CENTER FOR REPRODUCTIVE RIGHTS

Written Testimony by the Center for Reproductive Rights
before the United States House of Representatives
Committee on Energy and Commerce
Subcommittee on Health
on "H.R., ___ the Protect Life Act"

February 9, 2011

Chairman Pitts, Ranking Member Pallone, and Members of the Subcommittee:

We are pleased to submit this testimony on behalf of the Center for Reproductive Rights in strong opposition to the so-called "Protect Life Act."

The Center for Reproductive Rights ("the Center") promotes women's equality worldwide by securing reproductive rights as constitutional and international human rights. We protect rights by litigating in state and federal courts, including the U.S. Supreme Court. In addition to our U.S. work, the Center brings groundbreaking cases under international law before the United Nations and regional human rights bodies.

The bill you are considering today – which would more aptly be named the "Sacrifice Women's Lives Act" – is a dangerous and wholly unnecessary measure that denies women access to essential abortion care, including care necessary to save their lives. It is callous and shameful, and should be rejected.

There is No Federal Funding for Abortion in Healthcare Reform.

Part of a larger effort to overturn healthcare reform and remove essential coverage from millions of American families, the Pits abortion ban – like the Stupak-Pitts ban before it – creates a fiction about federal funding to bar coverage of abortion services in the private insurance market.

Under the Affordable Care Act, each insurer offering a plan on the new exchange system may choose whether to provide abortion coverage in private plans.[1] Burdensome and elaborate

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restrictions on insurers required by the so-called "Nelson Amendment" ensure that no federal dollar will flow to coverage of abortion. Moreover, the troubling and burdensome restrictions in the Hyde Amendment apply to federal funds in healthcare reform.[2] Indeed, a federal court in Virginia recently noted that the Affordable Care Act "contains strict safeguards at multiple levels to prevent federal funds from being used to pay for abortion services beyond those in cases of rape or incest, or where the life of the woman would be endangered," concluding that any claim to the contrary was not "plausible."[3]

There are no holes to plug. Arguments to the contrary are merely intended to mask the real intent of the bill – eliminating private insurance coverage of abortion services.

The Pitts Abortion Ban Would Eliminate Abortion Coverage in the Health Insurance Exchanges.

The bill also would reach into uncharted territory by imposing substantial burdens on the private insurance marketplace. By prohibiting any funds authorized or appropriated by the Affordable Care Act from going toward "any *part* of the costs of any health plan that includes coverage of abortion,"[4] the Pitts ban would bar insurance plans in the new exchanges from providing abortion coverage if a single person receiving premium assistance credits enrolls. Because a great majority of individuals on the exchanges will be subsidized, the Pitts ban would therefore essentially ban coverage of abortion in the exchanges for everyone – including those paying for coverage entirely with private dollars. Insurers are unlikely to offer a product that a majority of potential customers are barred from purchasing.

In addition to those constraints, the bill imposes significant new administrative burdens on any plan in the exchanges that could hypothetically offer a full range of reproductive healthcare. The bill would require an insurance company offering a plan with abortion coverage to offer a second plan "identical in every respect except that it does not cover abortions."[5] Insurers that tried to continue to offer abortion coverage — as most plans currently do[6] — would face high costs, technical complexities, and duplicative administrative requirements,[7] making it very likely that the Pitts ban would force plans to stop offering abortion insurance coverage.

Although the bill offers up the ability for women to purchase "abortion riders," it is irrational to ask women and families to plan for an unplanned pregnancy by purchasing separate, supplemental coverage. Moreover, women receiving premium assistance cannot afford healthcare insurance, let alone a second insurance policy. Most importantly, history shows that insurers simply do not offer "rider" coverage even when they are able to do so.[8]

This ban impacts the millions of unsubsidized individuals and small business employees expected to participate in the insurance exchanges. Over time, these restrictions will affect more and more women, as the health insurance exchanges are designed to grow over time to encompass the large-employer market.[9]

The Pitts ban would also decrease – or even eliminate – abortion coverage in the private market. A George Washington University Medical Center School report found after analyzing the similarly onerous Stupak-Pitts ban that "the treatment exclusions required . . . will have an industry-wide effect, eliminating coverage of medically indicated abortions over time for all women, not only those whose coverage is derived through a health-insurance exchange."[10]

The Pitts ban would forsake the fundamental promises of healthcare reform. It would deny women the protection of insurance coverage for abortion despite stringent restrictions that already assure that federal funding is segregated from payments for coverage, and would threaten or eliminate coverage that women already have for abortion in the private insurance marketplace.

