mitment is important to people we choose and even to people we don't choose at that moment.

It is also, however, the case that *Roe*'s goals, with its messages of individualism, adults' rights, rights more than responsibilities, and sexual license outside of marriage continue to erode our progress toward these important goals.

Thank you.

[The prepared statement of Ms. Alvaré follows:]

PREPARED STATEMENT OF HELEN M. ALVARÉ

INTRODUCTION:

Roe v. Wade (410 U.S. 113 (1973)) is rightly regarded as the most significant case in the history of abortion law and practice in the United States. And that is true. *Roe* marked the transition from a country in which nearly every state banned the vast majority of abortions, to a country in which no state could ban virtually any abortion. This was the effective consequence of *Roe*'s determination that even in the third trimester of a pregnancy, no state could ban any abortion if a doctor determined that it was necessary to preserve a woman's "life" or "health" extremely broadly defined to include "all factors—physical, psychological, emotional, familial, or the woman's age—relevant to the well being of the patient." In other words, any abortion a doctor and woman agree to. (See, *Roe*'s companion case, *Doe v. Bolton,* 410 U.S. 179, 192 (1973)).

What is less understood than *Roe*'s influence on abortion law and practice—and not just by the public, but even often by lawyers and legislators—is the degree to which *Roe,* and the cases which followed it, most particularly *Casey v. Planned Parenthood* (505 U.S. 833 (1992))—influenced the shape of the law affecting families generally. To put it plainly, it has been a pernicious influence with respect to families generally, but especially for children. It has, first, championed the notion that individual wants are more important than the common good of the family. Second, it suggests that adults' wants are more legally significant than children's needs and that parental rights are not necessarily derivative of parental responsibilities. Third, *Roe* not only elevated the constitutional status of sexual license, but did so without preserving traditional ties between sexual freedom and marriage or family. Fourth, *Roe* showed an easy willingness to usurp state legislatures' family-law-making prerogative; it combined this with its selective use of empirical data, and reliance upon emotional claims. Later courts, especially in the case of same-sex marriage, have felt free to do the same.

This testimony will illustrate how each of these problematic influences began largely with *Roe*. It will conclude with two reasons why *Roe* is, today, even more clearly out of step with modern empirical evidence about, and modern efforts to help, children and families.

I. PRE-ROE FAMILY LAW

The *Roe* Court's influence on family law is best understood by contrasting it briefly with the Supreme Court family law prior to *Roe*. Beginning in about the 1920s, the Supreme Court found that the Constitution's 14th Amendment (the Due Process Clause) contained certain substantive rights pertaining to families. In 1923 in *Meyer v. Nebraska,* 262 U.S. 390 (1923) and two years later in *Pierce v. Society of Sisters,* 268 U.S. 510 (1925) the Court articulated parents' constitutional right to direct the education of their children. This right was said to derive from parents' duties to their children. Said the *Pierce* Court: "The child is not the mere creature of the state: those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations" (268 U.S. 510, 535 (1925)). The pre-*Roe* cases concerning the rights of unwed fathers are even more explicit on this point. In *Lehr v. Robertson* (463 U.S. 248 (1983)), the Court stated plainly that "the rights of the parents are a counterpart of the responsibilities they have assumed." (Id. at 257).

Another theme in the Supreme Court's pre-*Roe* family jurisprudence was the Constitution's special respect for marriage. Even in the case responsible for creating a "constitutional privacy right" (the foundation for *Roe*), the Supreme Court linked the constitutional right to use contraception to the "sacred" quality of the marital relationship. *Griswold v. Connecticut* (381 U.S. 470, 486 (1965)).

Immediately prior to *Roe*, in a case heard and decided after the first oral argument in *Roe*, but before the second, the Supreme Court made the initial break with

the themes of marital community and children's rights sounded in earlier constitutional family cases. In *Eisenstadt v. Baird* (405 U.S. 438, 453 (1972)) the Court specifically extended to single individuals the constitutional privacy right to obtain contraception. Said the Court, "If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted government intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."

Immediately after *Eisenstadt* came *Roe.* And in one fell swoop, constitutional rights pertaining to the family were definitively severed from their earlier moorings. I will now consider the elements of that severance of and of their consequences, in order.

