June 16, 2021

Hon. Dick Durbin, Chair
Senate Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, DC 20510

Hon. Chuck Grassley, Ranking Member
Senate Committee on the Judiciary
152 Dirksen Senate Office Building
Washington, DC 20510

Hon. Richard Blumenthal, Chair
Senate Committee on the Judiciary
Subcommittee on the Constitution
224 Dirksen Senate Office Building
Washington, DC 20510

Hon. Ted Cruz, Ranking Member
Senate Committee on the Judiciary
Subcommittee on the Constitution
152 Dirksen Senate Office Building
Washington, DC 20510

Dear Senators Durbin, Grassley, Blumenthal, and Cruz:

We write to share our view that Congress has constitutional authority to pass S. 1975, the Women's Health Protection Act ("WHPA"). It has such authority pursuant to the Commerce Clause and the Necessary and Proper Clause in Section 8 of Article I of the Constitution. It also has such authority under Section 5 of the Fourteenth Amendment to the Constitution. This letter is limited to discussing these two clear sources of congressional authority.

The Commerce Clause

The Commerce Clause empowers Congress to "regulate Commerce . . . among the several states."[1] In addition, the Necessary and Proper Clause grants Congress authority to "make all Laws which shall be necessary and proper for carrying into Execution" its constitutional powers.[2] Pursuant to these powers, Congress can regulate three categories of conduct. "First, Congress can regulate the channels of interstate commerce. Second, Congress has authority to regulate and protect the instrumentalities of interstate commerce, and persons or things in interstate commerce. Third, Congress has the power to regulate activities that substantially affect interstate commerce."[3] Intrastate conduct "may still be reached by Congress if it exerts a substantial economic effect on interstate commerce."[4]

All nine circuit courts to address the question have held that Congress has authority under the Commerce Clause to protect access to abortion services.[5] These courts thus upheld the Freedom of Access to Clinic Entrances Act of 1994. In addition, in *Gonzales v. Carhart*, though the Supreme Court did not rule on Congress's authority to pass the Partial Birth Abortion Act of 2003, it referenced Congress's power "under the Commerce Clause, to regulate the medical profession."[6]

---

[1] U.S. Const. art. I, § 8, cl. 3.
[2] U.S. Const. art. I, § 8, cl. 18.
[3] *Gonzales v. Raich*, 545 U.S. 1, 16-17 (2005).
[4] *Id.* at 17 (quoting *Wickard v. Filburn*, 317 U.S. 111, 125 (1942)). Congress thus can "regulate purely local activities that are part of an economic 'class of activities' that have a substantial effect on interstate commerce." *Id.*
[5] *See Norton v. Ashcroft*, 298 F.3d 547, 556 (4th Cir. 2002) (citing cases); *see also U.S. v. Bird*, 401 F.3d 633, 634 (5th Cir. 2004) (reaffirming prior holding).
[6] *Gonzales v. Carhart*, 505 U.S. 124, 166 (2007).

The conduct regulated by WHPA substantially affects interstate commerce.[7] WHPA regulates a "commercial activity – the provision and receipt of reproductive health services."[8] "There is a national market for abortion services."[9] Every year, tens of thousands of women cross state lines to obtain abortion services.[10] An estimated one hundred doctors travel across state lines to provide abortion services.[11] In addition, abortion clinics "purchase medicine, medical supplies, surgical instruments and other necessary products, often from other States."[12] The conduct regulated by WHPA affects the supply[13] and demand[14] for clinical abortion care.

The goods and services protected by WHPA cannot be protected by the states acting separately. A state cannot protect its residents "who may need [abortion] care while present as students, workers, or visitors" in other states.[15] Nor can a state protect "the ability of their duly licensed physicians to provide abortion services" in other states.[16] Moreover, a reduction in the

---

[7] Insofar as clinics are buying and selling goods and services across state lines, WHPA "protects the instrumentalities of interstate commerce, and persons or things in interstate commerce." *Raich*, 545 U.S. at 16-17. All of the activity regulated by WHPA "substantially affect[s] interstate commerce." *Id.* at 17.

