RESPONSE OF CAROL TOBIAS,
PRESIDENT, NATIONAL RIGHT TO LIFE COMMITTEE

August 4, 2014

QUESTION FROM SENATOR GRASSLEY: *Nancy Northup, president and CEO of the Center for Reproductive Rights, repeatedly indicated that a law would be permissible under S. 1696 if regulated abortion is done in the same manner as other "similar" procedures. She said, "I think what's really critical about the bill . . . is right from the start, if this is something that is treating medically similar practices and procedures and services the same, there's no objection, nothing's going to be struck." The bill itself uses the term "medically comparable procedures," and in your written testimony, you discuss the ambiguity of the term "medically comparable," and difficulties in applying that term to abortion. Taking this into consideration, consider this possibility: Law X is a state law that regulates all centers in which surgical procedures are performed, and although Law X does not mention abortion, surgical abortion centers are obviously within the scope of the law. Let's even go a step further and stipulate, purely for purposes of my question, that a federal court finds that for purposes of reviewing this Law X under the terms of the federal law, S. 1696, abortion is indeed a "medically comparable procedure." Is Ms. Northup correct in suggesting that, once a court has concluded that Law X treats abortion the same as other "medically comparable procedures," Law X is therefore permissible under S. 1696?*

Regarding the manner in which S. 1696 would operate, Ms. Northup's testimony was an exercise in indirection. Under S. 1696, even a law that treats abortion exactly the same as other "medically comparable procedures" is presumptively invalid, if that law in any way diminishes access to abortion, or is claimed to do so.

For purposes of this analysis, one should ignore the verbose "findings and purposes" section of the bill, and go directly to key operative language, which is found in Section 4 of the bill. Section 4(b)(1), headed "Other prohibited measures or actions," provides that any "measure or action" that restricts abortion is unlawful if it "singles out abortion services" *or* if it would "make abortions services more difficult to access . . ." Likewise, Section 4(b)(2) says that a law is *prima facie* unlawful if the plaintiff demonstrates that the measure "singles out the provision of abortion services" *or* "impedes women's access to abortion services . . ."

In her verbal testimony, Ms. Northup sought to leave the impression that an abortion-impacting law is presumptively invalid only if it both singles out abortion *and* diminishes access – but in reading a statute, the difference between "or" and "and" is often all

important, and in S. 1696, the conjunction is "or." In short, S. 1696 is clearly and deliberately structured to create two separate and distinct routes for attacking a state or federal law that directly or indirectly affects abortion providers.

The "Law X" postulated in the question treats abortion exactly the same as other surgical procedures. Yet that fact would be essentially irrelevant under the actual language of S. 1696, because Law X would simply be attacked under the separate and distinct prohibition on laws that diminish "access" to abortion.

Section 4(b)(3) provides a list of seven "factors for a court to consider in determining whether a measure or action impedes access to abortion services." The first factor on the list is "whether the measure or action interferes with an abortion provider's ability to provide care and render services in accordance with her or his good-faith medical judgment." That single factor alone is so open-ended – essentially directing the federal courts that the "medical judgment" of any given abortionist should be deemed to trump a state's regulatory requirements – that the rest of the list hardly matters. Still, it should be noted that the rest of the list condemns, among other things, any regulations that might "delay some women in accessing abortion services" or are "reasonably likely to directly or indirectly increase the cost of providing abortion services or the cost for obtaining abortion services . . ."

Once a law is found to be *prime facie* invalid, *either* because it "singles out" abortion *or* because it is deemed to affect the provision of abortion services "directly or indirectly," it will be nullified unless the government can demonstrate by "clear and convincing evidence" (a high standard of proof) that the measure "significantly advances the safety of abortion services or the health of women," *and* that these interests "cannot be advanced by a less restrictive alternative measure or action."

Thus, a challenged law will not be saved by production of "clear and convincing" proof that it does no harm to the health of women (or actually advances health and safety of women, but not "significantly"), and that it advances other important governmental interests – for example, the value that a state sees in the life of an unborn child, at least after viability, or the sincerely held conscience rights of pro-life doctors, nurses, and other health care providers. In fact, the challenged law will not be saved even by production of "clear and convincing" proof that it actually protects the "health of women," or even by a demonstration that it "significantly advances" the health of women, unless the government can also prove that there is no "less restrictive alternative measure . . ." of advancing safety. Section 5 of the bill further instructs that "a court shall liberally construe" all of these requirements "to effectuate the purposes of the Act" – those purposes being, of course, to remove any requirement that would directly or indirectly

delay access to or increase the cost of any abortion, sought for any reason, at any point in pregnancy.

In summary: S. 1696 is not a formula for requiring that abortion be treated exactly the same as other "medically comparable procedures." (As I explained in my written testimony submitted for the July 15 hearing, that would be bad enough, since abortion is different from all other "medical procedures" and the U.S. Supreme Court has recognized that difference, as do most Americans.) Rather, S. 1696 would shield abortion providers from regulation and oversight to a unique degree, with the judgment of abortion providers substituted for the judgment of legislative and regulatory bodies that regulate all other fields of medical practice.