



Secretariat of Pro-Life Activities

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The Women's Health Protection Act

- The “Women’s Health Protection Act” would impose abortion on demand nationwide at any stage of pregnancy through federal statute. Immediately upon passage, the WHPA would invalidate state laws banning abortion at any stage of pregnancy, including laws that prohibit abortion based on race, sex, disability, or other characteristic.ⁱ
 - A. Pre-viability abortions would be allowed across the country for any reason.ⁱⁱ
 - B. Post-viability abortions would be allowed nationwide without meaningful limitation. Under the WHPA, such abortions would require only the “good-faith” medical judgment of a health care provider that “continuation of pregnancy” would pose “a risk” to the pregnant woman’s “life or health.” The WHPA defines “health care provider” broadly; the term is not limited to physicians. The provider’s judgment need not be objectively reasonable. The abortion must be allowed even if the baby could be safely delivered alive (there is no requirement that an abortion be necessary to avoid maternal risk, only that the provider make a good faith judgment that *continuation of pregnancy* would pose such a risk). The abortion must be allowed if, in the provider’s good faith judgment, there is *any* risk, whether physical or mental, however insignificant or remote the risk. These various qualifications essentially allow abortion on demand even after viability.
 - C. These rules would have a preemptive effect on all other federal and state laws.ⁱⁱⁱ
- The WHPA would render invalid state and federal laws that prohibit a particular method of abortion.^{iv}
- The WHPA would invalidate a host of laws that regulate abortion, including—
 - laws requiring that abortion be performed only by a physician,^v
 - ultrasound laws,^{vi}
 - parental notice or consent laws,^{vii}
 - waiting period laws,^{viii}
 - admitting privilege laws,^{ix}
 - laws that regulate prescribing, dispensing, or administering drugs for the purpose of inducing an abortion,^x
 - laws regulating or restricting the use of telemedicine specifically in relation to abortion,^{xi}
 - health or safety regulations specific to abortion facilities,^{xii}

- licensure, certification, and other credentialing requirements specific to a health professionals or facilities that performs abortions,^{xiii}
- laws prohibiting government funding for abortion,^{xiv}
- laws prohibiting use of government-owned or -operated facilities for an abortion,^{xv}
- laws authorizing the exclusion of abortion coverage from a health plan,^{xvi}
- laws creating any “similar” limitation; and
- laws that “impede access” to abortion, no matter how reasonable the law or how slight the impediment, including (a) any law that would delay or deter “some” patients in obtaining an abortion even if there would be no delay or deterrence in the vast majority of cases, and (b) any law that would increase the cost of an abortion, no matter how reasonable the law or how negligible the increased cost.

- The WHPA would likely trump conscience laws, state and federal, that protect the right of health care providers and professionals, employers, and insurers not to perform, assist in, refer for, cover, or pay for abortion.^{xvii} The WHPA expressly eliminates defenses under the Religious Freedom Restoration Act.^{xviii}

- A defense against any claimed violation of the WHPA can be successfully mounted only if the party defending the challenged pro-life law advances *clear and convincing evidence* (a more difficult standard to meet than mere preponderance of the evidence) that the challenged limitation or requirement “*significantly* advances the safety of abortion services or the health of patients” and “the safety of abortion services or the health of patients *cannot be advanced by a less restrictive alternative measure or action.*” [Emphasis added.] Thus, the Act would subject abortion regulations to a form of strict scrutiny in which the party defending the abortion law, rather than the party challenging it, bears a heavy burden of proof. Even a law that straightforwardly advances women’s health would be invalid unless the party defending it can present clear and convincing evidence that the advancement is “significant,” and that no less restrictive alternative is possible.

- The WHPA defines “abortion” to include not only abortion, but “any medical or non-medical services *related* to or provided in *conjunction* with an abortion (whether or not provided at the same time or on the same day as the abortion).” [Emphasis added.] ***For this reason, all that the bill does with respect to abortion would apply equally to other services, potentially to include contraceptives and sterilization.*** The WHPA’s findings refer specifically to contraceptives (see Finding 14), as well as “LGBTQ health services,” an apparent reference to sex reassignment treatment.

- The WHPA authorizes the Attorney General, and any aggrieved individual or entity, to sue for injunctive relief for a claimed violation of the WHPA. Under the WHPA, a court “shall” award litigation costs and attorney fees to the prevailing plaintiff.

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ⁱ The WHPA bars any “requirement that a patient seeking abortion services at any point or points in time prior to fetal viability disclose the patient’s reason or reasons for seeking abortion services, or a limitation on the provision or obtaining of abortion services at any point or points in time prior to fetal viability based on any actual, perceived, or potential reason or reasons of the patient for obtaining abortion services, regardless of whether the limitation is based on a health care provider’s degree of actual or constructive knowledge of such reason or reasons.” Even as to *post-viability* abortions, the broad discretion granted to a health care provider to perform an abortion based on the provider’s good faith judgment that continuation of pregnancy would pose a “risk,” however insubstantial or remote, to the woman’s health, would seem to bar any rule prohibiting an abortion sought, in whole or in part, because of the unborn child’s race, gender, disability, or other trait.