[8] *Norton*, 298 F.3d at 556 (quoting *Dinwiddie*, 76 F.3d 913, 919 (8th Cir. 1996)); *see also* Elizabeth Witwer et al., *Abortion service delivery in clinics by state policy climate in 2017*, 2 Contraception: X 100043 (2020) (in 2017, clinics charged average of $549 for first-trimester surgical abortion); Sarah Roberts et al., *Out-of-Pocket Costs and Insurance Coverage for Abortion in the United States*, Women's Health Issues, Mar.-Apr. 2014 (average out-of-pocket cost of abortion is $474).

[9] *Norton*, 298 F.3d at 558; *see also* Rachel K. Jones, Elizabeth Witwer & Jenna Jerman, *Abortion Incidence and Service Availability in the United States, 2017*, Guttmacher Inst. (Sept. 2019) (95% of abortions are provided by clinics).

[10] *See* Christina A. Cassidy, *Women seek abortions out of state amid restrictions*, Associated Press (Sept. 8, 2019) ("[A]t least 276,000 women terminated their pregnancies outside their home state between 2012 and 2017. . . . Nationwide, women who traveled from another state received at least 44,860 abortions in 2017, the most recent year available, according to the AP analysis of data from 41 states. That's about 10% of all reported procedures that year."); *see also Dinwiddie*, 76 F.3d at 919-20 ("Substantial numbers of women travel across state lines to obtain reproductive-health services.") (citing cases).

[11] *See* Soumya Karlamangla, *60 hours, 50 abortions: A California doctor's monthly commute to a Texas clinic*, Los Angeles Times (Jan. 24, 2019). More than 20% of U.S. doctors maintain active licenses to practice medicine in more than one State. *See* Aaron Young et al., *FSMB Census of Licensed Physicians in the United States, 2018*, 105 J. Med. Reg. 7, 11 (July 2019).

[12] *Norton*, 298 F.3d at 547 (quoting S. Rep. No. 103-117, at 31 (1993)).

[13] *See, e.g.*, *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2312-13, 2316 (2016) (Texas's "admitting-privileges requirement led to the closure of half of Texas' clinics, or thereabouts [from about forty to about twenty]. Those closures meant fewer doctors, longer waiting times, and increased crowding"; Texas's ambulatory surgical-center requirement "would further reduce the number of abortion facilities available to seven or eight facilities, located in Houston, Austin, San Antonio, and Dallas/Fort Worth," and "these few facilities could not "meet" that "demand.").

[14] "When a State severely limits access to safe and legal procedures, women in desperate circumstances may resort to unlicensed rogue practitioners . . . ." *Whole Woman's Health*, 136 S. Ct. at 2321 (Ginsburg, J., concurring). They may also attempt to self-manage their abortion. When Texas implemented TRAP laws, attempted self-induction rates measured triple the national average; women interviewed cited clinic closures as a key factor. Liza Fuentes et al., *Texas women's decisions and experiences regarding self-managed abortion*, BMC Women's Health, Jan. 2020; *see also* Abigail Aiken et al., *Demand for Self-Managed Medication Abortion Through an Online Telemedicine Service in the United States*, Am. J. Public Health, Jan. 2020 (76% of U.S. residents' requests to a website for medication abortion came from residents of states hostile to abortion).

[15] Brief for State of New York et al. as Amici Curiae in Supp. of Pet'rs at 1, *June Med. Servs. v. Russo*, 140 S. Ct. 2103 (2020) (Nos. 18-1323, 18-1460).

