weigh the judicial scales heavily against abortion regulations – for example, by establishing a *prima facie* premise that laws regulating abortion are invalid, and instructing the courts to “liberally construe” the pages of prohibitions contained in the bill, in order to “effectuate the purposes of the Act.”

In several provisions S. 1696 prohibits distinctions between abortion and “medically comparable” procedures. The bill fails to define what “medically comparable” means. Asked about this by a reporter, Mr. Chairman, you responded that the meaning is “for doctors to decide.”<sup>8</sup> Presumably the doctors who would

decide are the abortionists themselves.<sup>9</sup> In our view, there are no procedures that are “medically comparable” to abortion, because there are no other procedures in which medical professionals deliberately kill a member of the human family (except, in a few jurisdictions, physician-assisted suicide). But that is clearly not the construction of “medically comparable” that would be adopted by the courts in interpreting S. 1696, in view of the explicit statements regarding the purposes of the act, and the admonition that “a court shall liberally construe such provisions to effectuate the purposes of the Act.”

In addition, the bill requires each state legislature, and Congress, to defer to the personal judgment of each abortionist. It instructs the courts that a law “impedes access to abortion services” – and is, therefore, presumptively invalid – if it “interferes with an abortion provider’s ability to provide care and render services in accordance with her or his good-faith medical judgment.” One could hardly draft a more sweeping federal grant-of-immunity to the abortion industry as a whole, and to each individual abortionist – including the Gosnells.

Allow me to underscore that it is quite clear that, under this bill, it will avail a state nothing to prove that a given abortion-related or abortion-impacting law has *no harmful impact* on women’s health, and that the law in question serves other important public interests. It is apparent that those who crafted this bill

believe that, where abortion is involved, *there are no other interests* – untrammelled, immediate access to abortion, at any stage of pregnancy, is the only thing that matters.

So, for example: Federal law, and the laws of most states, protect (to varying degrees) the right of individual medical practitioners, and of private medical institutions, to decline to participate in the performance or providing of abortions.<sup>10</sup> We generally refer to such laws by the term “conscience protection laws.” The pro-abortion advocacy groups call them “refusal clauses,” and have escalated their rhetorical, legal, and legislative attacks on such laws in recent years. It is crystal clear that the existing state and federal conscience laws would be nullified by S. 1696. These laws do not jeopardize women’s health, but they would be nullified, both because they specifically mention abortion and because they may reduce access to abortion by allowing medical providers to refuse to collaborate in the killing of innocent members of the human family.

As a result, many dedicated medical professionals would be driven from their chosen fields of medicine, because they will not participate in the killing of their unborn patients; the net effect of these professionals leaving the field will be to the detriment of women’s health. Medical institutions that are animated by religious convictions that do not allow them to participate in the deliberate

TESTIMONY OF CAROL TOBIAS, S. 1696, PAGE 11

destruction of human life could be forced to close or to narrow their services, often to the detriment of the urban poor most often served by such institutions.<sup>11</sup>

The ideology of those who crafted S. 1696 drives them to demand that all medical service providers collaborate in the killing of innocent unborn humans, or face professional destruction. They have compared the existing conscience-protection laws to “Jim Crow” laws, saying that they provide government protection for “discrimination.” In S. 1696, you would give their ruthless ideology the force of federal law.

Some may claim that when I use terms like “killing” I am using rhetoric that is harsh or inflammatory. But no, I am simply clinically describing the reality that this legislation seeks to ignore. As feminist author Naomi Wolf wrote, “[T]he pro-life slogan, ‘Abortion stops a beating heart,’ is incontrovertibly true.”<sup>12</sup> Faye Wattleton, the former president of the Planned Parenthood Federation of America said, “So any pretense that abortion is not killing is a signal of our ambivalence, a signal that we cannot say yes, it kills a fetus but it is the woman’s body, and therefore ultimately her choice.”<sup>13</sup>

The bill contains a cosmetic provision that is intended to fool the uninitiated or inattentive into believing that it allows substantial limitations after “viability,” but this is entirely illusory. Even after “viability,” which would be defined and

