CENTER FOR REPRODUCTIVE RIGHTS

The Honorable Senator Charles Schwertner
Chairman, Senate Committee on Health & Human Services
Sam Houston Building, Room 420
P.O. Box 12068
Austin, TX 78711

February 14, 2017

Dear Chairman Schwertner:

The Center for Reproductive Rights urges you to reject Senate Bill 415, which would ban a safe method of abortion in the second trimester. This bill is clearly unconstitutional and will endanger the health of Texans by preventing physicians in the state 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 very recently against the state of Texas. Indeed, just last June, we won the landmark case *Whole Woman's Health v. Hellerstedt*,[1] in which the U.S. Supreme Court reaffirmed the Constitution's robust protections for a woman's decision to have an abortion. Those constitutional protections extend to abortion care in the second trimester. Indeed, health care providers have challenged laws nearly identical to Senate Bill 415 in Kansas, Louisiana, Alabama, and Oklahoma, and have successfully blocked these laws from going into effect in all four states.[2] This letter sets forth the constitutional and health policy flaws contained in Senate Bill 415.

I. Senate Bill 415 Is Unconstitutional.

Senate Bill 415 would ban the standard dilation and extraction (D&E) abortion procedure with extremely limited exceptions. D&E is a safe method of second trimester abortion, accounting for approximately 95% of all second trimester procedures nationally.[3] In order to obtain care that is not banned by this bill, women would be forced to undergo an additional,

[1] __ U.S. __, 136 S.Ct. 2292 (2016).
[2] In Louisiana, the state agreed not to enforce the restriction against licensed abortion clinics or their physicians while litigation proceeds.
[3] Karen Pazol *et al.*, ABORTION SURVEILLANCE - UNITED STATES, CTRS. FOR DISEASE CONTROL & PREVENTION, 2009, 61(SS08); 1-44 (November 23, 2012), https://www.cdc.gov/mmwr/preview/mmwrhtml/ss6108a1.htm.

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invasive, and unnecessary medical procedure even against the medical judgment of her physician. Senate Bill 415 is unconstitutional for the reasons set forth below.

The U.S. Supreme Court has repeatedly declared that a ban on the most common method of abortion is unconstitutional.[4] In *Stenberg v. Carhart*, the Court held specifically that a ban on the method of abortion outlawed by Senate Bill 415, D&E, is unconstitutional.[5] 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 in reliance on the continued availability of D&E, the most commonly used method of second trimester abortion.[6] The same reasoning applies here. Under Supreme Court precedent, this bill is plainly unconstitutional as an undue burden on the right to abortion.[7]

Additionally, the Supreme Court's recent decision in *Whole Woman's Health v. Hellerstedt* provides a strong reaffirmation of prior Supreme Court decisions affording strong constitutional protection to women's right to terminate a pregnancy.[8] That decision makes clear that the undue burden standard requires courts to meaningfully scrutinize pre-viability abortion restrictions.[9] In addition, in *Whole Woman's Health*, the Court made clear that even if an abortion restriction serves a valid state interest, its benefits must outweigh its burdens in order to pass constitutional muster.[10] Senate Bill 415 is divorced from any health-related state interest, with no evidence to support that the use of additional, medically unnecessary procedures increase the safety of the standard D&E procedure. In contrast, the law imposes significant burdens on patients by forcing them to accept unnecessary, and in some instances, untested, medical procedures in order to obtain an otherwise common and safe procedure. Regardless of the state interest asserted, no court has ever held that government-mandated imposition of a medically unnecessary, untested, and invasive procedure, or a more complicated and risky medical

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[4] *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).
[5] *See Stenberg*, 530 U.S. at 945-46.
[6] *See* Gonzales v. Carhart, 550 U.S. 124, 147, 164-65 (2007).
[7] "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); *accord* Whole Woman's Health v. Hellerstedt, 136 S.Ct. 2292, 2309-10 (2016).
[8] 136 S.Ct. at 2309-10.
[9] *Id.*at 2310 ("[W]hen determining the constitutionality of laws regulating abortion procedures," courts must place "considerable weight upon evidence . . . presented[.]"); *id*. (courts cannot give "uncritical deference" to the facts supporting the government's position).
[10] *See id*.