[16] *Id.*

availability of abortion services in one state can effectively "outsource" the provision of those services to other states.[17] "Those States can also reasonably expect meaningful increases in the number of out-of-state patients seeking later abortions, as many women may have to delay obtaining such services until they are able to obtain adequate funds for interstate travel."[18]

For the above reasons, Congress has the authority to enact WHPA pursuant to its Commerce Clause authority.

Fourteenth Amendment

Section 5 of the Fourteenth Amendment states that "Congress shall have the power to enforce, by appropriate legislation," the provisions of the Fourteenth Amendment, including Section 1 of the Amendment, which provides that no State shall "deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."[19] "Legislation which deters or remedies constitutional violations can fall within the sweep of Congress's enforcement power even if in the process it prohibits conduct which is not itself unconstitutional and intrudes into 'legislative spheres of autonomy previously reserved to the states.'"[20] The test is whether there is "congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end."[21]

WHPA seeks to protect the constitutional right of a woman to decide to end her pregnancy before viability, without the state imposing an undue burden on that right, and to end her pregnancy after fetal viability where it is necessary, in the good-faith medical judgment of the treating health care professional, for preservation of her life or health.[22]

The Supreme Court repeatedly has recognized the right of an individual "to be free from unwarranted government intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."[23] "These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and

---

[17] *Id.* at 4; *see also id.* at 20 ("History shows that many women will cross state lines, if they have the means to do so, when abortions are unavailable in their States of residence. . . . And in recent years, several States have experienced a substantial influx of patients seeking abortions following the enactment of onerous abortion restrictions by neighboring States.").

[18] *Id.* at 29; *see also* Brief for American College of Obstetricians and Gynecologists, American Medical Association et al. as Amici Curiae in Supp. of Pet'rs, *June Med. Servs. v. Russo*, 140 S. Ct. 2103 (2020) (Nos. 18-1323, 18-1460) ("During the first six months following the implementation of H.B. 2's privileges requirement, when at least one-third of Texas's clinics closed, there was a demonstrable increase in the proportion of abortions performed in the second trimester compared to the prior twelve-month period. . . . Laws that unnecessarily restrict women's access to abortion . . . disproportionately impact poor women, women of color, and young women. Women in these groups are more likely than others to experience unintended pregnancies. They are also more likely than others to seek abortion care. Women in these groups may face unique challenges in obtaining an abortion . . . . For example, one of the primary causes in delaying abortion care is the time it takes to raise money for travel and procedure costs (which continue to increase as the pregnancy progresses).").

[19] U.S. Const. amend. XIV, §§ 1, 5.

[20] *City of Boerne v. Flores*, 521 U.S. 507, 518 (1997) (quoting *Fitzpatrick v. Bitzer*, 427 U.S. 445, 445 (1976)).

[21] *Id.* at 520.

[22] *See Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992).

[23] *Id.* at 851 (quoting *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972)).

autonomy, are central to the liberty protected by the Fourteenth Amendment."[24] It is therefore "wrong to equate the judicial review applicable to the regulation of [this] constitutionally protected personal liberty with the less strict review applicable" to general state laws.[25] The right to abortion is "a rule of law and a component of liberty we cannot renounce."[26]

This right to end a pregnancy is of grave importance to women. "The ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives."[27] Approximately one in four women will have an abortion by age forty-five.[28] Approximately three-quarters of women obtaining an abortion are poor or low-income.[29] Women of color, women with low income, and young women make up a disproportionate number of the women obtaining abortions.[30] Access to abortion improves women's educational, economic, and health outcomes, and lowers the risk of violence for women in abusive relationships. In addition, fifty-nine percent of abortion patients are already parents, and restricted access to abortion negatively affects not just women but also their current and future children, for whom women seek to provide care.[31] Abortion access is a foundational element of women's equal ability to further their health, education, employment, and life's course.[32]

There is "a pattern of constitutional violations of the States in this area."[33] Many of these violations are reflected in court decisions over a period of decades. Other state laws go unchallenged because of the sheer volume of restrictions passed.[34] It is a current, widespread and growing problem that states are knowingly banning abortion before viability in violation of Supreme Court law, and that states are using women's health as a pretext to justify regulations designed to reduce abortion access.[35]