TESTIMONY OF CAROL TOBIAS, S. 1696, PAGE 12

determined solely by the abortion practitioner, the bill prohibits any limitation on abortion that the abortionist believes is required to enhance “health,” a term that the bill leaves entirely unconstrained, and that the states would therefore be powerless to narrow. We note that when a reporter pressed you, Mr. Chairman, to say whether the bill is in fact intended to allow abortions *after viability* based on “psychological” as well as physical health factors, your response was, “It doesn’t distinguish.”<sup>14</sup>

Besides the general prohibitions that by themselves would result in invalidation of nearly all laws that directly or indirectly touch on the practice of abortion, already discussed, S. 1696 also contains a list of specifically prohibited types of laws. These would guarantee elimination, among other things, of the laws that ensure that women who are considering abortion will have access to information that the abortion industry will not voluntarily provide, and time to absorb it before making a final decision. Of course, abortion providers hate such laws, in part because they result in some substantial loss of business – because many women, given concrete information on alternatives to abortion and time to consider that information, decide to carry their children to term.

These laws are, obviously, abortion-specific, and therefore they would be invalid under the tests imposed by S. 1696 -- yet I’ve never seen a poll on such a

requirement that showed less than 80 percent public support.

Or, consider the laws that require that the woman be informed of the right to view the ultrasound images of her unborn child. Abortion providers routinely perform ultrasounds in preparation for any abortion, including first-trimester abortions, but few abortionists can be expected to voluntarily display or offer to display the ultrasound images to the woman. Why do those who term themselves “pro-choice” fear laws that require the abortionist to offer or display the image? Is it because the ultrasound images provide graphic evidence that the ideological construct on which S. 1696 is based – that abortion is “just another medical procedure” – is a lie?

A 2011 Gallup poll found that 50 percent of respondents nationwide favored ultrasound display laws, and 69 percent favored a 24-hour waiting period, both of which would be impermissible under S. 1696.<sup>15</sup>

S. 1696 explicitly prohibits any limitation on reasons for which abortion may be performed. This would invalidate, for example, any state law that prohibits advertising or performing abortions purely for the purpose of eliminating unborn children who are not of the sex desired by a parent or parents. A 2012 report by the Committee on the Judiciary of the U.S. House of Representatives observed, “[T]he United States is one of very few industrialized nations that do not

restrict the various methods of sex-selection – despite our continuous condemnation of other countries that permit the practice.”<sup>16</sup> A national poll in 2006 found that 86 percent of Americans agreed that abortion to select the sex of a child should not be legal.<sup>17</sup>

In nations in which sex-selection abortion is widespread, and in certain communities in the United States in which it is also practiced, the targets are usually unborn females. It is curious that some of those who readily mouth polemic about a “war on women” also oppose both national and state legislation to curb this practice, as we saw in 2012 when the House of Representatives debated and gave strong majority support to the Prenatal Nondiscrimination Act.

Numerous polls have shown strong public support for legislation such as the Pain-Capable Unborn Child Protection Act (S. 1670), introduced last year by Senator Lindsey Graham -- upwards of two-to-one in some polls, with women more supportive than men.<sup>18 19</sup> The Pain-Capable Unborn Child Protection Act would extend protection to unborn children in the sixth month and later, by which point they are capable of experiencing great pain during the process of abortion<sup>20</sup>, with certain exceptions. Ten states have already enacted laws very similar to Senator Graham’s bill,<sup>21 22</sup> and several other states have passed other measures intended to curb abortion after the fifth month. Because the pro-abortion extremist

TESTIMONY OF CAROL TOBIAS, S. 1696, PAGE 15

groups have not been able to defeat these measures in the legislatures, and because they are afraid to take them to the U.S. Supreme Court, they now come to you to seek this legislation, which would invalidate both the 20-week laws and any meaningful post-viability abortion limitations, such as Pennsylvania's limitation on the circumstances in which abortions may be performed after 24 weeks, which was the one of the statutes that Kermit Gosnell was convicted of violating.

