The Heritage Foundation

ISSUE BRIEF

No. 5215 | SEPTEMBER 20, 2021

RICHARD AND HELEN DEVOS CENTER FOR RELIGION & CIVIL SOCIETY

The Truth About the So-Called Women's Health Protection Act: A Radical Proposal to Mandate Unfettered Abortion Access in Federal Law

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KEY TAKEAWAYS

Pro-abortion advocates want Congress to enact a bill to end broadly supported existing and future federal and state pro-life policy.

This far-reaching bill endangers unborn lives, women's health and safety, and medical providers' fundamental liberties while forcing taxpayers to fund abortion.

Congress instead should pursue policies rooted in the principle that life is our most basic human freedom and should be protected in public policy.

Pro-abortion legislators in the House of Representatives and the Senate are advocating for legislation called the Women's Health Protection Act (WHPA).[1] Despite claims that it simply codifies *Roe v. Wade,* the bill mandates an abortion regime that would be far more radical than the status quo.

The WHPA's stated purpose is to "promote access to abortion" by effectively repealing broadly supported existing pro-life policy and prohibiting the enactment of pro-life policy in the future. It would endanger long-standing state and federal laws that have been put in place over the past 40 years. It would endanger essentially all state-level abortion laws protecting the unborn and women's health—including from inhumane late-term abortion procedures—as well as existing state and federal laws protecting medical providers' consciences

and religious liberty and various provisions limiting taxpayer funding for abortions. These policies have been enacted by duly elected representatives around the country and represent broadly supported consensus policies.[2] Their repeal would reverse decades of emerging bipartisan consensus on abortion and replace that consensus with the Left's radical policy vision.

Sweeping Scope Beyond *Roe v. Wade*

Supporters' claims that the bill would simply "codify *Roe v. Wade*" are misleading and inaccurate. The bill would effectively repeal existing state laws, expressly prohibit future laws that regulate abortion and the abortion industry, and place at risk long-standing federal policies that reflect more than 40 years of bipartisan consensus. Since 1973, states have enacted more than 1,300 life-affirming policies—more than 500 in the past decade alone.[3] These laws have been enacted by policymakers duly elected by their constituents, and some have been litigated all the way to the Supreme Court and deemed constitutional. The WHPA simply ignores numerous long-standing laws protecting critical interests such as "protecting the integrity and ethics of the medical profession" and "regulating the medical profession in order to promote respect for life, including life of the unborn."[4]

The bill prohibits government entities from imposing any limitation or requirement that "expressly, effectively, implicitly, or as implemented singles out" and "impedes access to" abortion. The bill does not define what it means to "single out" abortion. The bill provides narrow exceptions if a requirement "significantly advances the safety of abortion services or the health of patients" and such safety "cannot be advanced by a less restrictive alternative measure." However, the factors "a court may consider" in deciding whether a requirement "impedes access to abortion" include overly broad examples such as whether the limitation or requirement "interferes" with an abortion provider's ability to perform an abortion and whether the limitation or requirement is "reasonably likely to directly or indirectly increase the cost of providing...or obtaining abortion services (including costs associated with travel, childcare, or time off work.)"

Through numerous references to "medically comparable procedures," the bill ignores long-established precedent that abortion is, in the words of the Supreme Court, a "unique act"[5] and "inherently different from other medical procedures."[6] Moreover, the bill makes no reference to the second human being directly affected by the abortion procedure: the unborn child. (This is a change from versions of the bill introduced in earlier Congresses, which used the term "fetus" in the definition of abortion.[7])

Threatening Policies that Protect Unborn Children

If enacted, the WHPA would threaten policies that protect unborn children in a variety of ways. The bill would prevent state protections for children from abortion based on their sex, race, or diagnosis of a genetic abnormality such as Down Syndrome—policies that, in the words of Justice Clarence Thomas, "promote a State's compelling interest in preventing abortion from becoming a tool of modern-day eugenics."[8]

It would also prevent states from enacting policies that protect children after they can survive outside the womb—something that more than half of the states currently address. The bill disallows post-viability abortion restrictions if the abortion provider believes that continuing the pregnancy would "pose a risk to the pregnant patient's life or health." The term "health" is never defined in the bill and has been considered elsewhere, in courts and in states, to include factors like emotional health, age, and financial health.