II. ROE'S FOUR NEGATIVE INFLUENCES UPON FAMILY LAW

Roe, first, championed the notion that individual wants are more important than the common good of the family. Unlike earlier cases save *Eisenstadt,* which had tied constitutional family rights to the good of the whole family community—especially the children but at least the marital couple—*Roe* is about the rights of one individual (the mother), to make a decision that affects others. The *Roe* majority protests (strenuously) that the Court is not awarding women absolute rights to do what they please with their bodies. Yet as cases subsequent to *Roe* have demonstrated, this it is exactly what *Roe* set in motion, as parents, husbands and other fathers were denied any recognized role in decisions concerning abortion. This tendency was at its zenith in the *Casey v. Planned Parenthood* abortion decision as captured best by Justice Sandra O'Connor's statement in the plurality opinion that "at the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe and of the mystery of human life." In other words, there is, in the eyes of the Constitution, protection for individual opinions about anything that might be included in the terms "existence, meaning, universe and the mystery of human life." (505 U.S. at 851).

Roe and *Casey*'s well-known philosophy and jurisprudence of individualism have migrated into other areas of family law, including that concerning the new reproductive technologies. Despite all we know about the superiority for children of birth into two-parent families, when *in vitro* fertilization (IVF) burst onto the scene with the birth of Louise Brown 5 years post-*Roe*, no state passed any law limiting the class of persons who could thereby become parents. When the state of Illinois attempted to place limits on the use of IVF, the 7th Circuit struck them down, citing *Roe* and extended its holding beyond abortion to the right to pursue artificial reproduction. *Lifchez v. Hartigan* (14 F.2d 260 (1990, 7th Cir.)) No state since that time has passed a law limiting the class of persons who might seek a baby by these means.

Second, *Roe* placed adults' wants above children's needs and severed parental rights from parental responsibilities. Historically, family law has envisioned itself as existing in large part to protect children's well-being. In adoption law, there is the notion that parental desires for children are not at all paramount, only the need for a good home for each child. Child support laws don't care whether a child's biological parents wanted the child, or even took failed steps to avoid conception. The child's need for support is paramount and the parents must pay it. Child custody laws are not about how badly one parent wants the child, but what is in the child's "best interests" as the laws of every state recite. *Roe* ignores this essential quality of family law, and tortures history, medicine and logic to conclude that the constitutional family law of privacy mandates a mother's right to seek an abortion of her child. The *Roe* court announces this particular conclusion following several paragraphs of its opinion in which having children is portrayed as an unbearable burden for women. The children's interests are not at all discussed. In so proceeding, *Roe* models the opposite of family law's longstanding prioritizing of children's interests.

This order of reasoning is, sadly, well-represented in the family law that followed *Roe*. In the actual legislative debates leading to no-fault divorce, it is remarkable how little time is spent discussing the effects upon children. As described above, the absence of limiting legislation respecting the new reproductive technologies is a further example. And finally, fresh evidence of the unwillingness to prioritize children's interests is appearing weekly in the debates concerning same-sex marriage, which either treat the consequences for children summarily, or show a marked willingness to rely on flawed studies about possible effects on children.

Third, *Roe*, especially in combination with *Eisenstadt* and *Casey,* not only elevated the constitutional status of sexual license, but did so without preserving traditional social and legal ties between sexual freedom and marriage or family. *Roe* and *Eisenstadt* did so by defining constitutional privacy rights broadly to cover *individual* decisions about reproductive matters generally. The practical effect of this

has been three decades of increasing out of wedlock pregnancies, and a high rate of abortions by single women (who represent 90% of all abortions). Justice O'Connor's plurality opinion in *Casey* implicitly affirmed this by declaring that: "for two decades," women "have organized intimate relationships and made choices that define their views of themselves and their places in society, in reliance on the availability of abortion in the event that contraception should fail."(505 U.S at 835). This is not a reference to married women, yet *Casey* strongly affirms the essential holding of *Roe*, which will continue to allow abortion to be used as a backup when unmarried couples have sexual relationships.

