April 11, 2012

VIA FACSIMILE AND FEDERAL EXPRESS

The Honorable Janice K. Brewer
Governor of Arizona
Executive Tower
1700 West Washington Street
Phoenix, AZ 85007

Re: House Bill 2036

Dear Governor Brewer:

The Center for Reproductive Rights strongly opposes Arizona House Bill 2036 and urges you to veto this measure. This bill will endanger the lives and health of the women of Arizona and prevent physicians from exercising their best medical judgment in caring for their patients. It is discriminatory, harmful to women and clearly unconstitutional. It would also be the most extreme abortion law passed in this country in recent memory.

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 country that secure the rights of women to have safe and legal abortions, including in Arizona. House Bill 2036 would violate the United States Constitution: It would ban pre-viability abortions and lacks even the most basic protections for women's lives and health. It also would prevent women from accessing medication abortion, one of the safest and most common methods of early abortion. Although the bill contains a myriad of other harmful and cruel restrictions on women and medical providers, this letter focuses primarily on some of the most serious constitutional flaws in the bill.

I. House Bill 2036 Would Enact an Unconstitutional Ban on Pre-Viability Abortion

House Bill 2036 violates long-established constitutional precedent prohibiting states from banning abortion prior to viability. This bill would ban abortions in Arizona at twenty weeks after the start of the woman's last menstrual period ("lmp")—eighteen weeks after conception—with no exceptions apart from medical emergencies where an abortion would be necessary to prevent *immediate* death or where a delay in providing an abortion would create a serious risk of "substantial

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and irreversible impairment of a major bodily function."[1] The bill does not contain an exception for situations in which an abortion is necessary to preserve a woman's life but where she will not die immediately, or where an abortion would be necessary to preserve her health.

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.[2] Although the point of viability, "meaning [the] realistic 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."[3] The twenty week lmp line in HB 2036 is at least four full weeks before the "generally understood" advent of viability. By completely banning some pre-viability abortions, HB 2036 directly conflicts with all U.S. Supreme Court precedent on abortion.

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 2036 directly contradicts these fixed constitutional principles.[8]

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[1] H.B. 2036, 50th Leg., 2d Reg. Sess. (Ariz. 2012), § 7 (adding ARIZ. REV. STAT. § 36-2159(B)); ARIZ. REV. STAT. § 36-2151(6).

[2] *See Roe v. Wade,* 410 U.S. 113, 163-64 (1973). In *Gonzales v. Carhart* ("*Carhart II*"), 550 U.S. 124 (2007), 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 and explained that its decision was fully consistent with past precedent. *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*).

[3] *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).

[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).

II. House Bill 2036 Unconstitutionally Fails to Protect Women's Lives and Health

House Bill 2036 also fails to contain even the most basic protections for women's lives and health – leaving women with life-threatening illness such as cancer, heart disease, or a myriad of other serious conditions without the ability to get essential medical care. Instead of the constitutionally-mandated exceptions for life and health that must be present even in post-viability abortion bans, this bill contains only an extremely narrow medical emergency exception[9] that would only allow abortions after twenty weeks lmp to avert *immediate* death or where, in the absence of an *immediate* abortion, delay in treatment would create a "serious risk of substantial and irreversible impairment of a major bodily function."[10] 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] House Bill 2036 would directly contradict this fixed constitutional precedent and endanger women's lives and health.

III. House Bill 2036 Would Prevent Women Facing Devastating Circumstances From Accessing Critical Medical Care

In addition to being plainly unconstitutional, HB 2036 bans abortion at a critical time in pregnancy. Twenty weeks lmp is when most pregnant women have their first opportunity to learn about the health of the fetus. Only at this point in pregnancy, may families discover that the fetus has a fatal abnormality and will not live beyond birth. These kinds of abnormalities can include lethal skeletal dysplasia, a severe bone growth disorder which causes many newborns to die immediately after birth from respiratory failure, or a diagnosis of open neural tube defects, which, in the most severe cases, can result in death within a few hours or days after birth.

