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4 MARKUP OF H.R. 3541, THE SUSAN B. ANTHONY AND FREDERICK

5 DOUGLASS PRENATAL NONDISCRIMINATION ACT OF 2011

6 Tuesday, February 7, 2012

7 House of Representatives

8 Committee on the Judiciary

9 Washington, D.C.

10 The committee met, pursuant to call, at 3:30 p.m., in
11 Room 2141, Rayburn Office Building, Hon. Lamar Smith
12 [chairman of the committee] presiding.

13 Present: Representatives Smith, Sensenbrenner, Coble,
14 Gallegly, Chabot, Forbes, Franks, Jordan, Poe, Chaffetz,
15 Marino, Gowdy, Adams, Quayle, Amodei, Conyers, Nadler, Scott,
16 Watt, Lofgren, Waters, Johnson, and Quigley.

17 Staff present: Sean McLaughlin, Chief of Staff; Travis

18 Norton, Parliamentarian, Sarah Kish, Clerk; Perry Apelbaum,
19 Minority Staff Director; and David Shahanlian, Minority
20 Counsel.
21

22 Chairman Smith. Without objection, the chair is
23 authorized to declare recesses of the committee at any time.

24 The clerk will call the roll to establish a quorum?

25 Ms. Kish. Mr. Smith?

26 Chairman Smith. Present.

27 Ms. Kish. Mr. Sensenbrenner?

28 Mr. Sensenbrenner. Present.

29 Ms. Kish. Mr. Coble?

30 Mr. Gallegly?

31 Mr. Gallegly. Present.

32 Ms. Kish. Mr. Goodlatte?

33 Mr. Lungren?

34 Mr. Chabot?

35 Mr. Chabot. Present.

36 Ms. Kish. Mr. Issa?

37 Mr. Pence?

38 Mr. Forbes?

39 Mr. King?

40 Mr. Franks?

41 Mr. Franks. Here.

42 Ms. Kish. Mr. Gohmert?

43 Mr. Jordan?

44 Mr. Jordan. Here.

45 Ms. Kish. Mr. Poe?

46 Mr. Poe. Present.

47 Ms. Kish. Mr. Chaffetz?

48 Mr. Chaffetz. Present.

49 Ms. Kish. Mr. Griffin?

50 Mr. Marino?

51 Mr. Gowdy?

52 Mr. Gowdy. Present.

53 Ms. Kish. Mr. Ross?

54 Ms. Adams?

55 Ms. Adams. Present.

56 Ms. Kish. Mr. Quayle?

57 Mr. Amodei?

58 Mr. Amodei. Present.

59 Ms. Kish. Mr. Conyers?

60 Mr. Conyers. Present.

61 Ms. Kish. Mr. Berman?

62 Mr. Nadler?

63 Mr. Nadler. Here.

64 Ms. Kish. Mr. Scott?

65 Mr. Scott. Here.

66 Ms. Kish. Mr. Watt?

67 Mr. Watt. Present.

68 Ms. Kish. Ms. Lofgren?

69 Ms. Jackson Lee?

70 Ms. Waters?

71 Mr. Cohen?

72 Mr. Johnson?

73 Mr. Pierluisi?

74 Mr. Quigley?

75 Ms. Chu?

76 Mr. Deutch?

77 Ms. Sanchez?

78 Mr. Polis?

79 Chairman Smith. Are there other members who wish to
80 record their presence? If not, the clerk will report?

81 Ms. Kish. Mr. Chairman, 15 members responded present.

82 Chairman Smith. A working quorum is present. Pursuant
83 to notice, I now call up H.R. 3541 for purposes of markup.

84 And the clerk will report the bill?

85 Ms. Kish. H.R. 3541, to prohibit discrimination against
86 the unborn on the basis of sex or race and for other --

87 Chairman Smith. Without objection, the bill will be
88 considered as read.

89 [The information follows:]

90

91 Chairman Smith. And I will recognize myself for an
92 opening statement.

93 First of all, I want to thank Chairman Franks for
94 introducing the Prenatal Nondiscrimination Act, also called
95 PRENDA. This legislation prohibits the performance of an
96 abortion with the knowledge it was sought based on the race
97 or sex of the child.