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procedure with no proven medical benefits, is a permissible means of regulating pre-viability abortion. Such extreme burdens on women, violating both their physical and decisional autonomy, unquestionably impose an unconstitutional burden on access to abortion.

Accordingly, courts have blocked D&E bans each time they are challenged. A handful of states have enacted D&E bans[11] and these laws have been challenged in Kansas, Louisiana, Oklahoma, and Alabama. None of the challenged laws are currently enforced.[12] In Kansas, a plurality of the state Court of Appeals concluded "that banning the standard D&E, a safe method used in about 95% of second trimester abortions, is an undue burden on the right to abortion."[13] The federal court that found Alabama's D&E ban was likely unconstitutional was particularly concerned with the alternatives to standard D&E, finding that they can increase health risks and are generally less safe than the standard procedure. The court stated of one alternative to standard D&E:

> The court is troubled by the State's argument that women should be required to undergo this inadequately studied, potentially risky procedure. Indeed, would we want ourselves or our families (our partners and children) to undergo a medical procedure for which the documented safety and effectiveness is comparably lacking and there is no potential medical benefit?[14]

These court decisions foreshadow the likely outcome should Senate Bill 415 be enacted: it too would face a court challenge, and Supreme Court precedent would clearly require striking down this legislation as unconstitutional.

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[11] Seven states have passed D&E bans: Alabama, Arkansas, Kansas, Louisiana, Oklahoma, West Virginia, and Mississippi. The Arkansas law has not yet taken effect.

[12] Hodes & Nauser v. Schmidt, 368 P.3d 667, 668 (Kan. Ct. App. 2016), *review granted* (Apr. 11, 2016); Nova Health Systems v. Pruitt, No. CV-2015-1838, at *5-6, (Okla. Cty. Dist. Ct. Oct. 28, 2015); West Alabama Women's Center v. Miller, Case No. 2:15cv497-MHT, 2016 WL 6395904, at *25 (M.D. Ala. Oct. 27, 2016). The defendants in the Louisiana challenge agreed not to enforce the law against licensed abortion clinics or their physicians while the litigation proceeds.

[13] *Hodes & Nauser*, 368 P.3d at 293, 297 (District Court's grant of preliminary injunction finding substantial likelihood that the D&E ban violated the Kansas Constitution affirmed by an equally divided Kansas Court of Appeals).

[14] *West Alabama Women's Center*, 2016 WL 6395904 at *19.

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II. Senate Bill 415 Presents an Unwarranted Intrusion in the Doctor-Patient Relationship.

A ban on D&E abortions not only robs women of access to the most common method of second trimester abortion, it also interferes with physicians' ability to care for their patients. Senate Bill 415 inserts itself into the medical exam room, potentially forcing physicians to perform medically substandard or even experimental procedures in order to care for their patients.

Unsurprisingly, medical experts in Texas do not support this legislation. The Texas section of ACOG, the nation's leading experts on women's health care, opposes Senate Bill 415, noting that the bill "prevents physicians from offering the safest medical care possible to patients" and "criminalizes physicians and puts them in the unconscionable position of having to deny a woman the evidence-based, compassionate care that results in the fewest complications, which would have a chilling effect on the availability of medical care for women in our state."

III. Conclusion

Senate Bill 415 is unconstitutional, medically unsound, and presents an unwarranted interference into private medical decisions. Furthermore, legislation similar to Senate Bill 415 has been blocked in other states. The lesson from these imprudent and unsuccessful attempts to obstruct access to second trimester abortion is clear: the U.S. Constitution protects access to pre-viability abortion care. We urge you to reject this legislation.

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

Sincerely,

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**admitted in New York*

cc: Sens. Carlos Uresti, Dawn Buckingham, Konni Burton, Lois Kolkhorst, Borris L. Miles, Charles Perry, Van Taylor, Kirk Watson