ⁱⁱ The WHPA would bar any “prohibition on abortion at any point or points in time prior to fetal viability, including a prohibition or restriction on a particular abortion procedure.” By virtue of an express exclusion, the bill does not apply to the partial birth abortion procedure as described in the federal law banning that procedure; the bill could apply to partial birth abortion procedures if defined differently in state law.

ⁱⁱⁱ The WHPA “supersedes and applies to the law of the Federal Government and each State government, and the implementation of such law, whether statutory, common law, or otherwise, and whether adopted before or after the date of enactment of this Act, and neither the Federal Government nor any State government shall enact or enforce any law, rule, regulation, standard, or other provision having the force and effect of law that conflicts with any provision of this Act, notwithstanding any other provision of Federal law, including the Religious Freedom Restoration Act of 1993 (42 U.S.C. 2000bb et seq.).” The only exception is for “[f]ederal statutory law adopted after the date of the enactment of this Act” that “explicitly excludes ... application” of the WHPA “by reference to” the WHPA. The term “states” includes not only all of the several states, but “the District of Columbia, the Commonwealth of Puerto Rico, and each territory and possession of the United States, and any subdivision of any of the foregoing.” Thus, for example, the Act would trump regulations issued by local (e.g., municipal and county) governments.

^{iv} This is made explicit for *pre-viability* abortions, *see* note ii *supra*, and is also likely true of *post-viability* abortions under provisions of the Act that bar (a) “similar” restrictions or limitations, or (b) restrictions or limitations that “impede access” to abortion.

^v This follows in part from the expansive definition of “health care provider.”

^{vi} The WHPA bars any “requirement that a health care provider perform specific tests or medical procedures in connection with the provision of abortion services, unless generally required for the provision of medically comparable procedures.”

^{vii} The WHPA lists “parental involvement laws (notification and consent” as one type of a law that “obstruct[s]” access to abortion. *See* also Finding 16 of the bill, referring to third-party authorization laws as among the “medically unnecessary barriers to abortion services.”

^{viii} The WHPA bars any “requirement that, prior to obtaining an abortion, a patient make one or more medically unnecessary in-person visits to the provider of abortion services or to any individual or entity that does not provide abortion services.” *See* also Finding 16 of the bill, referring to waiting periods as among the “medically unnecessary barriers to abortion services.”

^{ix} The WHPA bars any “requirement or limitation concerning ... staffing ... or hospital transfer arrangements of facilities where abortion services are provided ... that is not imposed on facilities or the personnel of facilities where medically comparable procedures are performed.”

^x The WHPA bars any “limitation on a health care provider’s ability to prescribe or dispense drugs based on current evidence-based regimens or the provider’s good-faith medical judgment, other than a limitation generally applicable to the medical profession.”

^{xi} The WHPA bars any “limitation on a provider’s ability to provide abortion services via telemedicine, other than a limitation generally applicable to the provision of medical services via telemedicine.” This provision would likely lead to the overturning of recent state efforts to prevent self-abortions using Mifiprex without an initial doctor's visit.

^{xii} The WHPA bars any “requirement or limitation concerning the physical plant [or] equipment ... [or] staffing ... of facilities where abortion services are provided ... that is not imposed on facilities ... where medically comparable procedures are performed.”

^{xiii} The WHPA bars any “requirement or limitation concerning the ... staffing ... of facilities where abortion services are provided, or the credentials or hospital privileges or status of personnel at such facilities, that is not imposed on facilities or the personnel of facilities where medically comparable procedures are performed.” Elsewhere the WHPA states that “[h]ealth care providers are subject to license laws in various jurisdictions, which are not affected by this Act *except as provided in this Act.*” [Emphasis added.] The italicized language renders the exclusion of license laws from the Act meaningless.

^{xiv} The WHPA states that 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, without a limitation or requirement that ... 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.” Government prohibitions on abortion funding of abortion would likely fail to pass the first part of this test because they typically identify abortion as an excluded item from funding (as, for example, the Hyde amendment does), and it is plausible, if not likely, that such prohibitions would be viewed as impeding access, as there is no requirement that the impediment be substantial, thereby failing the second part of this test. In addition, as noted below, the Act prohibits any “similar” restriction or limitation.

^{xv} See the preceding footnote.

^{xvi} The WHPA specifically lists “prohibitions of, and restrictions on, insurance coverage” as one type of law that, the bill claims, obstructs access to abortion. Elsewhere the bill states that the provisions of the WHPA “shall not supersede or apply to ... insurance or medical assistance *coverage* of abortion services” (emphasis added), but it is not clear whether coverage includes *exclusions* from coverage.

^{xvii} Though not specifically referenced in the WHPA, it would be argued that such laws single out, and impede access to, abortion services in contravention of the WHPA. See note xiv *supra*.

^{xviii} See note iii *supra*.