The WHPA would disallow widely supported policies that reflect advances in scientific knowledge of fetal development. More than a dozen states have acted to protect women and their unborn children from inhumane late-term abortions performed after 20 weeks, at which point scientific evidence suggests that the baby can feel excruciating pain during an abortion procedure.[9] Such a policy has been introduced and voted on repeatedly, though not enacted, in the U.S. Congress in a bill titled the Pain-Capable Unborn Child Protection Act, or "Micah's Law."[10]

Threatening Policies that Protect Women's Health and Safety

The WHPA would prevent states from enacting critical informed-consent policies that allow women to make fully informed decisions. From reflection periods to the opportunity for a woman to view the ultrasound image of her unborn child or listen to the sound of the heartbeat, the WHPA would jeopardize a state's ability to ensure that women have the opportunity—and the time—to receive valuable information that informs the decision as to whether or not to have an abortion.

The WHPA would prevent states from mitigating serious abortion-related health risks that become more pronounced the farther along a woman is in her pregnancy. It would prevent states from adequately regulating abortion facilities unless such requirements are similar to those for a facility where "medically comparable procedures" occur. This vague construction and the fact that abortion is unlike any other medical procedure raise the

prospect of a self-regulated abortion industry. It would also prevent states from enacting safety measures regarding chemical abortion—a process that carries a complication rate four times that of surgical abortion[11]—such as requiring in-person dispensing of chemical abortion pills and prohibiting telemedicine abortion.[12]

Threatening Conscience Rights and Religious Liberty

The WHPA prohibits a "limitation on a health care provider's ability to provide immediate abortion services when that health care provider believes, based on the good-faith medical judgment of the provider, that delay would pose a risk to the patient's health" and defines "health care provider" to mean individuals and entities. Because of the law's vague references to patient "health" and its explicit instruction to courts to "liberally construe" the bill's provisions, existing state and federal laws that prohibit discrimination based on moral or religious objections to abortion would be under threat.

For more than 40 years, such laws have ensured that individuals and entities such as doctors, nurses, and religiously affiliated hospitals do not have to violate their moral or religious convictions, and the WHPA threatens this fundamental right. It further threatens Americans' fundamental First Amendment rights by explicitly stating that the Religious Freedom Restoration Act of 1993 will not provide recourse if a policy otherwise runs afoul of the WHPA.

Threatening Policies that Restrict Taxpayer Funding for Elective Abortions

The WHPA says that it does not apply to "insurance or medical assistance coverage of abortion services" but does not define what such insurance or coverage entails. It remains an open question, then, what types of funding restrictions on abortion would survive under the WHPA.

The WHPA has been revised many times since 2013 when it was first introduced and has been addressed in numerous committee hearings. Its sponsors have had ample opportunity to clarify exactly how the WHPA would interact with state and federal policies that disentangle taxpayer dollars from elective abortion, and they have chosen not to do so. This ambiguity, taken in the context of the rest of the bill (like language prohibiting policies that increase the cost of abortions), raises the possibility that the Hyde Amendment and similar policies that prohibit funding for elective abortions in government programs would not survive the WHPA.

Conclusion

If enacted, the Women's Health Protection Act would threaten hundreds of state and federal pro-life policies that have been enacted by duly elected representatives in response to the wishes of their constituents. Broadly supported consensus policies,[13] including restrictions on taxpayer funding for abortions and policies that protect both women and unborn children from inhumane late-term abortion procedures, would be put in jeopardy. Despite claims that it simply codifies *Roe v. Wade*, the bill mandates an abortion regime that would be far more radical than the status quo.