98 The bill also prohibits the solicitation or acceptance
99 of funds for such purposes, and prohibits the Federal
100 funding of abortions based on race or sex.

101 As the *New York Times* has reported, "There is evidence
102 that some Americans want to choose their baby's sex through
103 abortions."

104 These sex selection abortions discriminate strongly
105 against females, and they are overwhelmingly opposed by the
106 American people. According to the most recent Zogby poll on
107 the subject, 86 percent of those surveyed thought sex
108 selection abortions should be illegal. Regardless of one's
109 views on abortion generally, everyone should object to its
110 practice on the grounds of race or sex.

111 PRENDA prohibits abortions based on race or sex, and

112 imposes the same penalties for a violation of its provisions
113 that are provided in the Civil Rights Act of 1964, including
114 a loss of Federal funding for offenders.

115 Arizona has already passed its own State-level version
116 of PRENDA. The law passed both the Arizona House and Senate
117 by over two-thirds margins. Similar bills have been
118 introduced in at least eight other States so far.

119 It is time to end the practice of using race or sex as
120 an excuse for abortion, and I thank Chairman Franks again
121 for his leadership on this issue.

122 That concludes my opening statement, and the gentleman
123 from Michigan, the ranking member of the Judiciary
124 Committee, is recognized for his opening statement?

125 Mr. Conyers. Thank you, Chairman Smith, and members of
126 the committee. Despite the lofty name of this bill and the
127 invocation of two of our great civil rights leaders, H.R.
128 3541 is the latest in a series of measures intended to chip
129 away at a woman's right to seek safe, legal medical care.

130 The Anthony-Douglass Prenatal Nondiscrimination Act
131 directly challenges a core holding of *Roe v. Wade* by placing
132 a prohibition on certain pre-viability in abortions. And

133 so, proponents of this legislation, I think, have
134 deliberately, and a few perhaps not intentionally, publicly
135 indicated this bill is intended to undermine and ultimately
136 overturn *Roe versus Wade*.

137 This bill has nothing to do with civil rights that
138 Anthony and Douglass tirelessly worked for, but instead will
139 target women for suspicion based on their race or ethnicity.
140 And after a number of terms in Congress, this legislation
141 approaches the shocking stage.

142 First, let me point out that the sponsors of the bill
143 point to misleading information as a reasoning for this
144 drastic measure. The memo of the majority to committee
145 members cites as the only evidence of a conspiracy against
146 the African-American community the first sentence of a 2008
147 policy journal article that states there is a higher
148 abortion rate for black women compared to white women.

149 What the memo does not tell you is that the report by
150 the Guttmacher Institute goes on to say that anti-abortion
151 activists have been waging a campaign around this fact,
152 falsely asserting that the disparity is the result of
153 aggressive marketing by abortion providers to minority

154 communities.

155 These activists are exploiting and distorting the facts
156 to serve their anti-abortion agenda. They ignore the
157 fundamental reason women have abortions and the underlying
158 problem of racial and ethnic disparities across an array of
159 health indicators. The truth is that behind virtually every
160 abortion is an unintended pregnancy.

161 In short, African-American women need better health care
162 services, not demonization and punitive legislation.

163 Now, this bill will make it more difficult for women of
164 color to obtain the basic reproductive health care services
165 that should be available to all women without reference to
166 race. And by threatening health care professionals with
167 prison time and lawsuits, it is inevitable that they will be
168 reluctant to treat some patients -- Asians, Pacific
169 Islanders, African-Americans, interracial couples -- where
170 someone might suspect that race or sex selection may be a
171 factor in the patient's decision.

172 And so, the third item that I would point is that 3541
173 tramples on the rights of women under the guise of
174 nondiscrimination, while doing nothing to provide women with

175 the resources they need to get adequate prenatal care so
176 that their babies, female and male, can come into this world
177 healthy, and so that both mother and child can thrive.

178 I will put the rest of my statement into the record, Mr.
179 Chairman, and thank you very much.

180 [The information follows:]

181

182 Chairman Smith. Thank you, Mr. Conyers.

183 The gentleman from Arizona, the chairman of the
184 Constitution Subcommittee, Mr. Franks, is recognized for an
185 opening statement?