Roe therefore helps enormously to explain the Supreme Court's holding in the Texas sodomy case, *Lawrence v. Texas* (539 U.S. 558 (2003)). *Roe* and *Casey* facilitated sexual practices having nothing to do with marriage or creating a family, but didn't offer explicit constitutional status to the sex itself. *Lawrence* takes that next step, holding that the Constitution does protect sexual practices having nothing whatsoever to do with marriage or with family. Justice Kennedy's opinion made a strenuous attempt to link sodomy to earlier constitutional family rights by stating: "When sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring." (539 U.S. at 567). Yet this attempt hardly passes the straight face test in the year 2006.

What practices other than abortion are blessed by the official severing of sex from marriage and the family? Out-of-wedlock births, which have now reached the highest rate in U.S. history. Rising rates of cohabitation which not only correlate with higher divorce rates, but which are also correlated with high rates of domestic violence, and with diminished educational and emotional outcomes for any children involved. And of course, calls for the legalization of same-sex marriage flow easily from pre-existing constitutional law severing sex and children from marriage and the family.

Fourth and finally, *Roe* demonstrated an easy willingness to usurp state legislatures' family-law-making prerogative. As a substitute for legislative hearings, the *Roe* Court performed its own "research," and eventually relied upon selectively chosen empirical data and upon emotional claims concerning plaintiffs' strong desires for abortion. Prior to *Roe*, state legislatures for over 100 years had made the law concerning abortion. Even at the time of the passage of the 14th Amendment—the Amendment eventually relied upon by *Roe* as the source of the abortion right—abortion was a crime in virtually all instances in every state. Almost no one suspected that the abortion law-making was the province of the judiciary, or that it would be federalized, yet that is what *Roe* did. It did so by accepting highly questionable data concerning pre-*Roe* abortion mortality, ignoring genetic findings about the beginnings of individual human life, and completely avoiding discussion about the possible detrimental effects upon women of abortion.

Today, these identical methods of lawmaking are most evident in the same-sex marriage and civil union cases. The *Goodridge v. Massachusetts Department of Health* case is perhaps the most representative. (440 Mass. 309 (2003)). Disregarding several hundred years of legislative leadership on the law concerning marriage, the Massachusetts Supreme Court held that the state constitution mandated recognition for same-sex marriage. As a substitute for legislative findings, the court performed its own cursory and selective review of relevant empirical literature and found no difficulties for children in legalizing same-sex marriage. The opinion also prominently featured the Court's own emotional accounts of same sex couples' desires for marriage. In other words, the *modus* was *Roe* all over again; only the issue was different.

In conclusion, a few thoughts about how today, perhaps more noticeably than ever before, *Roe v. Wade* and the family law messages it sends contradict the good of children, marriage, and family.

First, it is no secret that the poor have dramatically higher rates not only of abortion, but also of cohabitation, out-of-wedlock pregnancy, and divorce, than do members of better-off socio-economic classes. Contrary to *Roe*'s predictions, legal abortion has not at all improved their situation, and may have worsened it by providing a "back-up" for non-marital sexual relationships. Today, when it has become more difficult for the poor to rise out of their poverty, and when federal and state governments and private groups are enthusiastically promoting programs to discourage pregnancy and encourage stable marriage among the poor in order to help alleviate their poverty, easily available abortion have become a more notable enemy of progress.

Second, there is today a flourishing and well-respected medical and social science literature that shows perhaps better than ever before, empirically and exactly, how wrong was *Roe*'s facilitating the notion that adults' rights trump children's. With very little disagreement, social science has concluded that adult behaviors failing to

put children first—easy divorce, single parenting, cohabitant parenting—result in measurable harm to children. Responding to deteriorations in children's well-being resulting from these practices, federal and state lawmakers are responding, not only with dramatically improved child support collection laws, but also with marriage strengthening programs and fatherhood programs. *Roe* flies in the face of all of them.

It's time to acknowledge that *Roe* was not only out of step with the family law that came before it, but has come to be a major obstacle to all that our country wishes to accomplish today, on behalf of marriage, family, and especially vulnerable children. The sooner *Roe*'s influence is banished, the better for all of them.

Mr. CHABOT. Thank you very much, and I want to thank all the witnesses for staying pretty close to the 5 minutes.

Before we get into our questions up here, the Chair would note the presence of a former distinguished Member of the United States House of Representatives, Congressman Bob Dornan from California. Mr. Dornan, if you could stand and be recognized. [Applause.]

Thank you very much, and the Chair will yield himself 5 minutes for the purpose of asking questions. And, Professor, since you just got finished, I'll start with you, if I can.

