



Nominee: *Is there a point in pregnancy when you believe women lose their civil rights?*

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Dear Members of the Senate Judiciary Committee:

Long before President Obama selected Judge Sotomayor as his nominee to the Supreme Court, advocacy groups and media outlets identified the issue of “abortion rights” as a key issue for determining the nominee’s qualifications.<sup>1</sup> Focusing on abortion, however, makes it possible to ignore critical issues for women that might not be readily apparent. Nearly a million women each year terminate their pregnancies, close to another million suffer miscarriages and stillbirths, and more than four million women continue their pregnancies to term: Each and every one of these women benefits from the Court’s decision in *Roe v. Wade*.<sup>2</sup>

*Roe* stands for much more than the right to terminate a pregnancy. As the Supreme Court explained in later cases, *Roe* has been “sensibly relied upon to counter” attempts to interfere with a woman's decision to become pregnant or to carry her pregnancy to term.<sup>3</sup> In *Roe*, the Court rejected the argument that fetuses are persons and that states may treat them as such. In so doing the Court protected the Constitutional personhood of women. Thus, while the court in *Roe* recognized a limited state interest in potential life that permits states to prohibit access to abortion under some circumstances, the decision established that there is no point in pregnancy when women lose their fundamental civil rights – to bodily integrity, informed medical decision-making, due process, liberty, and life itself.

*Roe* and subsequent decisions recognized that according legal rights to fetuses separate from those of the pregnant women would not only jeopardize women’s lives and health by denying them access to legal abortion, but would also undermine substantially their dignity, their ability to participate as full and equal citizens in our society, in short their status as full Constitutional persons.<sup>4</sup>

Experience before *Roe* makes clear that if it were overturned hundreds of women would die each year from illegal abortions and thousand would have to risk their lives and liberty or be forced to endure unwanted pregnancies.<sup>5</sup> While few women were arrested pre-*Roe*,<sup>6</sup> legal action since then, including the arrests discussed below, suggests that it is far more likely that if abortion becomes illegal again, women themselves will be arrested.<sup>7</sup> Experience from other countries that still have restrictive abortion laws, establishes that criminalizing abortion does little to reduce the rate at which women seek to terminate their pregnancies.<sup>8</sup> Instead, it determines the conditions, often dangerous and demeaning, under which women do so.<sup>9</sup>

When laws criminalizing abortion were originally passed in the United States, one justification was to protect pregnant women from what had been, but is no longer, a dangerous procedure. Today the primary argument for outlawing abortion is that the “unborn” have separate legal rights. As Ramesh Ponnuru, a conservative writer, explained in a piece imagining life after *Roe*: “The crucial legal goal of the pro-life movement is . . . that unborn children be protected in law.”<sup>10</sup> This is one reason why the harm of overturning *Roe* extends beyond the issue of abortion.

For example, the claim that fetuses have legal rights independent of pregnant women, or that the state may assert such rights on behalf of fetuses, has been invoked to justify court orders taking custody of pregnant women and forcing them to undergo major surgery for the alleged benefit of the fetus.<sup>11</sup> In one case, later overturned on appeal, the surgery resulted in the death of the pregnant woman and her baby.<sup>12</sup> Claims of fetal rights were used to justify extraordinary state action against a Florida woman who wanted to have a vaginal birth after a previous delivery by Cesarean surgery. When she was near delivery, an armed Sheriff came to her home, took her into custody, strapped her legs together and transported her to a hospital, where, without any opportunity to challenge the state's actions, she was forced to undergo major surgery that she believed was unnecessary and dangerous to her and her baby. When she sued for violations of her civil rights, including deprivation of physical liberty and forced surgery without any semblance of due process, a federal district court said that "[w]hatever the scope of Ms. Pemberton's personal constitutional rights in this situation, they clearly did not outweigh the interests of the State of Florida in preserving the life of the unborn child."<sup>13</sup>

The argument that fetuses have separate legal rights (as opposed to moral value) has been used to justify the arrest of hundreds of pregnant women who love their children but who have not been able to overcome an addiction in the short duration of a pregnancy.<sup>14</sup> This claim has been used to justify policies targeting low-income women of color for illegal searches and seizures.<sup>15</sup> It has been used to justify the arrest and detention of pregnant women who drank alcohol,<sup>16</sup> who exercised their right to informed consent by refusing cesarean surgery,<sup>17</sup> who didn't get to the hospital quickly enough on the day of delivery,<sup>18</sup> who were in a "dangerous" location while pregnant,<sup>19</sup> who refused to submit to state ordered prenatal exams,<sup>20</sup> who are HIV-positive,<sup>21</sup> and who have experienced miscarriages and stillbirths.<sup>22</sup> This argument has been used to justify discrimination against women in the workplace.<sup>23</sup> It has been used as the basis for civil suits on behalf of children against their mothers for alleged acts of negligence during pregnancy.<sup>24</sup> It has been used to appoint or consider appointing guardians ad litem for fetuses not only to prevent abortions but also to determine what medications the pregnant woman would be allowed to take and how she might be required to deliver.<sup>25</sup>