186 Mr. Franks. Well, thank you, Mr. Chairman.

187 Mr. Chairman, in 1847, Frederick Douglass said, "Right
188 is of no sex; truth is of no color. God is the Father of us
189 all, and all are brethren."

190 Mr. Chairman, throughout America's history, we have
191 struggled to fulfill that conviction in our national life,
192 and it took a Civil War in this Nation to make the 7,000-
193 year-old State sanctioned practice of human slavery come to
194 an end ultimately across the world. American woman overcame
195 the mindless policy that deprived them of the right to vote.
196 Then this Nation charged into Europe and arrested the
197 hellish Nazi Holocaust. We crushed the Ku Klux Klan, and we
198 prevailed in the dark days of our own civil rights struggle.

199 In so many ways, we have made great progress in the area
200 of civil rights in this country, but there is one glaring
201 exception. We have overlooked unborn children and that life
202 itself is the most foundational of all civil rights.

203 The result is that in America today, between 40 and 50
204 percent of all African-American babies, nearly 1 in 2, are
205 killed before they are born, which is a greater cause of
206 death for African-Americans than heart disease, cancer,
207 diabetes, AIDS, and violence combined. A Hispanic child is
208 three times more likely to be aborted than a white child. A
209 black child is five times more likely to be aborted than a
210 white child.

211 Fourteen million African-American babies have been
212 aborted in America since *Roe versus Wade*. It translates to
213 fully one-fourth of the African-American population in
214 America today.

215 Add that to the thousands of little girls who have been
216 aborted in this country simply because they were little
217 girls instead of little boys, and these are travesties that
218 should assault the mind and conscience of every American.

219 The Susan B. Anthony/Frederick Douglass Prenatal
220 Nondiscrimination Act being marked up today by this
221 committee would help prevent race and sex discrimination
222 against the unborn by prohibiting anyone from subjecting
223 them to an abortion based on their sex or race, or coercing

224 a woman or transporting a woman into the United States to do
225 the same.

226 Medical associations have been fighting sex selection in
227 the form of abortion and embryo selection, sex selection,
228 for almost two decades. We are coming late to this party,
229 Mr. Chairman. The American College of Obstetricians and
230 Gynecologists, ACOG, the American Society of Reproductive
231 Medicine, ASRM, and the President's Council on Bioethics,
232 have all expressed condemnation of sex selection techniques.

233 The field of reproductive medicine is largely
234 unregulated in this country, and often all that stands in
235 the way of unethical practices are the unenforceable ethics
236 committee opinions of associations such as these.

237 A 2006 Zogby poll showed that 86 percent of all
238 Americans believe that sex selection abortions should be
239 illegal. PRENDA's support is further proved by its record
240 in the States. Wherever this bill has been voted upon, it
241 has passed overwhelmingly.

242 Most European countries and developed Asian countries
243 have either complete bans or significant restrictions on sex
244 selection abortion. The United States has condemned other

245 countries in our congressional resolutions, notably China,
246 for sex selection abortion practices; yet our own country
247 has become a safe haven for sex selection abortion.

248 In 2007, the United States spearheaded a resolution at
249 the United Nations calling on all member states to condemn
250 and discourage sex selection abortion; yet we are among the
251 worst offenders, at least in terms of legal permissiveness.

252 Mr. Chairman, it is time for us to come together and to
253 walk our talk. And that is what PRENDA is designed to do.

254 Now, I know that when the subject is related in any way
255 to abortion the doors of reason and human compassion in our
256 minds and hearts often close, and the humanity of the unborn
257 child can no longer be seen. But this is the civil rights
258 battle that will define our generation. And can we not at
259 least agree as Americans that it is wrong to knowingly kill
260 unborn children because they are the wrong color or because
261 they are baby girls instead of baby boys?

262 Mr. Chairman, I just want to thank you for your courage
263 in bringing up this bill for markup, and I truly hope that
264 its debate and passage will call all Americans in and
265 outside of Congress to an inward and heartfelt reflection

266 upon the humanity of unborn babies, and the inhumanity of
267 what is being done to them in 2012 in the land of the free
268 and the home of the brave.