The Pitts Bill Expands the Culture of Refusal and Intensifies a Discriminatory Refusal Policy.

Current law amply protects healthcare providers who entertain religious or moral objections to the provision of abortion services. Since 1973, the Church Amendment has provided that no individual may be discriminated against because they performed or refused to perform an abortion based on their religious beliefs or moral convictions. Other federal laws bolster opt-outs specifically for those who refuse to provide abortions services.[11] The Affordable Care Act left each of these laws intact, and as well as adding a new, one-sided provision barring health plans from discriminating against healthcare providers or facilities because of their *refusal* to "provide, pay for, provide coverage of, or refer for abortions."[12]

Women seeking abortion services, however, must often overcome significant hurdles in finding a provider – from the Guttmacher Institute: "87% of all U.S. counties lacked an abortion provider in 2008; 35% of women in the U.S. live in those counties."[13]

Against this backdrop, the Pitts bill heightens and dramatically expands dangerous refusal provisions that are at odds with prevailing standards of care, and out-of-step with international and human rights law.[14]

The Pitts Bill Allows Any Entity, for Any Reason, to Obstruct Access to Abortion Services

The refusal provision in the Pitts bill goes far beyond protecting individual conscience. Instead, it allows corporations to interfere with the doctor-patient relationship, regardless of the doctors' own beliefs or the patients' medical needs. It is a basic tenet of ethical healthcare provision that patients must be presented with accurate and complete information about their medical options in order to make decisions about their healthcare. The Pitts bill denies women that fundamental right.

The Pitts refusal provision could allow an endless stream of obstruction by those who would deny women access to abortion services for any reason. The Pitts provision does not limit its scope to those with religious or moral beliefs; instead, it would allow a denial of care by anyone, including those motivated to refuse access to abortion for political or other reasons. What's more, in a significant expansion of statutory refusal provisions, the Pitts bill could allow people with only a tangential connection to abortion care – such as receptionists who make appointments, ambulance drivers, or claims adjustors at insurance companies – to interfere with the provision of services in a way that could delay or deny care.

These provisions are out-of-step with international human rights standards and norms. International standards require that there must be a balance between health and conscience and require a recognition that the health of the patient is of primary importance.[15] So, while practitioners have a right to respect for their conscientious convictions regarding lawful procedures and should not suffer from discrimination on the basis of their convictions, refusal clauses must reflect prevailing standards of medical ethics that make patient's health care the primary consideration.

Refusal clauses may not be overbroad, and must not extend to those providing care before or after a procedure or those performing administrative services.[16] Providers must promptly tell patients that they refuse to provide certain health services and patients are entitled to be referred immediately, in good faith, for procedures that providers object to undertaking.[17] Despite growing international consensus on these standards, the Pitts refusal provision does not include a single patient protection to ensure that patients receive a full range of medically indicated treatment options or even all of the relevant information that they need to make decisions about their care.

The Pitts Bill's "Non-Discrimination" Provision Discriminates against Abortion Providers

A one-sided anti-discrimination clause is troubling because it ignores the real threats to providers of abortion services. Those who choose to provide abortion services are routinely harassed, intimidated, and threatened, as extensively documented in our 2009 report.[18] They also face serious employment discrimination. For example, one physician, the head of an ob-gyn residency program in Arizona was removed from his position simply for supporting training opportunities for residents who wanted them.[19] Another physician, a prominent family doctor, was asked to resign his position as the chair New York Medical College's Family Medicine program after a local newspaper published remarks he made about his decision to lease space to a clinic that would provide abortions.[20] Persistent harassment and discrimination, including retaliation that prevents residents from even being offered the opportunity to receive training in abortion services when requested has led to a shortage of abortion providers.

The Pitts refusal provision does nothing to protect the men and women who provide abortion services or otherwise support their provision. The lopsided provision violates a fundamental principle of American law by allowing discrimination based on viewpoint, and is inconsistent with the concepts of balance and fairness that undergird our legal system.

The new private right of action created by the Pitts bill, which applies only to those who refuse involvement (even tangential) in abortion services, would allow those healthcare entities to sue more easily than someone who has been discriminated against because of her religious beliefs unconnected to abortion.

