CENTER FOR REPRODUCTIVE RIGHTS

wvfree.org
Advocates for Reproductive Health, Rights and Justice

March 1, 2016

The Honorable Earl Ray Tomblin
Office of the Governor
State Capitol
1900 Kanawha Boulevard, East
Charleston, WV 25305

Dear Governor Tomblin:

The Center for Reproductive Rights and WV FREE urge you to veto Senate Bill 10, which is constitutionally flawed and will endanger the health of West Virginia women by preventing physicians in West Virginia from exercising their best medical judgment in caring for their patients.

The Center for Reproductive Rights is a legal advocacy organization dedicated to protecting the rights of women to access safe and legal abortion and other reproductive health care. For more than 20 years, we have successfully challenged restrictions on abortion throughout the United States, including in West Virginia. We have also challenged restrictions similar to Senate Bill 10 in Kansas and Oklahoma, where we successfully blocked both bills from going into effect.

WV FREE is the state's leading reproductive health, rights and justice organization with over 16,000 supporters. Founded in 1989, WV FREE works every day for West Virginia women and families to improve education on reproductive health options, increase access to affordable birth control, reduce teen pregnancy, improve adolescent health, and protect personal decision-making, including decisions about whether or when to have a child.

I. Senate Bill 10 Would Ban the Most Common Method of Abortion After the First Trimester.

Senate Bill 10 would ban D & E abortions with extremely limited exceptions. D & E is a safe, common method of second trimester abortion, accounting for approximately 95% of all second trimester procedures nationally.

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Direct Supreme Court precedent has repeatedly declared a ban on the most common method of abortion to be unconstitutional.[1] In *Stenberg v. Carhart*, the United States Supreme Court held specifically that a ban on the method of abortion outlawed by this bill, D & E, is unconstitutional.[2] Moreover, the most recent Supreme Court case addressing an abortion ban, *Gonzales v. Carhart*, ruled that a ban on another second-trimester procedure, D & X, was constitutional only because of the *continued availability* of D & E, the most commonly used method of second trimester abortion.[3] The same reasoning applies here. Under Supreme Court precedent, this bill is plainly unconstitutional as an undue burden on the right to abortion.[4]

II. Courts Have Blocked Unconstitutional Abortion Bans Like Senate Bill 10.

As established in *Stenberg v. Carhart*, a ban on the most common method of abortion is unconstitutional.[5] Only two states – Kansas and Oklahoma – have passed similar extreme measures.[6] Both of these laws, passed in 2015, were blocked before they took effect,[7] in cases brought by the Center for Reproductive Rights. The Kansas Court of Appeals recently upheld a preliminary injunction issued against that state's law, holding that the ban creates an undue burden for those seeking second trimester abortion care. The Court rejected the State's proposed alternative of fetal demise prior to the procedure, holding that, "[g]iven the additional risk, inconvenience, discomfort, and potential pain associated with [alternatives to D & E abortion proposed by the State of Kansas], some of which are virtually untested, we conclude that banning the standard D & E, a safe method used in about 95% of second trimester abortions, is

[1] *See* Stenberg v. Carhart, 530 U.S. 914, 945-46 (2000); Planned Parenthood of Cent. Mo. V. Danforth, 428 U.S. 52, 77-79 (1976).
[2] *See* Stenberg v. Carhart, 530 U.S. 914, 945-46 (2000).
[3] *See* Gonzales v. Carhart, 550 U.S. 124, 147, 164-65 (2007).
[4] "A finding of an undue burden is a shorthand for the conclusion that a state regulation has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus… [and]…a statute which, while furthering the interest in potential life or some other valid state interest, has the effect of placing a substantial obstacle in the path of a woman's choice cannot be considered a permissible means of serving its legitimate ends." Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 877 (1992).
[5] *See* Stenberg v. Carhart, 530 U.S. 914, 945-46 (2000).
[6] These laws are nearly identical to SB 10 with few exceptions, including SB 10's excision of criminal penalties. The excising of the criminal provisions in the bill mean next to nothing, since the chilling effect of losing one's license for violating the bill would still keep doctors from exercising their best medical judgment to protect their patient's health in all circumstances, amounting to a ban on D & E abortion in the state of West Virginia.
[7] Hodes & Nauser, MDs, P.A. v. Schmidt, No. 114,153, 2016 WL 275297, at *13-14 (Kan. Ct. App. Jan. 22, 2016); Nova Health Systems v. Pruitt et al., Case No. CV-2015-1838, 5-6, (Okla. Cty. Dist. Ct. Oct. 28, 2015).

an undue burden on the right to abortion."[8] In an October 2015 order, the District Court of Oklahoma County temporarily blocked the law, finding that the ban "imposes an impermissible burden by banning D & E abortion procedures" and that "the alternative [methods] proposed [by the State]…are not reasonable, and would likely be unavailable in Oklahoma."[9]

III. Conclusion.

SB 10 is unconstitutional, medically unsound, and presents an unwarranted interference into private medical decisions. Further, legislation similar to SB 10 has been blocked in the only other two states to have passed such an extreme restriction. The lesson from these imprudent and unsuccessful attempts to obstruct access to the most commonly used method of second trimester abortion is clear: the federal Constitution protects access to D & E abortions. We urge you to veto this legislation.

Please do not hesitate to contact us with any questions or for additional information.

Sincerely,

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[8] Hodes & Nauser, MDs, P.A. v. Schmidt, No. 114,153, 2016 WL 275297, at *14 (Kan. Ct. App. Jan. 22, 2016)
[9] Nova Health Systems v. Pruitt et al., Case No. CV-2015-1838, 6, (Okla. Cty. Dist. Ct. Oct. 28, 2015)