

Colorado Chapter of National Lawyers Association
Commission for the Protection of Constitutional Rights

TESTIMONY OF BRAD BERGFORD

Regarding House Bill 16-1218

Women's Reproductive Information Guarantee for Health and Transparency (RIGHT) Act

April 21, 2016

The Pennsylvania Abortion Control Act, which was litigated and appealed to the Supreme Court in *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), required:

- 1) A doctor to provide a woman seeking an abortion with information and imposed a waiting period of at least 24 hours between provision of the information and the abortion;
- 2) A minor to obtain consent of one parent or a judge's order before having an abortion;
- 3) A married woman to sign a statement averring that her husband had been notified, her husband was not the father, her husband forcibly had impregnated her, or that she would be physically harmed if she notified her husband; and
- 4) A public report on every abortion, detailing information on the facility, physician, patient, and steps taken to comply with the Act. (The name of the patient was confidential.)

The first three provisions did not apply in medical emergencies, i.e., physician determined immediate abortion necessary to avert death or serious risk of substantial, irreversible impairment of a major bodily function.

The issue in *Planned Parenthood v. Casey* was whether a law is unconstitutional as an undue burden on a woman's right to an abortion before fetal viability, if the law places a substantial obstacle in the path of a woman's exercise of her right.

The sharply divided court held that a law is unconstitutional as an undue burden on a woman's right to an abortion before fetal viability if it places a substantial obstacle in the path of a woman seeking to exercise her right. The Court also affirmed its holding in *Roe v. Wade* holding that after viability the state may regulate, or even prohibit, abortion, except where it is necessary to preserve the life or health of the mother. *Planned Parenthood v. Casey* represents the first time that the Court downgraded a fundamental right to a protected liberty interest.

So, the question regarding this bill is whether it's provisions constitute an undue burden on a woman's right to an abortion before fetal viability.

The Court held that states can require information that "is truthful and not misleading" be made available to a woman to help ensure that she "apprehend the full consequences of her decision." The court stated that doing so reduces "the risk that a woman may elect an abortion, only to

discover later, with devastating psychological consequences, that her decision was not fully informed.”

State Laws Summary¹:

38 states require that women receive counseling before an abortion is performed: 30 of these states detail the information a woman must be given; 8 states have abortion-specific requirements generally following the established principles of informed consent.

28 of these states also require women to wait a specified amount of time—most often 24 hours—between the counseling and the abortion procedure.

14 states require that counseling be provided in person and that the counseling take place before the waiting period begins, thereby necessitating two separate trips to the facility

28 states direct the state health agency to develop written materials: 10 require that the materials be given to a woman seeking an abortion, 18 require that the materials be offered to her

14 states require that the woman be informed that she cannot be coerced into obtaining an abortion.

Nearly all the states that require counseling require information about the abortion procedure and fetal development.

25 states require that the woman be given information about the specific procedure, while 23 require information about all common abortion procedures.

33 states require that the woman be told the gestational age of the fetus

27 states include information on fetal development throughout pregnancy.

12 states include information on the ability of a fetus to feel pain

6 states require that the woman be told that personhood begins at conception.

25 states include information about the risks of abortion.

20 states include accurate information on the potential effect of abortion on future fertility; in 4 states, the written materials inaccurately portray this risk.

5 of the 7 states that include information on breast cancer inaccurately assert a link between abortion and an increased risk of breast cancer

9 of the 22 states that include information on possible psychological responses to

¹ Source: https://www.guttmacher.org/sites/default/files/pdfs/spibs/spib_MWPA.pdf

abortion stress negative emotional responses.

Without question, the HB16-1218 is constitutional and reflects the sort of common-sense efforts that legislative bodies around the country have employed to provide important medical information.