---

[24] *Id.*
[25] *Whole Woman's Health*, 136 S. Ct. at 2309-10 (contrasting the scrutiny of abortion restrictions to the scrutiny in *Williamson v. Lee Optical of Okla.*, 348 U.S. 483 (1955)).
[26] *Casey*, 505 U.S. at 871.
[27] *Id.* at 856.
[28] Jenna Jerman, Rachel Jones & Tsuyoshi Onda, *Characteristic of U.S. Abortion Patients in 2014 and Changes Since 2008*, Guttmacher Institute (2016).
[29] *Id.*
[30] *Id.*; *see also supra* note 18.
[31] *See* Brief for National Women's Law Center et al. as Amici Curiae in Supp. of Pet'rs, *June Med. Servs. v. Russo*, 140 S. Ct. 2103 (2020) (Nos. 18-1323, 18-1460); Brief for Social Science Researchers as Amici Curiae in Supp. of Pet'rs, *June Med. Servs. v. Russo*, 140 S. Ct. 2103 (2020) (Nos. 18-1323, 18-1460); Rhia Ventures, *Hidden Value: The Business Case for Reproductive Health* (2020).
[32] Though in light of the woman's clear liberty interest, it is not necessary to reach the matter, abortion restrictions also harm women's equality, and rely on and reinforce stereotypes about women's roles, women's decisionmaking, and women's need for protection. *See Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721 (2003) (holding that family-care provision of Family and Medical Leave Act is a valid exercise of congressional power under Section 5 of the Fourteenth Amendment to enforce the Equal Protection Clause).
[33] *Id.* at 729 (2003); *see also Tenn. v. Lane*, 541 U.S. 509, 525 (2004) (upholding Title II of the Americans with Disabilities Act as applied to access to the courts based on a "pattern of unconstitutional treatment").
[34] *See* Center for Reproductive Rights, *What if* Roe *Fell?* (2019).
[35] *See* Brief for 197 Members of Congress as Amici Curiae in Supp. of Pet'rs, *June Med. Servs. v. Russo*, 140 S. Ct. 2103 (2020) (Nos. 18-1323, 18-1460); Brief for Catholics for Choice et al. as Amici Curiae in Supp. of Pet'rs, *June Med. Servs. v. Russo*, 140 S. Ct. 2103 (2020) (Nos. 18-1323, 18-1460).

WHPA is a congruent and proportional remedy. WHPA focuses on bans and unnecessary medical regulations which do not confer any health benefit but which substantially reduce access to abortion. This is consistent with Supreme Court law.[36]

Accordingly, WHPA is a valid exercise of Congress's legislative authority under Section 5 of the Fourteenth Amendment.

* * *

For the above reasons, Congress has the constitutional power to pass WHPA.

Sincerely,[37]

Erwin Chemerinsky
Dean & Jesse H. Choper Distinguished Professor of Law
University of California Berkeley School of Law

Walter E. Dellinger III
Douglas B. Maggs Professor Emeritus of Law
Duke University School of Law

Michael C. Dorf
Robert S. Stevens Professor of Law
Cornell Law School

Geoffrey R. Stone
Edward H. Levi Distinguished Professor of Law
University of Chicago Law School

Laurence H. Tribe
Carl M. Loeb University Professor and
Professor of Constitutional Law Emeritus
Harvard Law School

[36] *See June Med. Servs.*, 140 S. Ct. at 2112-13 (plurality opinion); *id.* at 2133-34 (Roberts, C.J., concurring in judgment); *Whole Woman's Health*, 136 S. Ct. at 2309; *Casey*, 505 U.S. at 878-79.
[37] Institutional affiliation is noted for identification purposes only and does not constitute institutional endorsement.