CENTER FOR REPRODUCTIVE RIGHTS

April 2, 2012

VIA FACSIMILE AND FEDERAL EXPRESS

The Honorable Nathan Deal
Governor of Georgia
206 Washington Street
Suite 203, State Capitol
Atlanta, GA 30334

Re: House Bill 954

Dear Governor Deal:

The Center for Reproductive Rights strongly opposes House Bill 954 and urges you to veto this measure. This bill is clearly unconstitutional and would be one of the most extreme abortion laws passed in this country in recent memory. This bill will endanger the health of pregnant women in Georgia who have a constitutional right to access the essential reproductive healthcare banned by this bill and will prevent physicians in Georgia from exercising their best medical judgment in caring for their patients.

The Center for Reproductive Rights is a non-profit advocacy organization that seeks to advance reproductive freedom as a fundamental human right. A key part of our mission is ensuring that women throughout the United States have meaningful access to high-quality, comprehensive reproductive health care services. As a part of that mission, we have litigated cases all over the United States that secure the rights of women to have safe and legal abortions, including in Georgia. HB 954 would violate both the United States Constitution and the Georgia Constitution for two reasons: it bans some abortions before viability and it fails to adequately protect women's health either before or after viability.

I. HB 954 Would Enact an Unconstitutional Ban on Pre-Viability Abortion

HB 954 violates long-established constitutional precedent prohibiting states from banning abortion prior to viability. This bill bans abortions in Georgia at twenty weeks post-fertilization, with exceptions only to prevent a woman's death, to "avert serious risk of substantial and irreversible physical impairment of a major bodily function," not including psychological or emotional conditions, or in cases of a "medically futile pregnancy."[1] H.B. 954, § 2, amending GA. CODE ANN. § 16-12-141(c)(1). Although the point of viability, "meaning [the] realistic

[1] This term is vaguely defined in the bill but appears to cover only a narrow set of circumstances in which a fetus has a fatal condition.

120 Wall Street
New York, New York 10005
Tel. 917 637 3600 Fax. 917 637 3666
www.reproductiverights.org

potential for long-term survival outside the uterus," differs with each pregnancy, a fetus is not "generally understood to have achieved viability . . . [until] twenty-four weeks lmp or later."[2] Twenty weeks gestation is markedly before viability. Indeed, the findings in HB 954 do not suggest that viability begins at twenty weeks gestation. Instead, the bill purports to ban abortion at the point when the legislature (contrary to the best medical research) believes that fetuses may feel pain, despite constitutional precedent precluding states from banning abortion before viability for *any* reason.

For nearly forty years, the U.S. Supreme Court has recognized that the U.S. Constitution prohibits a state from enacting a law that bans abortion prior to the point in pregnancy when a fetus is viable and prohibits a state from drawing a line at a particular gestational age to establish when viability begins.[3] As the Supreme Court has said repeatedly, "viability marks the earliest point at which the State's interest in fetal life is constitutionally adequate to justify a legislative ban on nontherapeutic abortions."[4] The Supreme Court has never wavered from this position, despite numerous opportunities to do so. The Court has emphasized that "viability" is necessarily a "flexib[le] . . . term," and that states *cannot* "place viability, which essentially is a medical concept, at a specific point in the gestation period."[5] Moreover, because "[t]he time when viability is achieved may vary with each pregnancy,"[6] the Court also has insisted that the determination of viability must be left to the physician's judgment.[7] HB 954 directly contradicts these fixed constitutional principles.[8]

The sponsors and proponents of HB 954 may argue that more recent decisions of the Supreme Court leave open the potential for states to ban abortion based on factors other than

---

[2] *Planned Parenthood Fed'n of America v. Gonzales*, 435 F.3d 1163, 1166 n.1 (9th Cir. 2006); *rev'd on other grounds*, *Gonzales v. Carhart*, 550 U.S. 124 (2007).

[3] *See Roe v. Wade,* 410 U.S. 113, 163-64 (1973).

[4] *Planned Parenthood of S.E. Pa. v. Casey,* 505 U.S. 833, 860 (1992); *see also id.* at 870 ("We conclude the line should be drawn at viability, so that before that time the woman has a right to choose to terminate her pregnancy."); *id.* at 879.

[5] *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 64 (1976).

[6] *Id.*

[7] *Colautti v. Franklin*, 439 U.S. 379 (1979). "Viability is reached when, in the judgment of the attending physician on the particular facts of the case before him, there is a reasonable likelihood of the fetus' sustained survival outside the womb, with or without artificial support. Because this point may differ with each pregnancy, neither the legislature nor the courts may proclaim one of the elements entering into the ascertainment of viability—be it weeks of gestation or fetal weight or any other single factor—as the determinant of when the State has a compelling interest in the life or health of the fetus. Viability is the critical point." *Id.* at 388-89; *see also Casey*, 505 U.S. at 870 (holding again that "the line should be drawn at viability, so that before that time the woman has a right to choose to terminate her pregnancy"); *Webster v. Reprod. Health Servs.*, 492 U.S. 490 (1989) (holding that the determination of viability is a matter for the judgment of the attending physician); *see id.* at 516-17 (plurality opinion); *id.* at 526-27 (O'Connor, J., concurring); *id.* at 545 n.6 (Blackmun, J., joined by Brennan, J., and Marshall, J., concurring and dissenting).

