

To: Members of Congress

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Subject: The Abortion on Demand Until Birth Act (also called the Women’s Health Protection Act)

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In early September, Speaker Nancy Pelosi [announced](#) the House of Representatives will consider the Women’s Health Protection Act when the House reconvenes later this month. This bill would be better titled the Abortion on Demand Until Birth Act as it eviscerates common-sense pro-life laws nationwide and creates a federal right to carry out abortions on unborn children for any reason throughout pregnancy.

### **Background**

As states are increasingly moving to [humanize the law](#) through legislation that acknowledges the unique human characteristics of unborn children, the Abortion on Demand Until Birth Act does the opposite. It ignores the science and enshrines the outdated ideas that led to the *Roe v. Wade* decision nearly fifty years ago.

Gone are the days when the abortion industry could hide behind the myth that a child in the womb is just a “blob of tissue.” Today’s science shows:

- At 6 weeks:
  - Unborn babies in the womb have a heartbeat of about 98 beats per minute.
  - Blood vessels are forming into the circulatory system.
  - The brain and spinal cord are beginning to develop.
- By 10 weeks:
  - Babies have arms and legs, fingers and toes.
  - The baby can kick and will jump if startled.
  - Their pain receptors have been developing for weeks (week 7).
- At 15 weeks, babies:
  - Have fully developed hearts – pumping 26 quarts of blood per day.

As state legislatures follow the science and protect the most fragile humans, the abortion lobby fears the courts may do the same in the Mississippi late-term abortion case *Dobbs v. Jackson Women’s Health Organization*. At issue is a Mississippi law protecting unborn children at 15 weeks. Oral arguments in the case are expected before the end of the year and a decision by June of 2022. In this landmark case the court will [consider](#) whether “all pre-viability prohibitions on elective abortions are unconstitutional.”

If the court were to lift the viability standard entirely, it would be the responsibility of federal and state lawmakers to determine the parameters under which abortion is, or is not, permitted. Desperate to lock down their abortion agenda after years of reliance on unelected judges who maintained the so-called right to abortion, the abortion lobby created the Abortion on Demand Until Birth Act to strip state lawmakers of the power to legislate regarding abortion, instead creating a national standard of unfettered abortion. But they didn't stop there. This bill not only overturns recent laws protecting unborn children before viability, but also overturns longstanding commonsense laws upheld by the Supreme Court such as informed consent and waiting periods.

The abortion lobby knows that science is not on their side, and neither is the public:

- 65% of Americans think states should make abortion laws.
- 65% of Americans say abortion should be illegal in the second trimester.
- 80% of Americans say abortion should be illegal in the third trimester.

For more information about public opinion and abortion, please see [www.sba-list.org/polling](http://www.sba-list.org/polling).

The Texas Heartbeat Act (SB8) has also given abortion advocates renewed interest in enshrining sweeping abortion protections. However, it should be noted, that the Supreme Court has not ruled on the merits of the law, but rather on whether the Court has grounds to block the Heartbeat Act at this juncture. For resources regarding the Heartbeat Act, please see [Texas-Heartbeat-Act-One-Pager-1.pdf \(sba-list.org\)](#).

## **Analysis of H.R. 3755**

### **Overview**

This bill, titled the Women's Health Protection Act of 2021, is more aptly titled the Abortion on Demand Until Birth Act. Look no further than the findings to see why. Finding 16 cites the United Nations human rights treaty, saying, "legal abortion services, like other reproductive health care services, must be available, accessible, affordable, acceptable, and of good quality..."

Building on that, the stated purpose of the bill in section 2(b) is "to permit health care providers to provide abortion services without limitations or requirements that single out the provision of abortion services...and make abortion services more difficult to access..." and "to promote access to abortion services..."

The emphasis is on permitting health care providers to provide abortion without limitations, and the bill findings make clear that this bill is designed to protect abortion business: "Health care providers engage in a form of economic and commercial activity when they provide abortion services, and there is an interstate market for abortion services."

### **Prohibited Pro-Life Laws**

Section 4(a) declares, "A health care provider has a statutory right under this Act to provide abortion services, and may provide abortion services, and that provider's patient has a corresponding right to receive such services without any of the following limitations or

requirements...” A list of specifically prohibited types of pro-life laws follows, including policies that have been upheld by the Supreme Court under the *Roe* doctrine, like informed consent and waiting period laws.

Two provisions (sections 4(a)(4) and (5)) block laws protecting against telemedicine abortion and/or mail-order abortion pills. This ignores the [risks](#) to women of unsafe do-it-yourself abortions without seeing a doctor first. Because the bill prohibits states from enacting effective laws that “single out” abortion or abortionists (section 4(b)(2)), any law addressing the unique dangers associated with mail-order abortion would be blocked.

In section 4(a)(8), the Abortion on Demand Until Birth Act would also enshrine the outdated viability standard currently slated for consideration by the Supreme Court, by blocking “a prohibition on abortion at a point or points in time prior to fetal viability, including a prohibition or restriction on a particular abortion procedure.”