The so-called "Women's Health Protection Act" is not a new idea. It is an expanded version of the so-called "Freedom of Choice Act" or "FOCA," originally proposed in 1989. While we recognize the FOCA as an antecedent to S. 1696, there are some important distinctions between the two, and the current bill is even more extreme. For example, the FOCA of 1993 applied only to state laws, while S. 1696 would apply also to previous acts of Congress limiting abortion, with the exception of the Partial-Birth Abortion Ban Act of 2003.<sup>23</sup> The Hyde Amendment, the Helms Amendment to the Foreign Assistance Act, federal conscience protection laws, and many other previous congressional enactments would be invalidated by S. 1696.<sup>24</sup>

In 1992, committees in both the House and Senate approved the FOCA. Presidential candidate Bill Clinton endorsed the measure, and after his election in 1992, Planned Parenthood predicted that the FOCA would be law within six

TESTIMONY OF CAROL TOBIAS, S. 1696, PAGE 16

months of Clinton's inauguration. In early 1993, committees in both the Senate and the House again approved the FOCA, albeit in slightly differing versions,<sup>25</sup> and pro-abortion activist groups made an all-out effort to enact it.

But the wheels came off when, encouraged by a national educational campaign directed by National Right to Life, many lawmakers belatedly looked beyond the title of that bill, and beyond the marketing slogan – which was that the bill was simply a “codification of *Roe v. Wade*.” These lawmakers came to realize that they would be accountable for the *actual sweeping effects* of the operative language of the legislation, which would have invalidated a great number of state laws that enjoyed (then and now) broad popular support.

Because the actual language of the bill would have imposed a national policy far out of step with mainstream public opinion, the FOCA was eventually shelved.<sup>26</sup>

This history is instructive with respect to S. 1696. Pro-abortion advocates seek to advance this legislation behind a smokescreen of highly generalized and demagogic rhetoric about “women's health” – and perhaps initially, the mainstream news media will be uninterested in engaging in detailed exploration of the sweep of the bill, and disinclined to get specific about the types of state laws that are targeted by this proposal. Nevertheless, the radical sweep of the so-called

“Women’s Health Protection Act” will be more and more widely understood as time goes on. Those lawmakers who embrace this measure ultimately will have a great deal of explaining to do.

---

#### Endnotes

1. The chairman of the Committee on the Judiciary is Senator Patrick Leahy (D-Vt.), but by his designation, this hearing is chaired by Senator Richard Blumenthal (D-Ct.), who is the chief sponsor of S. 1696. Therefore, all references in this testimony to “Mr. Chairman” are addressed to Senator Blumenthal, including quotations of past public statements by Senator Blumenthal.
2. My testimony is applicable as well to the companion bill introduced in the U.S. House of Representatives, H.R. 3471.
3. In quoting the statement of the Supreme Court on this point, I do not fully embrace the Court’s terminology. We recognize that an abortion ends not “a potential life,” but the life of an actual unique human individual, with all of his or her inherent potential. Nevertheless, the Court’s recognition that abortion is “inherently different” is noteworthy, especially since three of the justices who endorsed this statement had been in the majority in *Roe v. Wade* (Justices Stewart, Burger, and Powell).
4. The 281-page report on the Gosnell affair issued in 2011 by a grand jury in Philadelphia catalogs, in unsparing detail, the politically motivated “hands off” mindset adopted by state agencies, and the tolerance and active collaboration of others in the abortion-provider “community,” that allowed Gosnell to operate his carnal house without impediment and at great profit for decades. Although the entire report should be required reading for any lawmaker considering support for S. 1696 or H.R. 3471, a few brief excerpts must suffice here:

Pennsylvania is not a third-world country. There were several oversight agencies that stumbled upon and should have shut down Kermit Gosnell long ago. But none of them did, not even after Karnamaya Mongar’s death.