[8] Notably, the United States Court of Appeals for the Tenth Circuit struck down a Utah statute that, like HB 954, banned abortion after twenty weeks gestation. *Jane L. v. Bangerter*, 102 F.3d 1112, 1114 (10th Cir. 1996). That court held that Utah's attempt to legislate the viability determination was "directly contrary to the Supreme Court authority," and found that the state's "deliberate decision to disregard controlling Supreme Court precedent set out in *Roe*, *Danforth*, *Colautti*, and *Webster*, and to ignore the Supreme Court's repeated directive that viability is a matter for an attending physician to determine" showed that the state intended "to prevent a woman from exercising her right to choose [a previability] abortion" and imposed "an unconstitutional undue burden on her right to choose." *Id.* at 1115-17 (footnote omitted).

viability. No case, however, has ever held or even suggested that a state can ban abortions at any point prior to viability— regardless of the state interest identified. In *Gonzales v. Carhart* ("*Carhart II*"),[9] the most recent Supreme Court case on abortion, the law at issue did not ban abortions in general or abortions at any particular point in pregnancy. Rather, it banned only *one abortion procedure.* Although the Supreme Court upheld that law, the Court emphasized that safe alternative abortion procedures were available at all times and in all cases and explained that its decision was fully consistent with past precedent.[10] By completely banning some pre-viability abortions, HB 954 directly conflicts with all U.S. Supreme Court precedent on abortion.

II. HB 954 Unconstitutionally Fails to Protect Women's Health

HB 954 contains an extremely narrow health exception for abortions performed after twenty weeks, permitting them only when an abortion is necessary to avert death or "serious risk of substantial and irreversible physical impairment of a major bodily function." The exception prevents physicians from considering *any* mental health issues in evaluating whether a woman's health is compromised by the pregnancy and explicitly prohibits physicians from providing abortions to patients at risk for suicide. Such a narrow health exception is unconstitutional at any stage of pregnancy, even *after* viability, because it does not adequately allow physicians to exercise their medical judgment to protect women's health in all circumstances.

Since recognizing the constitutional right to choose an abortion, the Supreme Court has consistently held that even when a state may ban abortion *after* viability, any such ban must make an exception when an abortion "is necessary, in appropriate medical judgment, for the preservation of the life *or health*" of the woman.[11] The Supreme Court has rejected the notion that women's physical health can be defined as narrowly as it is in HB 954 and has explicitly stated that psychological health is a component of women's health.[12]

HB 954 bans all abortions twenty weeks after fertilization. Therefore, a woman needing an abortion to protect her health whose condition does not meet the bill's narrow exception would not have a safe alternative to end her pregnancy, as Supreme Court precedent has required for nearly forty years.[13]

---

[9] 550 U.S. 124 (2007).

[10] *See, e.g., id.* at 146 (stating that its decision is guided by the principle, *inter alia*, that "[b]efore viability, a State 'may not prohibit any woman from making the ultimate decision to terminate her pregnancy,'" quoting *Casey*).

[11] *Roe*, 410 U.S. at 165 (emphasis added); *Casey*, 505 U.S. at 879 (quoting *Roe*, same).

[12] *See Doe v. Bolton*, 410 U.S. 179, 192 (1973) ("[T]he medical judgment may be exercised in the light of all factors—physical, emotional, psychological, familial, and the woman's age—relevant to the well-being of the patient. All these factors may relate to health."); *cf. Casey*, 505 U.S. at 882 ("It cannot be questioned that psychological well-being is a facet of health."); *Thornburgh v. ACOG*, 476 U.S. 747, 768-69 (1986) (invalidating post-viability abortion restriction because it placed pregnant women at medical risk by failing to require maternal health to be the "physician's paramount consideration"); *Women's Med. Prof'l Corp. v. Voinovich*, 911 F. Supp. 1051, 1080-81 (S.D. Ohio 1995) (holding post-viability abortion restriction unconstitutional because "a state may not constitutionally limit the provision of abortions only to those situations in which a pregnant woman's physical health is threatened, because this impermissibly limits the physician's discretion to determine what measures are necessary to preserve her health"), *aff'd on other grounds*, 130 F.3d 187 (6th Cir. 1997).