The Pitts Bill Would Allow Denial of Emergency Care, Threatening Women's Lives

A late addition to the revised version of the Pitts bill would allow the expansive refusal provision described above to trump patient protections in a key federal health law, the Emergency Medical Treatment and Active Labor Act ("EMTALA")[21], as well as similar patient protections in state laws.[22] As the name implies, a particular focus of concern under EMTALA is the health and safety of pregnant women, who must be able to go to the nearest emergency room for adequate care throughout a pregnancy.

Just last year, the Affordable Care Act expressly maintained EMTALA and like state laws.[23] Indeed, of the numerous refusal provisions Congress has passed in the past, it has never overridden laws requiring emergency care. Notably, the sponsor of the Weldon Amendment – the most expansive federal refusal law – asserted that "in situations where a mother's life is in

danger a health care provider must act to protect the mother's life."[24] The Pitts bill goes where no federal law has gone before – it expressly sacrifices women's lives.

Allowing refusal objections to interfere with even those emergency measures necessary to save the life of a pregnant woman would mean that women entering a hospital are unwittingly allowing others to play Russian Roulette with their lives. Several months ago, the Bishop of an Archdiocese in Arizona excommunicated a nun who had permitted a life-saving pregnancy termination at St. Joseph's hospital for a mother of four who was 11 weeks pregnant. The Catholic status of the hospital was also subsequently revoked.[25] In a letter about the case, Bishop Olmsted argued that there was no way to provide life-saving treatment for the pregnant woman in question consistent with Church doctrine. Referring to the life-saving abortion, Bishop Olmsted wrote, "[t]he end does not justify the means."[26]

St. Joseph's is not an isolated case. Other jarring examples of Catholic hospitals' disregard for women's lives were described in a 2008 article in the American Journal of Public Health: One woman 14 weeks pregnant who suffered ruptured membranes and was in the middle of a miscarriage was forced to travel 90 miles to another hospital – notwithstanding the fact that there was no chance that the fetus could survive.

In another instance, a woman was already septic, and her doctor recommended a uterine aspiration. The Catholic hospital staff refused, despite the fact that the woman was hemorrhaging. Rather than treat the woman, the Catholic hospital staff proposed giving her a transfusion and waiting for the fetus to die before helping the woman. The receiving hospital reportedly filed a violation of EMTALA in that case. Yet another woman, pregnant at 19 weeks, was described by a doctor as "dying before our eyes." She had a 106 degree fever and the whites of her eyes were filled with blood, but still the Catholic hospital refused to treat her until the fetus finally died. The woman barely survived after spending 10 days in the intensive care unit.[27]

The Pitts refusal provision allows hospitals to refuse even to refer a dying woman to another facility willing to offer appropriate medical care. The Pitts bill would let women die in American hospitals despite treatable conditions.

Preemption Language Would Undermine Access to Essential Health Services – Such as Cervical Cancer Screenings and Vaccines – Well Beyond Abortion.

The Pitts ban includes a subtle but insidious provision that would undermine the integrity of the healthcare law far beyond the abortion compromise. The proposal's broad carve-out protection for any state refusal law could allow insurers to refuse to offer important services that are part of

minimum standards for health coverage set by the Affordable Care Act. These standards could include services and supplies related to contraception, infertility, and sexually transmitted infections. Preventive services already required include screening and counseling for HIV and several other sexually transmitted infections, cervical cancer screening, and vaccination for human papilloma virus.

Vocal opponents of comprehensive healthcare object to a broad range of services – from birth control to genetic testing, from end-of-life care to reproductive technologies that allow more and more couples to become parents.[28] The Pitts ban would open the door to limitless refusals to provide coverage for services that Congress has determined are part of base-line care.

Additional Provisions in the Pitts Ban Undermine Access to Healthcare.

The Pitts Ban Would Trample on States' Rights

In the fair balance struck during healthcare reform, the Affordable Care Act does not affect any state law regarding coverage or funding of abortion services – either prohibiting or requiring it.[29] The Pitts ban would destroy this even-handed protection for state policies, and instead would protect only those state laws that restrict or prohibit coverage of abortion, undermining the sovereignty of states that may choose to treat abortion services like other healthcare services.