269 And I would yield back.

270 Chairman Smith. Thank you, Mr. Franks.

271 The gentleman from New York, Mr. Nadler, the ranking
272 member of the Constitution Subcommittee is recognized for
273 his opening statement?

274 Mr. Nadler. Thank you, Mr. Chairman.

275 Despite the fact that this bill is couched in the
276 language of civil rights, indeed it amends the civil rights
277 crimes chapter of the Federal Criminal Code, it is nothing
278 more than yet another attack on the fundamental
279 constitutional rights of women. It does not improve their
280 ability to choose to have a healthy and successful
281 pregnancy. It does not improve the prospects for their
282 children once those children come into the world. It does
283 nothing to improve the lot of women who may really need our
284 help.

285 It does make abortion prior to viability a crime under
286 certain circumstances. This is facially unconstitutional.

287 The Supreme Court has held, beginning with *Roe v. Wade* and
288 confirmed in *Casey* and subsequent cases, that the decision
289 whether to have a child or whether to end a pregnancy is a
290 private one. Prior to viability, her choices, her thoughts,
291 her decisions, her reasons, her bodily integrity, are not
292 the State's business. It is no one's business but hers.

293 In *Roe versus Wade*, the Court said, "With respect to the
294 State's important and legitimate interest in potential life,
295 the compelling point is at viability." This is so because
296 the fetus then presumably has the capability of meaningful
297 life outside the mother's womb. State regulation protective
298 of fetal life after viability, thus, is both logical and
299 biological justifications. If the State is interested in
300 protecting fetal life after viability, it may go so far as
301 to proscribe abortion during that period, except when it is
302 necessary to preserve the life or health of the mother.

303 In addition to being unconstitutional insofar as it
304 affects pregnancies before viability, the bill provides an
305 opportunity for endless and costly litigation. In every
306 case, a doctor or a court or a jury will have to read a
307 woman's mind to determine what her thinking was when she

308 chose to have an abortion. It will turn medical personnel
309 into police, examining women's motives for choosing to have
310 an abortion, while at the same time trying to limit their
311 own civil and criminal liability.

312 Under this bill, a relative who disagreed with a woman's
313 choice would be able to sue a doctor simply by alleging that
314 the woman had an impermissible reason. The doctor would
315 face years of litigation at great expense proving what he
316 did or did not know as to her reasons or as to what the
317 woman may have been thinking at the time.

318 Any clinic employee who suspected that a woman's motives
319 ran afoul of this law would have a legal obligation, under
320 penalty of prison, to report that suspicion to law
321 enforcement.

322 How would this affect the basic practice of medicine?
323 Should a doctor tell a woman the sex of her fetus whether
324 she wants to know or not? Should a doctor discuss a woman's
325 options when she becomes pregnant? Should a doctor risk
326 discussing a woman's personal situation with her? Should a
327 doctor have to issue the medical equivalent of a *Miranda*
328 warning, anything you say to your doctor or to a member of

329 my staff can and will be used against you?

330 Perhaps my colleagues feel comfortable policing women's
331 thoughts, their bodies, and their personal decisions, but I
332 am not sure the medical profession is ready to do so. I
333 certainly am not, and the Constitution, at least prior to
334 viability, does not permit it.

335 As I said, this bill is facially unconstitutional. It
336 would bar a woman from having an abortion at any time
337 throughout pregnancy on the basis of her reasons. I am not
338 sure some of my colleagues believe there is ever a
339 legitimate reason for a woman to have an abortion, and they
340 have long opposed the constitutionally required exception to
341 any prohibition to protect a woman's health, but that is the
342 law.

343 While this bill may be an unconstitutional intrusion to
344 women's private choices, it does nothing to help women or
345 their children. That sort of legislation is not on the
346 agenda here or in this Republican controlled Congress.

347 Where is the legislation providing women with the means
348 to achieve independence so that they are not subject to
349 community and familial pressures, so they are less likely to

350 choose an abortion? Where is the funding for the Violence
351 Against Women Act? Where is the support for family planning
352 services so we have fewer unplanned pregnancies and,
353 therefore, fewer abortions? Where is the commitment to
354 maternal and child health programs?