In the end, Gosnell was only caught by accident, when police raided his offices to seize evidence of his illegal prescription selling. Once law enforcement agents went in, they couldn't help noticing the disgusting conditions, the dazed patients, the discarded fetuses. . . . After 1993, even that pro forma [inspection] effort came to an end. Not because of administrative ennui, although there had been plenty. Instead, the Pennsylvania Department of Health abruptly decided, for political reasons, to stop inspecting abortion clinics at all. The politics in question were not anti-abortion, but pro. With the change of administration from Governor Casey to Governor Ridge, officials concluded that inspections would be "putting a barrier up to women" seeking abortions. Better to leave clinics to do as they pleased, even though, as Gosnell proved, that meant both women and babies would pay. (pp. 8-9)

Gosnell, bizarrely, applied for admission [to the National Abortion Federation] shortly after Karnamaya Mongar's death. Despite his various efforts to fool her, the evaluator from NAF readily noted that records were not properly kept, that risks were not explained, that patients were not monitored, that equipment was not available, that anesthesia was misused. It was the worst abortion clinic she had ever inspected. Of course, she rejected Gosnell's application. She just never told anyone in authority about all the horrible, dangerous things she had seen. Bureaucratic inertia is not exactly news. We understand that. But we think this was something more. We think the reason no one acted is because the women in question were poor and of color, because the victims were infants without identities, and because the subject was the political football of abortion. (p. 13)

. . . Gosnell began to rely much more on referrals from other areas where abortions as late as 24 weeks are unavailable. More and more of his patients came from out of state and were late second-trimester patients. Many of them were well beyond 24 weeks. Gosnell was known as a doctor who would perform abortions at any stage, without regard for legal limits. His patients came from several states, including Delaware, Maryland, Virginia, and North Carolina, as well as from Pennsylvania cities outside the Philadelphia area, such as Allentown. He also had many late-term Philadelphia patients because most other local clinics would not perform procedures past 20 weeks. (p. 27)

*Report of the Grand Jury*, in the Court of Common Pleas, First Judicial District of Pennsylvania, Criminal Trial Division, In Re Misc. No. 0009901-2008, R. Seth Williams, district attorney.

<http://www.phila.gov/districtattorney/PDFs/GrandJuryWomensMedical.pdf>

5. Gallup, January 10-12, 2003, asked respondents if they would vote for “a law requiring doctors to inform patients about alternatives to abortion before performing the procedure.” Yes 88%, no 11%.

6. S. 1696 contains a “Limitation” that provides exceptions for four types of abortion-related laws, three of which would otherwise be invalid under the general prohibitions in the bill; it appears that the three exceptions were included for purely tactical reasons. One exception fences off “the procedure described in section 1531(b)(1) of title 18, United States Code,” which is the federal Partial-Birth Abortion Ban Act, enacted in 2003 and upheld by the U.S. Supreme Court in the 2007 decision in *Gonzales v. Carhart*. In addition, there are exceptions for “laws regulating physical access to clinic entrances,” “requirements for parental consent or notification before a minor may obtain an abortion,” and “insurance coverage of abortion.” Regarding the last, see the next endnote.

7. The provision dealing with “insurance coverage of abortion” apparently protects the laws, now enacted by more than half the states, to limit coverage of abortion under health insurance plans sold on the Obamacare exchanges. Some defenders of S. 1696 have claimed that this exception also protects the federal Hyde Amendment and the similar laws that are in effect in most states, which prevent funding of elective abortion under entitlement programs such as Medicaid, but it is highly doubtful that such programs would be considered “insurance” as the term is used in the bill. Thus, all limitations on abortion coverage under government entitlement programs, such Medicaid, would be subject to challenge and likely invalidation under S. 1696. In addition, it is beyond dispute that longstanding provisions of federal law that prevent direct funding of abortion under Title X of the Public Health Service Act and under the Foreign Assistance Act (which no one can claim relate to “insurance”) would be nullified. Those who crafted S. 1696 could easily have drafted an exception to cover laws of the Hyde Amendment type, if that had been their real intent. Indeed, the version of the “Freedom of Choice Act” that was approved by the Senate Committee on Labor and Human Resources on April 29, 1993, contained such an exception, which

TESTIMONY OF CAROL TOBIAS, S. 1696, PAGE 20

read: “Nothing in this Act shall be construed to . . . prevent a State from declining to pay for the performance of abortions.” For further discussion of the application of S. 1696 to laws limiting government funding of abortion, see John McCormack, “Senate Democrats Introduce Bill to Strike Down State Abortion Laws: Far-reaching measure would invalidate law used to convict late-term abortionist Kermit Gosnell,” *The Weekly Standard*, November 20, 2013. [http://www.weeklystandard.com/blogs/senate-democrats-introduce-bill-strike-down-popular-state-abortion-laws\\_767931.html](http://www.weeklystandard.com/blogs/senate-democrats-introduce-bill-strike-down-popular-state-abortion-laws_767931.html)