Would you explain the impact on abortion law if *Roe v. Wade* and its progeny were overturned? Isn't it true that rather than outlawing abortion, such action would merely return the issue to the people and their State legislatures and allow each State to determine for itself whether and how to regulate abortion?

Ms. ALVARÉ. Yes, thank you. That is correct. There's no indication the Supreme Court is prepared to find a constitutional right in an unborn child such that abortion could never be performed; rather, it would return to the States, and you might get something like what happened with the States prior to the Supreme Court taking away from them their ordinary, hundreds-of-year-old responsibility for legislating in this area, which is you are going to get different laws in different States.

This is often referred to disparagingly by advocates of legal abortion as "a patchwork of laws" and, you know, "sending people to the back alleys" and "turning back the clock." Well, federalism is by nature going to mean different laws in different States, number one; number two, we do know that the evidence on loss of life related to abortion when it was illegal had much more to do with the absence of antibiotics and that the rate of deaths related to abortion was going down precipitously before abortion ever became legal, because it was related primarily to the presence of antibiotics, not to the mostly legal doctors who were performing abortion prior to *Roe*.

Mr. CHABOT. Thank you. Would you also comment on recent studies finding connections between depression and suicide and abortion?

Ms. ALVARÉ. Previously, we had relied really on studies like one I have with me today that had to do with Finland or Denmark, because they have national register banks charting every woman's medical history. And we knew when they looked at every woman in the country and her medical history that women who had had abortions suffered disproportionately psychiatric follow-up, suicide, and so forth. So we had studies from other countries.

Our NIH and other Federal organs, despite abortion being the most common surgery performed on women, have not pursued the

question of its effects in any really large organized study, which I don't understand. But we do have a study that come out as recently as—I think it was just last month, the one you referred to in the Journal of Child Psychology and Psychiatry, showing subsequent depression in young women having abortion, and we also have a continuing influx of European studies showing the same.

Mr. CHABOT. Okay. Thank you.

Ms. Roy, let me turn to you, if I can, at this point. In your testimony, you stated that a woman's decision to abort is made—and your way of defining it was in a "heightened, alarmed state." Could you elaborate on a woman's mental state at the time she is deciding whether to abort and how that mental state affects her decisionmaking process?

Ms. ROY. Certainly. Usually, sexual relations has the risk of pregnancy, and there are many couples who are copulating outside of marriage. And what happens is very often the choice to abort is because the woman has been caught pregnant. She has been caught in her actions and moves to eradicate the crisis that she is vulnerable at this time. She also feels the press from both sides that she knows what church teaching is and what a large majority of society says about it, and so there is a press from one side to reduce the getting caught by moving for an abortion.

On the other side, she feels that she failed somehow because she should have prevented this, and there's been a pressure.

So what happens is a squeezing mentally takes place on a woman when there is a positive pregnancy test, and in that alarmed, heightened state, she moves toward an abortion decision without looking at other options. Add to that the pressure that you need to move ahead on this right away, right away. There is no appropriate counsel. I hear from women over and over again that they have not received proper education as to her options and feels, again, very much like a second-class citizen as she moves in this emergency mode to a decision that is not educated and not well thought out.

Mr. CHABOT. Thank you. I want to squeeze one more question here in the time I have remaining. Could you please describe some of the negative effects experienced by the women who you've counseled for pregnancy loss due to abortion?

Ms. ROY. Yes, and research on this is in my attachment.

Mr. CHABOT. You can go on in your question a little long than the light there. I have to get in under the light.

Ms. ROY. You have to get in under the light.

Mr. CHABOT. Yes.

Ms. ROY. Okay. On page 4, 5, and 6, these are things that come up again and again and again with the women I work with. And, again, I don't have a doctoral degree, but I see these women all the time. I have them call on the telephone. I am also solicited to talk to women before they make this decision so that they can hear both sides of the issue: guilt, emotional numbing, dreams and nightmares, changes in relationships, lowered self-esteem and self-hatred, dizziness and fading, sleep disturbances, sexual problems, thoughts of harming children, she can't forgive herself, inability to concentrate, preoccupation with death, mood swings, depression, sadness, preoccupation with abortion or the due date, loss of hope,

and deserving of punishment, emotional shutdown, and less interest, a lowered interest in previously enjoyed activities.