The bill defines viability as “the point in a pregnancy at which, in the good-faith medical judgment of the treating health care provider, based on the particular facts of the case before the health care provider, there is a reasonable likelihood of sustained fetal survival outside the uterus with or without artificial support” (Sec. 3(7)).

While most Americans associate viability with a gestational age of about 22 weeks, abortionists – who have a much more pliable definition of viability – would have full discretion to determine viability in this bill.

The abortion industry’s view of viability was demonstrated by the [testimony](#) of Dr. Colleen McNicholas, Chief Medical Officer for Planned Parenthood for the St. Louis Region and Southwest Missouri, during her testimony before the Oversight and Government Reform Committee in November 2019. Asked when she considered an unborn child to be viable, she [said](#), “There is no particular gestational age. There are some pregnancies in which the fetus will never be viable...” Later she affirmed, “My practice includes abortion care through the point of viability and as we previously discussed that could be at any point.”

Section 4(a)(8) clearly blocks protections for unborn children at 15 weeks – currently under litigation before the Supreme Court – or at 20 weeks – the age in popular bills restricting painful-late term abortions – or, based on Colleen McNicholas’ slippery testimony, at any point in pregnancy. For more information about fetal pain please see [this article](#) from the Charlotte Lozier Institute and this [Amicus Brief](#) filed in the *Dobbs* case.

Section 4(a)(8) also expressly prohibits states from restricting “a particular abortion procedure,” such as brutally painful dismemberment abortions. (Note: a later section of the bill allows the Partial-Birth Abortion Ban Act to remain in place.)

Section 4(a)(9) further enshrines abortion until birth by blocking “a prohibition on abortion after fetal viability when, in the good-faith medical judgment of the treating health care provider, continuation of the pregnancy would pose a risk to the pregnant patient’s life or health.” This

*post-viability* health exception fails to acknowledge the option of delivering the unborn child to preserve his or her life while also addressing the health condition of the mother. Medical emergency exceptions are sometimes included in state pro-life laws, but those narrowly tailored exceptions are not what the Abortion on Demand Until Birth Act envisions. Instead, it gives full decision-making regarding use of the health exception to the abortion industry who has a financial interest in completing the abortion. Neither “health” nor “risk” is defined in the Act, but the Act directs the courts to “liberally construe” provisions of the Act to “effectuate” its “purposes.”

The *Doe v. Bolton* decision, issued as the companion to *Roe v. Wade*, set very broad parameters for health exceptions, stating,

*We agree with the District Court, [that ‘the term “health” presented no problem of vagueness’] that the medical judgment may be exercised in the light of all factors -- physical, emotional, psychological, familial, and the woman's age -- relevant to the well-being of the patient. All these factors may relate to health.*

This sweeping health exception is meant to be construed broadly as any psychological, social, or emotional impact whatsoever. In so doing, it has the effect of making abortion available throughout all of pregnancy without any meaningful restriction.

Section 4(a)(11) targets laws connected to the reason for the abortion, creating an impediment to the ability of states to prevent discrimination abortions targeting unborn babies with Down Syndrome or other [fetal anomaly diagnoses](#), or discrimination abortion based on [characteristics like sex](#).

As if the extremism on full display in subsection (a) were not sufficient, the authors added this final catchall in subsection (b):

*The statutory right specified in subsection (a) shall not be limited or otherwise infringed through... any limitation or requirement that (1) is the same or similar to one or more of the limitations or requirements described in subsection (a); or (2) 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.*

The second part of this subsection is simple. If a law specifically regulates abortion and impedes access to abortion services (i.e. reduces abortion), it is illegal. This is made clear in section 4(c)(2) which lists the following as a factor for determining if a policy impedes access to abortion services: “Whether the limitation or requirement is reasonably likely to delay or deter some patients in accessing abortion services.”

## **Preemption and Liberal Construction**

In the next sections, it is made clear that the bill will supersede all state laws and all current and future federal laws, including the Religious Freedom Restoration Act, and would be effective

immediately. A narrow carveout is applied to allow continued application of a federal law regarding access to clinics, laws on the treatment of insurance and medical coverage of abortion, the Partial-Birth Abortion Ban Act, and state contract law (see section 5(b)).

As if the law were not sweeping enough, section 7 directs the courts to “liberally construe” the statute to “effectuate the purposes of the Act.”

Section 8 gives the Attorney General authority to seek injunctive relief against any pro-life law prohibited by the Act. Individuals, including abortion providers, may also sue for injunctive relief and a prevailing plaintiff may receive reimbursement for the cost of litigation.

**Note regarding conscience rights:** While forcing physicians, nurses and other health care entities to participate in abortion is not expressly listed as a requirement under the act, sections 4(a) and (b) state “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...* (emphasis added). It is not clear whether the patient only has a right to receive such services from a willing provider, or whether their right could be imposed on any health care provider. The latter is very likely when considered in light of the rule of liberal construction in section 7.

## **Conclusion**

The Abortion on Demand Until Birth Act has one purpose – to shore up the abortion industry nationwide by giving them a carte blanche to carry out abortions throughout pregnancy for any reason. As the American people – and perhaps the Supreme Court – see the error of *Roe v. Wade*, the abortion industry has turned to their allies in Congress to demand full support for brutal abortion.