Fortunately, these horrific cases do not represent controlling legal precedent. Many of the cases were dismissed when challenged and most of the lower court decisions upholding these state actions were overturned on appeal. Those cases that survived do so only as exceptional outliers, in part, because *Roe* stands as the law of the land.

Abortion is undeniably a key and contentious issue in the confirmation process, but it is important to remember that 60% of women having abortions are already mothers<sup>26</sup> and that by age 44, approximately 84% of all women in the United States have been pregnant and given birth.<sup>27</sup>

Because decisions regarding *Roe v. Wade* will inevitably affect *all* pregnant women, we the undersigned request that the Judiciary Committee ask Judge Sotomayor (and every future Supreme Court nominee): Is there a point in pregnancy when you believe women lose their civil rights? If so, what is that point; and on what do you base your conclusion?

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<sup>1</sup> Editorial, *Choosing a New Justice*, N.Y. TIMES, May 7, 2009, at A30 ("If Mr. Obama chooses someone who believes *Roe v. Wade* was wrong, for example, abortion rights could be lost for a generation."); James Oliphant, *Abortion Issue Looms Over Supreme Court Choice*, L.A. TIMES, May 3, 2009 ("Abortion issue looms over Supreme Court choice"); Editorial, *Souter: The Extremist*, WASH. TIMES, May 4, 2009 ("Mr. Souter's extremist position on abortion puts to rest the popular canard that he is a moderate.").

<sup>2</sup> *Roe v. Wade*, 410 U.S. 113 (1973).

<sup>3</sup> *Planned Parenthood v. Casey*, 505 U.S. 833, 859 (1992).

<sup>4</sup> BOB WOODWARD & SCOTT ARMSTRONG, *THE BROTHERS* 233 (1979) (noting that during the Court's deliberation on *Roe*, Justice Stewart insisted that the Court rule explicitly on the question of fetal personhood recognizing that creating a competition between the fetus and women and "[w]eighing two sets of rights would be dangerous").

<sup>5</sup> See Ward Cates, *Legal Abortion: The Public Health Record*, 215 SCIENCE 1586 (1982) (estimating that, before *Roe*, 200,000 to 1,200,000 illegal abortions were performed each year and that in 1965, 235 women died from illegal abortions).

<sup>6</sup> See, e.g., *In re Vickers*, 123 N.W.2d 253 (Mich. 1963) (affirming dismissal of habeas corpus petition of a woman being held in county jail for contempt resulting from refusal to answer questions about her abortion); *Commonwealth v. Hauze*, 4 Pa. D. & C.2d 61 (Pa. Ct. Quarter Sess. 1955) (approving of indictment charging woman with conspiracy to submit to her own abortion); Jon Nordheimer, *She's Fighting Conviction for Aborting Her Child*, N.Y. TIMES, Dec. 4, 1971, at 37 (Shirley Ann Wheeler was convicted of manslaughter because she had an abortion); *2 Held in Abortion Ring*, N.Y. TIMES, Apr. 8, 1943, at 24 (Julia Mae Norwood was arrested in Connecticut for submitting to an abortion when police raided a suspected abortion provider's residence); *A Woman's Crime*, N.Y. TIMES, Jan. 22, 1878, at 8 ("Mrs. Margaret Koster ... was arrested on complaint of her husband, last night, by Detective Schmitberger, of the Twentieth Precinct, on a charge of abortion. The woman was locked up pending the action of the Coroner.").