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[8] Notably, the United States Court of Appeals for the Tenth Circuit struck down a Utah statute that, like SB 589, 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).

[9] The Supreme Court has upheld this type of language only in cases where the issue was whether women could be could be required to delay the procedure twenty-four hours, but not whether she could have an abortion at all. *Casey*, 505 U.S. at 880. The Court has never upheld such narrow language as adequate for a life or health exception to a complete abortion ban.

[10] H.B. 2036, 50th Leg., 2d Reg. Sess. (Ariz. 2012), § 7 (adding Ariz. Rev. Stat. § 36-2159(B)); Ariz. Rev. Stat. § 36-2151(6).

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

During the legislative debate, several experienced physicians spoke out about the serious problems with the timing of this unconstitutional abortion ban. One physician who provides abortions for women who have been given a diagnosis of severe fetal abnormality pointed out that in most cases, women "will be past 20 weeks before the fetal abnormality is even diagnosed. For such women, this bill would force them to carry the pregnancy to term, often at substantial health risks to themselves. For other women who may receive a poor diagnosis before twenty weeks, either for themselves or the fetus, this bill would have the effect of imposing an arbitrary deadline by which women who are facing these difficult circumstances must decide whether to continue the pregnancy."[12] If HB 2036 became law, it would force women in these difficult circumstances to carry doomed pregnancies to term or to terminate their pregnancies immediately without being able to consult with specialists and consider all their options. As this physician said, "the dignity of making a decision whether to carry to term when faced with these and other difficult circumstances belongs to women and their families, not to the legislature."[13]

An Arizona geneticist who counsels families facing these difficult circumstances also came forward to implore the legislature not to pass this harmful bill. He noted that

> HB 2036 would not allow the time which is currently available in Arizona for the patient and her family to get the necessary counseling and information to make an informed consent. In fact, in my opinion and experience, forcing these mothers to make hurried decisions . . . could quite easily lead to pregnancy terminations that would not have otherwise been performed. It is so important that a patient have the time to gather all the necessary information from other medical specialists, such as pediatric surgeons, pediatric neurosurgeons, pediatric cardiologists, pediatric urologists, or neonatologists (to name just a few) of the different specialists from whom our patients commonly seek consultation prior to making a final decision about continuing or ending a pregnancy.[14]

IV. House Bill 2036 Unconstitutionally Restricts Women's Access to Medication Abortion, a Safe, Common and Effective Method of Early Abortion

Medication abortion is a safe and effective method of early abortion. Medication abortion is the preferable method for some women because of deeply held and personal reasons, such as victims of rape or sexual assault who may choose a procedure using medications alone rather than having an invasive surgical procedure, and for other women because it allows them to experience pregnancy loss in the privacy of their home. Moreover, there are some women for whom medication abortion is a safer procedure, such as women with certain uterine anomalies.

House Bill 2036 would unconstitutionally limit women's access to medication abortion by requiring that "any medication, drug or other substance used to induce an abortion is administered with the protocol that is authorized by the United States Food and Drug Administration and that is

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[12] *Hearing on H.B. 2036 Before the S. Judiciary Comm.*, 50th Leg., 2d Sess. (Ariz. 2012) (statement of Paul A. Isaacson, M.D.).

[13] *Id.*

[14] *Hearing on H.B. 2036 Before the S. Judiciary Comm.*, 50th Leg., 2d Sess. (Ariz. 2012) (statement of Gary Simpson, M.D.).

outlined in the final printing labeling instructions for that medication."[15] This restriction raises a number of serious constitutional problems.