8. McCormack, *ibid.*

9. The great majority of states do limit the performance of legal abortions to licensed physicians, and the U.S. Supreme Court has repeatedly held that such a “restriction” is constitutional. However, pro-abortion activist groups have been campaigning to weaken or repeal these “doctor-only” laws, and recently succeeded in California. It is highly doubtful that such “doctor-only” laws could be sustained in the face of the prohibitions contained in S. 1696.

10. “Quickly following the 1973 Church Amendment [a federal law, 42 U.S.C. § 300a-7], almost every state enacted its own abortion conscience law. Today, 46 states provide protection to individual providers. Almost as many states provide protection to institutions. But sometimes institutional conscience protection is limited only to private or even only to religious hospitals.” Thaddeus Mason Pope, “Legal Briefing: Conscience Clauses and Conscientious Refusal,” *The Journal of Clinical Ethics* 21, no. 2 (Summer 2010): 163-80.

11. It is noteworthy that the version of the “Freedom of Choice Act” reported by the Senate Committee on Labor and Human Resources on April 29, 1993, contained an explicit exception to preserve conscience protection laws: “Nothing in this Act shall be construed to . . . prevent a State from protecting unwilling individuals or private health care institutions from having to participate in the performance of abortions to which they are conscientiously opposed.” Such a provision is conspicuously lacking from the so-called “Women’s Health Protection Act,” because the drafters of this legislation apparently believe that conscience and religious liberty count for nothing in any case in which they might impede access to abortion.

12. Naomi Wolf, “Our Bodies, Our Souls,” *The New Republic*, October 16, 1995, page 29.

13. “Speaking Frankly,” *Ms.*, May/June 1997, page 67. Such quotations could be multiplied for pages. See also “Partial-Birth Abortion on Trial,” by Cathy Cleaver Ruse, Esq., *Human Life Review*, Spring 2005, <http://www.nrlc.org/uploads/pba/RusePBAonTrial.pdf>.

14. John McCormack, “Senate Democrats Introduce Bill to Strike Down State Abortion Laws: Far-reaching measure would invalidate law used to convict late-term abortionist Kermit Gosnell,” *The Weekly Standard*, November 20, 2013. (TWS: And you can't say whether it's physical or also psychological? BLUMENTHAL: It doesn't distinguish.) [http://www.weeklystandard.com/blogs/senate-democrats-introduce-bill-strike-down-popular-state-abortion-laws\\_767931.html](http://www.weeklystandard.com/blogs/senate-democrats-introduce-bill-strike-down-popular-state-abortion-laws_767931.html)

15. Gallup poll, July 15-17, 2011: “A law requiring women seeking abortions to wait 24 hours before having the procedure.” – favor 69%, oppose 28%. “A law requiring women seeking an abortion to be shown an ultrasound image of her fetus at least 24 hours before the procedure.” – favor 50%, oppose 46%.

16. Committee on the Judiciary, U.S. House of Representatives, 112<sup>th</sup> Congress, report on the Prenatal Nondiscrimination Act (PRENDA) (H.R. 3541), May 29, 2012, page 11. The PRENDA, in the form considered by the House on May 31, 2012, would have made it a federal offense to knowingly do any one of the following four things: (1) perform an abortion “knowing that such abortion is sought based on the sex or gender of the child”; (2) use “force or the threat of force . . . for the purpose of coercing a sex-selection abortion”; (3) solicit or accept funds to perform a sex-selection abortion; or (4) transport a woman into the U.S. or across state lines for this purpose. The bill explicitly provided, “A woman upon whom a sex-selection abortion is performed may not be prosecuted or held civilly liable for any violation of this section, or for a conspiracy to violate this section.” A solid majority of the House (246-168) voted to pass the bill, but it fell short of the two-thirds majority required for passage under Suspension of the Rules. President Obama opposed the PRENDA.