<sup>7</sup> See, e.g., *State v. Ashley*, 701 So. 2d 338 (Fla. 1997) (Ms. Ashley was charged with manslaughter and third-degree murder after she shot herself in the stomach resulting in the loss of her pregnancy. The Florida Supreme court eventually dismissed the indictment.); Rick Brundrett, *Woman's Abortion Is Unique S.C. Case*, STATE (Charleston, S.C.), May 1, 2005, at A1 (Gabriela Flores convicted of illegal abortion after taking Cytotec to induce an abortion.); Catie O'Toole, *Abortion Attempt Charge Lodged; West Monroe Woman Accused of Self-Abortion*, POST-STANDARD (Syracuse, N.Y.), Apr. 11, 2007, at B1 (Katrina Pierce was charged with self-abortion after taking numerous Tylenol and Motrin in an apparent suicide attempt); Tim Landis, *Self-Abortion Charge Makes Witt Woman's Case a Rarity*, STATE J.-R. (Springfield, Ill.), Jan. 31, 1996, at 1 (Lyn Lyerla charged with illegal abortion for allegedly attempting abortion on herself. After a non-jury trial, she was acquitted.); Lynn Paltrow, *A Post Roe World With Criminal Penalties Our Mothers Could Not Have Imagined*, HUFFINGTON POST, Jan. 7, 2006, available at <http://www.huffingtonpost.com/lynn-m-paltrow/a-postroe-world-with-criminal-penalties-our-mothers-could-not-have-imagined>.

<sup>8</sup> Gilda Sedgh et al., *Induced Abortion: Estimated Rates and Trends Worldwide*, 370 LANCET 1338 (2007).