Americans broadly support policies that the WHPA would disallow. Many Americans across the country also are working to help women who face the reality of an unplanned or challenging pregnancy, believing that women and children deserve better than abortion. Rather than take away the American people's ability to have a say in pro-life policymaking, Congress should pursue policies that protect innocent unborn human lives.

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Endnotes

1. S. 1975, Women's Health Protection Act of 2021, 117th Cong., introduced June 8, 2021, https://www.congress.gov/bill/117th-congress/senate-bill/1975/actions (accessed September 19, 20021), and H.R. 3755, Women's Health Protection Act of 2021, 117th Cong., introduced June 8, 2021, https://www.congress.gov/bill/117th-congress/house-bill/3755?s=1&r=1 (accessed September 19, 2021). Members of Congress first proposed the WHPA in 2013 during the 113th Congress. It has been proposed in every Congress since then and underwent a significant rewrite during the 116th Congress in 2019.
2. Susan B. Anthony List, "Where Do Americans Stand on Abortion? Public Opinion Polling on Americans' Positions on Abortion," last updated February 20, 2020, https://www.sba-list.org/polling (accessed September 19, 2021).
3. Elizabeth Nash and Lauren Cross, "2021 Is on Track to Become the Most Devastating Antiabortion State Legislative Session in Decades," Guttmacher Institute *Policy Analysis*, updated June 14, 2021, https://www.guttmacher.org/article/2021/04/2021-track-become-most-devastating-antiabortion-state-legislative-session-decades (accessed September 19, 2021).
4. *Gonzales v. Carhart*, 550 U.S. 124 (2007), https://supreme.justia.com/cases/federal/us/550/124/#tab-opinion-1962400 (accessed September 19, 2021).
5. *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), https://www.oyez.org/cases/1991/91-744 (accessed September 19, 2021).
6. *Harris v. McRae*, 448 U.S. 297 (1980), https://supreme.justia.com/cases/federal/us/448/297/ (accessed September 19, 2021).
7. Previous versions defined "abortion" as "any medical treatment, including the prescription of medication, intended to cause the termination of a pregnancy except for the purpose of increasing the probability of a live birth, to remove an ectopic pregnancy, or to remove a dead fetus." The current version instead uses the term "abortion services," defined as "abortion and any medical or non-medical services related to and provided in conjunction with an abortion (whether or not provided at the same time or on the same day as the abortion).
8. *Box v. Planned Parenthood of Indiana and Kentucky, Inc.*, 587 U.S. ___ (2019), Justice Thomas, concurring, https://www.supremecourt.gov/opinions/18pdf/18-483_3d9g.pdf (accessed September 19, 2021)..
9. Fact Sheet, "Science of Fetal Pain at 20 Weeks," Charlotte Lozier Institute, Spring 2020, https://s27589.pcdn.co/wp-content/uploads/2020/02/Science-of-Fetal-Pain-Fact-Sheet-Spring2020.pdf (accessed September 19, 2021).
10. S. 61, Pain-Capable Unborn Child Protection Act, 117th Cong., introduced January 27, 2021, https://www.congress.gov/bill/117th-congress/senate-bill/61/text?r=4&s=1 (accessed September 19, 2021), and H.R. 1080, Pain-Capable Unborn Child Protection Act, 117th Cong. introduced February 15, 2021, https://www.congress.gov/bill/117th-congress/house-bill/1080/all-info (accessed September 19, 2021).
11. American Association of Pro-Life Obstetricians & Gynecologists, "Medical Management of Elective Induced Abortion," *Practice Bulletin* No. 8, February 25, 2020, https://aaplog.org/wp-content/uploads/2020/03/FINAL-PB-8-Medical-Management-of-Elective-Induced-Abortion.pdf (accessed September 19, 2021).
12. See also Melanie Israel, "Chemical Abortion: A Review," Heritage Foundation *Backgrounder* No. 3603, March 26, 2021, https://www.heritage.org/sites/default/files/2021-03/BG3603.pdf.
13. Susan B. Anthony List, "Where Do Americans Stand on Abortion?"