The Pitts Ban Interferes with the Private Market Decisions of Insurance Plans

The Affordable Care Act allows insurers to determine whether or not a plan provides coverage of abortion services.[30] It also ensures that there will be at least one multi-state plan that does not provide coverage of abortion services, allowing for a range of options.[31] The Pitts ban would interfere with the private market decisions of insurance plans by barring all such coverage in any multi-state plan.[32]

The Bill Includes Gag Provisions that Would Deny Access to Reproductive Health Information

The Pitts ban prohibits anyone implementing the Affordable Care Act – the Department of Health and Human Services, the state-based exchanges – from ensuring "access" to abortion services.[33] Under this new and far-reaching language in the Pitts ban, therefore, women could be barred from even receiving information about abortion services. For example, the Pitts bill could prevent a state that chooses to ban coverage of abortion in their exchange from requiring that information regarding alternate coverage of abortion be made available to those in their exchange. The bill could also prohibit the Secretary from requiring that patient "navigators,"

who help enroll individuals in qualified health plans using "fair and impartial information," give individuals information about which plans cover abortion.

Conclusion: Congress Should Reject this Bill.

The Center for Reproductive Rights urges Congress to reject the dangerous and extreme Pitts abortion ban.

Endnotes

[1] Patient Protection and Affordable Care Act, Pub L. No. 111-148, § 1303, 124 Stat. 119, 168-171 (codified at 42 U.S.C.A. § 18023 (West 2010)) (hereinafter "PPACA").
[2] PPACA § 1303(b)(1)(B)(i).
[3] *Liberty University v. Geithner*, No. 6:10-cv-00015-nkm, 2010 WL 4860299, at *24 (W.D. Va. Nov. 30, 2010) (explaining further that "In plans that do provide non-excepted abortion coverage, a separate payment for non-excepted abortion services must be made by the policyholder to the insurer, and the insurer must deposit those payments in a separate allocation account that consists solely of those payments; the insurer must use only the amounts in that account to pay for non-excepted abortion services. Act § 1303(b)(2)(B), (C). Insurers are prohibited from using funds attributable to premium tax credits or cost-sharing reductions in out-of-pocket maximum limits for individuals with income below 400 percent of the federal poverty level to pay for non-excepted abortion services. Act § 1303(b)(2)(A).").
[4] Protect Life Act, 112th Congress, § 2(a)(4), *available at* http://republicans.energycommerce.house.gov/Media/file/PDFs/pitts_01a_xml.pdf (hereinafter "Protect Life Act").
[5] Protect Life Act, 112th Congress, § 2(a)(4).
[6] Guttmacher Institute, *Memo on Private Insurance Coverage of Abortion* (Jan. 19, 2011), *at* http://www.guttmacher.org/media/inthenews/2011/01/19/index.html.
[7] *See*, Sara Rosenbaum et. al., *An Analysis of the Implications of the Stupak/Pitts Amendment for Coverage of Medically Indicated Abortions, at* 25 (Nov. 16, 2009), *at* http://www.gwumc.edu/sphhs/departments/healthpolicy/dhp_publications/pub_uploads/dhpPublication_FED314C4-5056-9D20-3DBE77EF6ABF0FED.pdf.
[8] *See, e.g.*, Kaiser Foundation, "How the House Abortion Restrictions Would Work," Nov. 10, 2009, *available a*t http://www.kaiserhealthnews.org/Stories/2009/November/10/abortion-explainer.aspx (last visited Nov. 11, 2009); Peter Slevin, *Insurers report on use of abortion riders*, Washington Post, Mar. 14, 2010.
[9] PPACA § 1312(f)(2)(B)(i).
[10] Sara Rosenbaum et. al., *An Analysis of the Implications of the Stupak/Pitts Amendment for Coverage of Medically Indicated Abortions* (Nov. 16, 2009), *available at* http://www.gwumc.edu/sphhs/departments/healthpolicy/dhp_publications/pub_uploads/dhpPublication_FED314C4-5056-9D20-3DBE77EF6ABF0FED.pdf.
[11] *See* Church Amendment, 42 U.S.C. § 300a-7 (2006); Coats Amendment, 42 U.S.C. § 238n (2006); Weldon Amendment, Pub. L. No. 111-8, § 508(d)(1), 123 Stat. 524, 803 (2009).
[12] PPACA § 1303(b)(4).