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- <sup>9</sup> See David A. Grimes et al., *Unsafe Abortion: The Preventable Pandemic*, 368 LANCET 1908 (2006).
- <sup>10</sup> *One Untrue Thing: Life After Roe*, NATIONAL REV. ONLINE, Aug. 1, 2007, available at <http://article.nationalreview.com/?q=ZjkwNWQ4ZDQ2NTljNDg4MjUyYWYxZWQ0NDVjMTkxYjg=>.
- <sup>11</sup> Janet Gallagher, *Prenatal Invasions & Interventions: What's Wrong with Fetal Rights*, 10 HARV. WOMEN'S L.J. 9 (1987).
- <sup>12</sup> *In re A.C.*, 573 A.2d 1235, 1253 (D.C. 1990) (en banc) (vacating a court-ordered cesarean section that was listed as a contributing factor to the mother's death on her death certificate); see also, George Annas, *Foreclosing the Use of Force: A.C. Reversed*, HASTINGS CTR. REP., July/Aug. 1990, at 27.
- <sup>13</sup> *Pemberton v. Tallahassee Mem'l Reg'l Med. Ctr.*, 66 F. Supp. 2d 1247 (N.D. Fla. 1999); Presentation by Laura Pemberton at the National Summit to Ensure the Health and Humanity of Pregnant and Birthing Women, held in Atlanta, Georgia January 18-21 (2007), available at <http://vimeo.com/4895023>.
- <sup>14</sup> E.g., *State v. Geiser*, 763 N.W.2d 469 (N.D. 2009); *Kilmon v. State*, 905 A.2d 306 (Md. 2006); *State v. Aiwohi*, 123 P.3d 1210 (Haw. 2005); *Whitner v. State*, 492 S.E.2d 777 (S.C. 1997); *Sheriff, Washoe County v. Encoe*, 885 P.2d 596 (Nev. 1994); *Johnson v. State*, 602 So. 2d 1288 (Fla. 1992); see also LYNN PALTROW ET. AL, CRIMINAL PROSECUTIONS AGAINST PREGNANT WOMEN (ACLU / Reprod. Freedom Project 1992).
- <sup>15</sup> *Ferguson v. City of Charleston*, 532 U.S. 67 (2001); *Ferguson v. City of Charleston*, 308 F.3d 380 (4th Cir. 2002) (remand); DOROTHY ROBERTS, *KILLING THE BLACK BODY: RACE, REPRODUCTION, AND THE MEANING OF LIBERTY* 164-67 (1997); LAURA E. GOMEZ, *MISCONCEIVING MOTHERS: LEGISLATORS, PROSECUTORS, AND THE POLITICS OF PRENATAL DRUG EXPOSURE* (1997).
- <sup>16</sup> Lisa Sink, *Prosecutors Seek to Protect Fetus of Jailed Woman: Arrested For Repeat Drunken Driving, She Hasn't Agreed to Treatment*, MILWAUKEE J. & SENTINEL, Aug. 28, 1998, at 1 (in explaining why he opposed bail, District Attorney Paul Bucher said "Our concern is for the safety of the fetus and the community[.]").
- <sup>17</sup> Richard L. Berkowitz, *Should Refusal to Undergo A Cesarean Section Be A Criminal Offense?*, 104 OBSTETRICS & GYNECOLOGY 1212 (2004); Howard Minkoff & Lynn M. Paltrow, *Melissa Rowland and the Rights of Pregnant Women*, 104 OBSTETRICS & GYNECOLOGY 1234 (2004).
- <sup>18</sup> Reporter's Transcript, *People v. Stewart*, No. M508197 (Cal. Mun. Ct. San Diego County Feb. 26, 1987) (transcript of hearing granting demurrer of indictment charging Pamela Rae Stewart with failing to support a child. According to the court, one theory that the prosecution relied upon was "that she failed to seek prompt medical attention when she experienced bleeding."); Debra Cassens Moss, *Is Ignoring M.D. Criminal? California Case Raises Questions of Women's Duties During Pregnancy*, A.B.A. J., Jan. 1, 1987, at 23 (noting Ms. Stewart was charged for "not doing what her doctor told her to do[.]"); see also Angela Bonavoglia, *The Ordeal of Pamela Rae Stewart*, MS., Aug. 1987, at 92.
- <sup>19</sup> *In re Unborn Child of Starks*, No. 93,606 (Okla. Sept. 23, 1999); Transcript of Jury Trial, *In re Unborn Child of Starks*, No. JF990127 (Okla. Dist. Ct. Rogers County Nov. 24, 1999) (among the allegations of neglect, "she was in this environment that contained vapors and chemicals and other toxic substances that could not have been healthy for her unborn child or herself or anybody else in that residence.").
- <sup>20</sup> Findings and Orders, *In re Unborn Child Corneau*, No. CP-00-A-0022 (Mass. Juv. Ct. Attleboro Div. Aug. 29, 2000) (finding Rebecca Corneau in contempt of court and ordering that she be held in a women's prison until she gave birth because she refused to comply with a court-ordered prenatal exam); see also Ellen Goodman, Editorial, *Just How Far Can the State Go in Protecting an 'Unborn' Child?*, BOSTON GLOBE, Sept. 10, 2000, at F7; *Fetus Dispute Brings Wider Issue to Fore*, BOSTON GLOBE, Sept. 10, 2000, at B1.
- <sup>21</sup> Transcript of Presentence Conference and Sentencing Proceedings, *United States v. Tuleh*, No. 09-19-B-W (D. Me. May 14, 2009). See also Judy Harrison, *Judge Jails Woman Until Baby Is Born: HIV-Positive Diagnosis Spurs Extended Sentence*, BANGOR DAILY NEWS, June 3, 2009.
- <sup>22</sup> E.g., *State v. McKnight*, 576 S.E.2d 168 (S.C. 2003); *McKnight v. State*, 661 S.E.2d 354 (S.C. 2008); Gabrielle Maple, *Miscarriage Proof Frees Woman; She Faces Charges of Killing Her Baby*, TIMES-PICAYUNE (New Orleans), Aug. 18, 2004 (Michelle Greenup was charged with homicide when she lost her pregnancy. Prosecutors later dropped the charges when medical evidence proved she had a miscarriage).
- <sup>23</sup> See *Int'l Union v. Johnson Controls*, 499 U.S. 187 (1991); CYNTHIA R. DANIELS, *AT WOMEN'S EXPENSE: STATE POWER & THE POLITICS OF FETAL RIGHTS* (1993); RACHEL ROTH, *MAKING WOMEN PAY: THE HIDDEN COSTS OF FETAL RIGHTS* (2000).
- <sup>24</sup> *Stallman v. Youngquist*, 531 N.E.2d 355, 359-61 (Ill. 1988) (refusing to recognize the tort of maternal prenatal negligence, holding that granting fetuses legal rights in this manner "would involve an unprecedented intrusion into the privacy and autonomy of the [state's female] citizens").

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- <sup>25</sup> E.g., *In re J.D.S.*, 864 So.2d 534 (Fla. 2004); see also Susan Goldberg, *Of Gametes and Guardians: The Impropriety of Appointing Guardians Ad Litem for Fetuses and Embryos*, 66 WASH. L. REV. 503 (1991).
- <sup>26</sup> Gilda Sedgh et al., *Induced Abortion: Estimated Rates and Trends Worldwide*, 370 LANCET 1338 (2007).
- <sup>27</sup> Ctr. for Disease Control & Prevention, *Recommendations to Improve Preconception Health and Health Care – United States: A Report of the CDC/ATSDR Preconception Care Work Group and the Select Panel on Preconception Care*, 55 (No. RR06) MORBIDITY & MORTALITY WEEKLY REP., (REPORTS AND RECOMMENDATIONS) 2 (Apr. 21, 2006), available at <http://www.cdc.gov/mmwr/PDF/rr/tr5506.pdf>.