[13] The Supreme Court's decision in *Carhart II* does not alter the requirement that any law banning all methods of abortion must contain a comprehensive health exception. In *Carhart II*, the Court was considering a law that banned just *one method* of abortion. 550 U.S. at 167; *see also id.* at 164 ("Alternatives are available to the prohibited

Although supporters of HB 954 may claim that the Supreme Court has approved the language in the bill's exception, they are incorrect. The Supreme Court has addressed this type of language only in the context of medical emergencies, where the issue was not whether the woman could have an abortion at all, but whether she could be required to delay the procedure twenty-four hours in order to undergo the state's mandated informed consent process or to seek parental consent.[14] Even in those contexts, the Supreme Court has never upheld any exception that was limited solely to "physical health." To the contrary, the Court has repeatedly emphasized that health *includes mental health.*[15] By excluding mental health, the "medical emergency" exception in HB 954 fails to meet even basic constitutional thresholds for a medical emergency exception when an abortion is delayed. The Court has never upheld such narrow language as adequate for a *health* exception to a complete abortion ban.

III. HB 954 Would Violate the Georgia Constitution

HB 954 also would violate the right to privacy guaranteed by the Georgia Constitution. "The right of privacy has a long and distinguished history in Georgia."[16] Indeed, the Supreme Court of Georgia was the first court of last resort in the United States to recognize a constitutional right of privacy, making the Court a "pioneer in the realm of the right of privacy."[17] Since that time, the Georgia appellate courts have repeatedly recognized the right of privacy as a fundamental constitutional right, such that restrictions on the right merit "careful scrutiny by the courts."[18] Thus, a government limitation on the right to privacy will pass constitutional muster if the limitation is shown to serve a compelling state interest and to be narrowly tailored to effectuate only that interest.[19]

Georgia courts have recognized the right to privacy in a variety of contexts. For instance, the Supreme Court of Georgia found that a citizen's right to privacy protected his right to refuse medical treatment and trumped any interest the State may have in the preservation of life.[20] The Supreme Court of Georgia also held that the right of privacy protects private, consensual sexual activity between adults, even if others would find such activity to be morally objectionable.[21]

Further, the Supreme Court of Georgia has made clear that "the 'right to be let alone' guaranteed by the Georgia Constitution is far more extensive than the right of privacy protected by the U.S. Constitution."[22] Under federal law, states cannot ban abortion before viability, nor can they define viability as based on a single factor rather than leaving the decision to physician

---

procedure."); *id.* at 165 ("Here the Act allows, among other means, a commonly used and generally accepted method, so it does not construct a substantial obstacle to the abortion right.").

[14] *Casey*, 505 U.S. at 880.

[15] *See, e.g., id.* at 882; *Bolton*, 410 U.S. at 192.

[16] *Powell v. State*, 510 S.E.2d 18, 21 (Ga. 1998).

[17] *Id.*

[18] *Id.* at 21-22 (citation omitted).

[19] *Id.* at 24.

[20] *Georgia v. McAfee*, 385 S.E.2d 651, 652 (Ga. 1989).

[21] *Powell*, 510 S.E.2d at 24.

[22] *Id.* at 22.

discretion, where it rightly belongs.[23] Further, even after viability, federal law prohibits a ban on abortion when needed to protect a woman's life or health.[24]

Because Georgia law provides even broader protection of the right of privacy than federal law, if enacted, HB 954 would violate the right of privacy guaranteed by the Georgia Constitution by banning all abortions, with only the most limited of exceptions, after 20 weeks. The Georgia ban applies regardless of whether the pregnancy has reached viability. Additionally, the ban would apply regardless of a woman's individual circumstances; it would apply to victims of rape and incest, to very young minors, and to women who are making the very difficult decision to terminate a wanted pregnancy because of a poor prognosis for their own health or for the health of the fetus. For these reasons, the ban is not only unconstitutional, it is cruel.

The Supreme Court of Georgia has made clear that the Georgia Constitution "is made for people of fundamentally differing views."[25] Under Georgia law, "[t]he individual's right to freely exercise his or her liberty is not dependent upon whether the majority believes such exercise to be moral, dishonorable, or wrong."[26] By making a decision for women about an issue that affects their liberty so uniquely, rather than leaving this most private decision for a woman to make herself, the Georgia legislature has violated the right to privacy protected by Georgia law.

IV. Conclusion

HB 954 is an unconstitutional ban on pre-viability abortions and does not adequately protect women's health before or after viability. We urge you to veto HB 954. Please do not hesitate to contact us if you would like further information.

Sincerely,

Jordan Goldberg
State Advocacy Counsel*
United States Legal Program
917-637-3681
*Admitted in New York and New Jersey

---

[23] *See supra* section I.
[24] *See supra* section II.
[25] *Powell*, 510 S.E.2d at 26 n. 6 (internal citations omitted).
[26] *Id.* at 27 (Sears, J., concurring).