And because it's as popular as abortion is, but so rarely it is talked about, she moves to isolate, and so her emotional processing is shut down. And so she bides time thinking that she's got this beach ball under the water taken care of, but it leaks out when something else triggers this, and then she moves to counseling, or to self-medicate through drugs, alcohol, over-the-counter drugs, further relationships, a repeat pregnancy, isolation, frigidity—"I will never be in this situation again." A myriad of things I see come through the doors all the time.

Mr. CHABOT. Thank you very much. My time has expired.

The gentleman from New York, Mr. Nadler, is recognized for 5 minutes.

Mr. NADLER. Thank you, Mr. Chairman.

Ms. Alvaré, Professor Alvaré, in your testimony you cited the Supreme Court decision in *Pierce v. Society of Sisters*, which is the 1925 case that established that parents have a constitutional right to direct the upbringing of their children, in this case the right of parents to send their children to a Catholic rather than a public school. This is an unenumerated right which the Court derived from the 14th amendment, from its penumbras, I suppose.

Do you believe that *Pierce* was wrongly decided? Or do you believe that the Constitution does, in fact, protect certain unenumerated rights, as I stated before?

Ms. ALVARÉ. I have never written on this, and I can't claim to be an expert on it. It wasn't the substance of my testimony because it's not something that I've pursued.

Mr. NADLER. But do you believe that *Pierce* was rightly decided or wrongly decided?

Ms. ALVARÉ. I've never really been called on to think about that, and I have to say——

Mr. NADLER. All right. You're ducking the question.

Ms. ALVARÉ [continuing]. That it cautioned—no, sir, I really am not. If you know law professors——

Mr. NADLER. Well, you cited the case.

Ms. ALVARÉ. I cited it for a description of the break that *Roe* made with what——

Mr. NADLER. All right. Thank you.

Dr. O'Connor?

Ms. ALVARÉ. Please let me just——

Mr. NADLER. No, I don't want——

Ms. ALVARÉ [continuing]. Say that as a law professor——

Mr. NADLER. I have 5 minutes. Excuse me. I asked you a question. You didn't answer it.

Dr. O'Connor, do you believe that *Pierce* was rightly decided or wrongly decided? And do you believe that the Constitution protects certain unenumerated rights?

Ms. O'CONNOR. I adamantly believe that the Constitution protects unenumerated rights. We can go back to statements of Alexander Hamilton once saying, "The Constitution doesn't protect my right to shave, but I can do it every morning."

Mr. NADLER. Okay.

Ms. O'CONNOR. There are simply so many rights inherent in the way we have ordered our lives. When you look at that Bill of Rights and look through how those Bill of Rights have been incorporated through the 14th amendment, that if we were—if you were today to find that that—that enumerated rights no longer—excuse me, that rights contained in the Constitution from the penumbras were no longer valid rights, the kind of America we would have today would be very different than the one we have now.

Mr. NADLER. Thank you very much.

Back to Professor Alvaré. We have a prominent pollster—who is not here but is supposed to be here—on today's panel. Do you think it's appropriate to use polls to decide questions of constitutional rights? Do you believe that the concept of the independent judiciary protecting rights that may be unpopular among the vast majority of the public is incorrect?

Ms. ALVARÉ. I don't want to use polls to define human rights, absolutely not. I find it encouraging that most of the public disagrees with *Roe*, but I wouldn't use that as the basis ever for my argument.

Mr. NADLER. Now you just said an unestablished fact.

Dr. O'Connor, do you—same question. Do you believe that it's appropriate to use polls to decide constitutional rights or that a right can be there in spite of it being very unpopular?

Ms. O'CONNOR. I absolutely believe that it is not the responsibility of the Court to measure and look—the Court can look at polls, and I'm not going to stop them from being as fully well rounded. But in terms of basing an opinion on it, absolutely not. If we had done that, cases like *Brown v. Board of Education* would have been voted——

Mr. NADLER. Thank you.

Professor Alvaré again. You question the validity of some of the decisions leading up to *Roe*, such as *Griswold*, and also such as those protecting the—well, such as *Griswold*, the right of couples to use birth control. Do you believe these decisions were wrongly decided, that *Griswold* was wrongly decided?