[13] Guttmacher Institute, *Facts on Induced Abortion in the United States* (Jan. 2011), *at* http://www.guttmacher.org/pubs/fb_induced_abortion.html.
[14] Protect Life Act, 112th Cong. § 2(a)(7) (2011).
[15] International Covenant on Civil and Political Rights, Art. 18, *opened for signature* December 19, 1966, 999 U.N.T.S. 85 (entered into force March 23, 1976), *ratified by the United States*.
[16] *See, e.g.*, *Janaway v. Salford Health Authority*, 2 All E.R. 1079 (H.L. 1988) (conscience objection clause in UK abortion law only applies to participation in treatment); Regulations for the Implementation of the Act dated June 13 1995 no. 50 concerning Termination of Pregnancy, with Amendments in the Act dated 16 June 1978 no. 66 cf. § 12 of the Act, laid down by Royal Decree, 1 December 1978, § 20 (Nor.) (Regulations implementing Norway's abortion law expressly provide that the right to refuse to assist in an abortion belongs only to the personnel who perform or assist the actual procedure).
[17] *See, e.g.*, Code de la Sante Publique, arts. L2212-8 and R4127-18 (Fr.) (2001) (France's Public Health code places a legal obligation on providers to immediately communicate their refusal to perform an abortion).
[18] Center for Reproductive Rights, *Defending Human Rights: Abortion Providers Facing Threats, Restrictions, and Harassment* (2009), *available at* http://reproductiverights.org/sites/crr.civicactions.net/files/documents/DefendingHumanRights.pdf.
[19] *See* Center for Reproductive Rights, *Ex-Ob-Gyn Chief in Arizona Receives Million-Dollar Settlement in Discrimination Case*, *at* http://reproductiverights.org/en/press-room/ex-ob-gyn-chief-in-arizona-receives-million-dollar-settlement-in-discrimination-case.
[20] Ian Fisher, *Casualty of the Abortion Debate; A Doctor, Aiming at Conciliation, Instead Loses a Post*, N.Y. Times, Mar. 24, 1998.
[21] *See* 42 U.S.C. §§ 1395dd(a)-(c). Stabilizing treatment is defined in EMTALA as "such medical treatment of the condition as may be necessary to assure, within reasonable medical probability, that no material deterioration of the condition is likely to result from or occur during the transfer of the individual from a facility." 42 U.S.C. § 1395dd(e)(3)(a). An emergency medical condition is one that, absent proper treatment, places the health of the patient in serious jeopardy, or risks serious impairment to bodily functions or serious dysfunction of any bodily organ or part. *See* 42 U.S.C. § 1395dd(e)(1).
[22] California's Health and Safety Code requires hospitals and physicians to treat any condition that presents the "danger of loss of life, or serious injury or illness." *See* Cal. Health & Safety Code § 1317. Though California accommodates doctors' personal beliefs, a doctor's personal beliefs do not trump the health and life of her patients. The state excuses from providing abortions those providers who have notified their health-care facility, in writing, of a moral, ethical or religious objection to participating in abortion procedures. But for obvious reasons, the "conscience clause" does not apply to "medical emergency situation[s] and spontaneous abortions." *See* Cal. Health & Safety Code § 123420(d).
[23] PPACA § 1303(d).
[24] 151 Cong. Rec. H176-02 (daily ed. Jan. 25, 2005) (statement of Rep. Weldon) (emphasis added).
[25] *See* Laurie Goodstein, *Arizona: Hospital Loses Catholic Affiliation*, N.Y. Times, Dec. 22, 2010, at A25.
[26] *See* Bishop Thomas J. Olmsted, *Statement in Response to Abortion Performed at St. Joseph's Hospital* (May 15, 2010).
[27] Lori R. Freedman, et al., *Where There's a Heartbeat: Miscarriage Management in Catholic-Owned Hospitals*, 98 Am. J. of Pub. Health 1774 (2008).
[28] *See, e.g.*, Helen Alvare, *How the New Health Care Law Endangers Conscience* (June 2010), available at http://www.thepublicdiscourse.com/2010/06/1402; United States Conference of Catholic Bishops, "Issues of Life

and Conscience in Health Care Reform: An Analysis of the 'Patient Protection and Affordable Care Act' of 2010" *at* http://www.usccb.org/healthcare/PPACA-Analysis-5-24-10.pdf (stating that the Affordable Care Act "includes provisions that promote or could promote coverage for contraception, sterilization and other services to which Catholics and others may have moral objection").

[29] PPACA § 1303(c)(1).

[30] PPACA § 1303(b)(1)(A)(ii).

[31] PPACA § 1334(a)(6).

[32] Protect Life Act, 112th Cong. § 2(b) (2011).

[33] Protect Life Act, 112th Cong. § 2(a)(3) (2011).