17. Zogby poll, March 10-14, 2006: “Do you agree or disagree that it should be illegal in the U.S. to have an abortion because of the sex of the fetus?” Agree 86%, disagree 10%, not sure 4%.

18. *Washington Post-ABC News* Poll, July 18-21, 2013: “The U.S. Supreme Court has said abortion is legal without restriction in about the first 24 weeks of

TESTIMONY OF CAROL TOBIAS, S. 1696, PAGE 22

pregnancy. Some states have passed laws reducing this to 20 weeks. If it has to be one or the other, would you rather have abortions legal without restriction up to (20) weeks, or up to (24) weeks?” Up to 20 weeks, 56% (including 60% women); up to 24 week, 27%.

[http://www.washingtonpost.com/page/2010-2019/WashingtonPost/2013/07/25/National-Politics/Polling/question\\_11465.xml?uuid=bN9EXvUZEeKB-o6Ds4ZMNg](http://www.washingtonpost.com/page/2010-2019/WashingtonPost/2013/07/25/National-Politics/Polling/question_11465.xml?uuid=bN9EXvUZEeKB-o6Ds4ZMNg)

19. Quinnipiac University Poll, July 28-31, 2013: “The U.S. Supreme Court has said abortion is legal without restriction in about the first 24 weeks of pregnancy. Some states have passed laws reducing this to 20 weeks. If it has to be one or the other, would you rather have abortions legal without restriction up to 20 weeks, or up to 24 weeks?” Up to 20 weeks, 55% (60% of women); up to 24 weeks, 30%. <http://www.quinnipiac.edu/news-and-events/quinnipiac-university-poll/national/release-detail?ReleaseID=1931>

20. While a detailed discussion of this subject is beyond the scope of this hearing, extensive medical documentation is posted on the NRLC website at

<http://www.nrlc.org/abortion/fetalpain/>

See, for example, “Fetal Pain: The Evidence” and “Report of Dr. Kanwaljeet S. Anand, expert on fetal pain, to U.S. federal court reviewing the Partial-Birth Abortion Ban Act.”

21. In order of enactment: Nebraska, Kansas, Idaho, Oklahoma, Alabama, Georgia, Louisiana, Arkansas, North Dakota, and Texas.

22. It should also be noted that on June 18, 2013, the U.S. House of Representatives passed the Pain-Capable Unborn Child Protection Act, H.R. 1797, which is virtually identical to Senator Graham’s S. 1670, by a margin of 228 to 196. On May 13, 2014, Senator Blumenthal objected to a unanimous consent request, propounded by Senator Graham, under which the Senate would have voted on both S. 1670 and S. 1696 (one after the other, not one as an amendment to the other). See *Congressional Record*, May 13, 2014, pp. S2935-36. See also <http://www.nationalrighttolifenews.org/news/2014/05/nrlc-and-allies-press-for-senate-action-on-key-pro-life-bill-but-senate-democrats-block-votes/#.U8Ew1iieb4Z>

23. The Partial-Birth Abortion Ban Act is 18 U.S.C. §1531. The National Right to Life Committee presented extensive information on the practice of partial-birth abortion to the Senate Judiciary Committee in 1997. See testimony of Douglas Johnson, legislative director, National Right to Life Committee, on the Partial-

TESTIMONY OF CAROL TOBIAS, S. 1696, PAGE 23

Birth Abortion Ban Act, Joint Hearing Before the U.S. Senate Judiciary Committee and the Constitution Subcommittee of the U.S. House Judiciary Committee, March 11, 1997, <http://www.nrlc.org/abortion/pba/test/>

24. Regarding the four “exceptions” contained in S. 1696, see endnotes no. 6 and 7.

25. S. 25, approved by the Senate Labor and Human Resources Committee on April 29, 1993, and H.R. 25, approved by the House Judiciary Committee on May 19, 1993.

26. While a detailed discussion of the history of the “Freedom of Choice Act” is beyond the scope of my testimony today, see, for example, “Congress Faces New Abortion Battle,” Timothy M. Phelps, *Newsday*, April 12, 1993; and “High Hopes Turn to Uncertainty for Freedom of Choice Act,” Alissa J. Rubin, *Congressional Quarterly Weekly Report*, May 8, 1993, 1154.