Ms. ALVARÉ. I didn't at all question *Griswold*. Again, the purpose of my citing *Griswold, Pierce, Meyer,* and the *Lehr* cases was simply to establish that *Roe* was something new and different in family law——

Mr. NADLER. Okay. So——

Ms. ALVARÉ [continuing]. And broke away——

Mr. NADLER [continuing]. You're not commenting on whether they're rightly or wrongly decided.

Ms. ALVARÉ. Yeah, that wasn't the purpose of my use of it, yes.

Mr. NADLER. Okay. And do you believe there is any constitutional right to privacy?

Ms. ALVARÉ. I believe there is a constitutional right to privacy. That is one of those things that the Supreme Court has said there are things inherent in ordered liberty without which other constitutional rights——

Mr. NADLER. So you might call something——

Ms. ALVARÉ [continuing]. Can't exist and——

Mr. NADLER [continuing]. Inherent—so something that isn't specifically mentioned in the Bill of Rights or the Constitution but

that as inherent in ordered liberty, would that be synonymous with an unenumerated right?

Ms. ALVARÉ. Why I didn't answer the first question in the whole, again, being careful and a lawyer, is that one doesn't want to say I believe there could be any unenumerated right that you could tell me about or——

Mr. NADLER. But there are some unenumerated rights because they're inherent to the concept of ordered liberty.

Ms. ALVARÉ. In that one in particular, it seems clear that when they say there are some rights without which other rights cannot exist, that seems logical. Of course——

Mr. NADLER. Okay.

Ms. ALVARÉ [continuing]. Abortion is——

Mr. NADLER. So the question—all right. So there's some unenumerated rights. The question is which ones. That's a fair statement. Thank you.

Ms. ALVARÉ. Yes.

Mr. NADLER. Professor O'Connor, it is often said—in fact, we heard Professor Alvaré say that overturning *Roe* would simply return the questions to the States. What happens to those State laws on the books today that outlaw abortion but are unenforceable today because of the current Supreme Court decisions, if *Roe* were to be overturned?

Ms. O'CONNOR. Well, Congressman, first of all, there are several States that already have on their books what we call "trigger provisions," which the minute that *Roe v. Wade* is overruled would then in turn do the same and outlaw abortion in their States. Much as—probably more important in terms of our discussion today is just looking at what is going on in South Dakota right now as we speak. As much as I have respect for all of the gentlemen on this panel——

Mr. CHABOT. The gentleman's time has expired. The witness——

Mr. NADLER. An additional——

Mr. CHABOT [continuing]. Can continue.

Ms. O'CONNOR. Pardon me?

Mr. CHABOT. The gentleman's time's expired, but you can continue answering the question.

Ms. O'CONNOR. Okay. As much as respect I have for all of you, if I am in a hospital and a doctor has to make a decision as to whether or not he is going to have to—my life is in danger and he has to——

Mr. CHABOT. The gentleman has sought another 2 minutes, so I'm yielding that to him now, and so he can determine if he wants you to continue talking or use some of it himself.

Ms. O'CONNOR. I do not want a Member of Congress telling a physician how he or she can determine whether or not my life is in danger at a critical moment in a hospital——

Mr. NADLER. That should be a doctor's decision, not a Member of Congress.

Ms. O'CONNOR. I think it should be a doctor's decision and not yours.

Mr. NADLER. Thank you. If abortion can be outlawed—if we permitted abortion to be outlawed—then can other procedures that re-

sults in the destruction of an embryo, such as in vitro fertilization, also be outlawed by the same constitutional logic?

Ms. O'CONNOR. I definitely think so.

Mr. NADLER. Thank you.

Ms. O'CONNOR. And I'm very concerned to also hear today that contraceptive is now up for debate in terms of also taking that logic.

Mr. NADLER. Thank you.

And in Professor Alvaré criticizing the Court's, quote, "well-known philosophy of jurisprudence of individualism as found in *Roe* and *Casey*," I am very troubled by the collectivist notion of constitutional rights. I've always thought the rights protected by the Constitution were individual rights. Could you comment on this briefly?

Ms. O'CONNOR. I definitely agree with you. We are a Nation founded on individual rights and what could be more important than the individual right to decide what you would like to do with your body.