355 It is a disgrace that pregnant women are not guaranteed
356 proper prenatal care and nutrition, and that every child is
357 not guaranteed proper health care and nutrition. President
358 Obama certainly tried to make great strides in providing
359 these basic services, which are available in every other
360 civilized and developed country. But some of my colleagues
361 seem to view maternal and child health care as a threat to
362 the republic.

363 There are many things Congress could do to assist women,
364 including women who are under pressure from their families
365 or communities to terminate a pregnancy. There are many
366 things we can do to deal with the phenomenon of the
367 preference for male children, strategies that have worked
368 and that assist women rather than turning them into suspects
369 or pariahs. We can work with their doctors and provide
370 necessary resources to women and their families, but that

371 costs money, and it does not play well in the world of
372 abortion politics.

373 If this were really about valuing the lives of women and
374 African-Americans, I think we would see legislation moving
375 through this committee to uplift their condition. We have
376 not seen anything but hostility to those efforts.

377 Mr. Chairman, if we want to do something about the
378 preference for male children, if we want to do something
379 about the continued undervaluing of women, if we want to do
380 something about fostering the autonomy of women, if we want
381 to do something about racial discrimination, if we want to
382 do something to promote maternal and child health, then we
383 should do it. But this bill does nothing to solve any of
384 those problems. It is merely another unconstitutional
385 assault on women's access to health care, and an attempt to
386 criminalize doctors and women.

387 I urge the members of this committee to reject this
388 cynical and destructive legislation.

389 I yield back.

390 Chairman Smith. Thank you, Mr. Nadler.

391 I am going to recognize the gentleman from Arizona for

392 the purposes of offering an amendment, and I am hoping we
393 can do this very, very quickly, and then we will need to
394 recess to go vote.

395 This amendment does nothing but add an acronym to the
396 title of the bill, but the gentleman from Arizona is
397 recognized for his amendment?

398 Mr. Franks. Mr. Chairman, I do have an amendment at the
399 desk, and it does indeed --

400 Chairman Smith. The clerk will report the amendment?

401 Ms. Kish. Amendment to H.R. 3541 --

402 Chairman Smith. Without objection, the amendment will
403 be considered as read.

404 [The amendment of Mr. Franks follows:]

405

406 Chairman Smith. And the gentleman from Arizona is
407 recognized to explain the amendment.

408 Mr. Franks. It makes minor technical changes, Mr.
409 Chairman. In addition to adding the acronym PRENDA, it also
410 makes clear that the mother in the case may bring action
411 against a person who violates any of PRENDA's four
412 prohibitions. That was already in the bill, but this makes
413 sure that he is on the same legal standing as other
414 plaintiffs. And it is technical only.

415 And I would yield back.

416 Chairman Smith. Thank you, Mr. Franks.

417 The gentleman from New York, Mr. Nadler, does he wish to
418 be recognized?

419 Mr. Nadler. Mr. Chairman, I do not really understand
420 what this amendment does. It was just handed to me.

421 Chairman Smith. Okay.

422 Mr. Nadler. It refers to various sections. Could we --

423 Chairman Smith. Yeah.

424 Mr. Nadler. Could we vote on this after we come back so
425 we --

426 Chairman Smith. We are not going to come back, but the

427 gentleman makes a good point. I want him to have an
428 opportunity to look at the --

429 Mr. Nadler. I cannot hear you.

430 Chairman Smith. I want the gentleman to have ample time
431 to look at the amendment, so we are not planning to come
432 back after this series of votes.

433 Mr. Nadler. We are not?

434 Chairman Smith. So, we will go on and stand in recess
435 until 1:00 tomorrow and resume the markup at that time. At
436 that time, we will proceed with debate on this amendment.

437 Mr. Nadler. I appreciate the chairman.

438 Chairman Smith. Yeah.

439 [Whereupon, at 3:58 p.m., the committee recessed, to
440 reconvene at 1:00 p.m., Wednesday, February 8, 2012.]