Mr. NADLER. Thank you. And finally, Professor Alvaré, you have been very critical of the health exception as enumerated by the Court and as interpreted by the Court, especially as it applies to a woman's mental health. Do you believe that Government should be permitted to criminalize abortions in cases of rape and incest?

Ms. ALVARÉ. Yes, my position is very clear. First of all, there really isn't medical indication for abortion today in almost any situation you can think of other than sepsis, number one. Number two, health abortions are being provided as Planned Parenthood——

Mr. NADLER. Excuse me. This is a different question. Do you believe that Government should be permitted to criminalize abortions in cases of rape and incest?

Ms. ALVARÉ. I believe doctors should be forbidden from performing abortions, yes, in the United States——

Mr. NADLER. Your answer is yes.

Ms. ALVARÉ [continuing]. Case of the life of the mother, you will find that they really don't exist medically today in the——

Mr. NADLER. Let me ask you one follow-up question. If the Constitution only protects the right to abortion in cases where it's necessary to preserve the life of the——

Mr. CHABOT. The gentleman's time has expired, but the gentleman can complete his question and the witness can answer it.

Mr. NADLER. Thank you.

How great a probability of death do you think there has to be before a doctor could perform the procedure with confidence that she or he or his or her patient won't face criminal charges? How much physical injury short of death does the Constitution permit the State to require a woman to endure before she has the right to an abortion, if at all? Could it require her to endure possible sterility or loss of a limb if the doctors were confident she would survive?

Ms. ALVARÉ. I have never written on that, so I can't answer that question. I'm sorry.

Mr. CHABOT. The gentleman's time has expired.

Mr. NADLER. Thank you.

Mr. CHABOT. Just a quick follow-up question with Professor Alvaré, if I could. The professor indicated that you believe that the

Constitution does include the right to privacy, but even if it does include a right to privacy, am I accurate in saying that you do not believe that that right to privacy would include the right to have an abortion?

Ms. ALVARÉ. Absolutely, I agree with that. The right of privacy cannot include the right to terminate a third party's life, and the way that *Griswold v. Connecticut* linked it to the good of the community, seems to me that that had a proper foundation.

Mr. CHABOT. Thank you very much.

Before we go on with the questioning, our fourth witness has arrived. I know they had weather problems up in New York, so we are very glad you were able to make it.

We have already given you an introduction and sang your praises, so, we'll just cut right to the chase here, and you're recognized for 5 minutes.

TESTIMONY OF KELLYANNE CONWAY, PRESIDENT AND CHIEF EXECUTIVE OFFICER, the polling company™, inc.

Ms. CONWAY. Thank you very much, Mr. Chairman, and thank you, Members of the Committee, for having me here today. And I would like to acknowledge my co-panelists and thank them for their participation.

I would also like to enter my entire testimony into the record if I may.

Briefly, the methodology and phraseology of any type of public opinion polling should be taken with the utmost care, but in the case of abortion, which many would admit melds together matters of religion, morality, science, medicine, law, gender, politics, it is that much more critical that polling not be governed by quick and easy sound bites, pro-life or pro-choice even. It seems intuitive that the best way to find out if someone is pro-life or pro-choice on the matter of abortion, would be indeed to ask them the question, "Are you pro-life or pro-choice on abortion?" And that question is asked routinely.

Gallup asked the question just last month, and came up with 53 percent, quote, "pro-choice," 42 percent, quote, "pro-life," leading us to believe that only 5 percent of the country feels that it either depends, or they're not sure, or they don't have an opinion on that. It's a very rare instance where only 5 percent of Americans have not rendered an opinion on almost any matter.

What is flawed about a question as simple as "Are you pro-choice or pro-life," is that it does not take into account that the underlying matter seems to be very non-static and dynamic to many individuals. And the better polling questions on the matter of abortion, and in more specific legal context, *Roe v. Wade*, exists when they are taken from the wisdom of qualitative information.

To wit, if you listen to people long enough in focus groups, you recognize that there are gradations of viewpoints depending on what they know about the circumstances leading to the pregnancy, what they know about why said woman would want to seek an abortion. Is it that her, as Professor O'Connor puts the dramatic example of, her life is in jeopardy? Is it one of those rare occasions as to why the million plus abortions occur in this country per year? Or is it more what the Alan Guttmacher Institute has said is the