First, it is unconstitutionally vague. The Due Process Clause of the United States Constitution requires that laws adequately describe the conduct prohibited so that both those who must conform their conduct to the law and those charged with enforcing the law can understand their obligations.[16] Moreover, statutes that threaten to inhibit the exercise of constitutionally protected rights, such as a woman's right to obtain an abortion, must meet an exacting standard of clarity.[17] The fundamental flaw with HB 2036 is this respect is that it is based on a misunderstanding of the role of the FDA. The FDA does not "authorize" any particular drug protocol, and does not prohibit the "off-label" use of medication, which is both common and often the best medical practice. Moreover, while the legislative findings discuss mifepristone, medication abortion is provided using two drugs - mifepristone and misoprostol. While the FDA final printing label for mifepristone describes a protocol using misoprostol, the label for misoprostol, a drug approved for treatment of ulcers, does not reference abortion. As a result of these unconstitutionally vague terms, it may be impossible for physicians to determine how to comply with the law. As a result, HB 2036 could effectively prohibit all medication abortions – leaving women without access to a safe, common method of abortion and forcing some women to have surgical abortions even if medication abortion would be a safer option.[18]

Second, even if this language is read to limit the provision of medication abortion to the mifepristone-misoprostol protocol provided on the FDA-approved label for mifepristone, that limitation would run directly counter to the best medical research available. It is standard medical practice in the United States for physicians to prescribe FDA-approved drugs in dosages and for medical indications that were not specifically approved – or even contemplated – by the FDA, particularly when supported by adequate research as to the safety and efficacy of such an alternative protocol. In the case of medication abortion, both the American College of Obstetricians and Gynecologists (ACOG) and the World Health Organization have declared that research-based protocols used throughout the United States are safer and more effective than the outdated protocol approved as part of the product labeling by the FDA.[19] These evidence-based protocols, allowing patients to take different dosages of each medication and to take the second medication in their own homes, is the standard of care throughout the United States, including in Arizona. Forcing physicians to use a single out-dated protocol would prevent them using their best medical judgment and the best medical research in providing care to women in the state.

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[15] H.B. 2036, 50th Leg., 2d Reg. Sess. (Ariz. 2012), § 2 (adding ARIZ. REV. STAT. § 36-36-449.03(E)(6)).

[16] *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972).

[17] *Colautti v. Franklin*, 439 U.S. 379, 389 (1979) (citing *Grayned*, 408 U.S. at 109).

[18] By forcing women to seek surgical abortions instead of medication abortions, regardless of what is best for their health, this bill could also violate women's right to bodily integrity. *See Cruzan v. Director, Missouri Department of Health*, 497 U.S. 261, 278 (1990); *see also Riggins v. Nevada*, 504 U.S. 127, 134 (1992) (an inmate's interest in avoiding involuntary administration of antipsychotic drugs is protected under the Due Process Clause); *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997) (Due Process Clause protects right to bodily integrity).

[19] *See* American College of Obstetricians and Gynecologists, ACOG Practice Bulletin No. 67: Medical Management of Abortion, 106 Obstet. Gynecol. 871 (2005); World Health Organization, Safe Abortion: Technical and Policy Guidance for Health Systems (2003), *available at* http://whqlibdoc.who.int/publications/2003/9241590343.pdf.

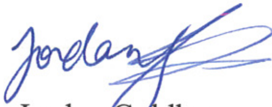
Two other states, North Dakota and Oklahoma, adopted similar laws in 2011 and both laws were immediately enjoined by courts.[20] The court in North Dakota, for example, found that "the legislature's decision to ban the off-label use of abortion-inducing drugs is both illogical and inconsistent with the declared purpose of promoting women's health. . . . Patients, in consultation with their physician, have the absolute right to choose the method, whenever reasonable options exist. There is no place for legislative interference with such personal rights and decisions."[21]

Both cases are ongoing and, notably, the costs to the states to defend the laws continue to mount. If HB 2036 becomes law, Arizona would be the third state in two years to adopt this type of unconstitutional restriction and could face similar legal action, along with the accompanying costs.

V. Conclusion

HB 2036 is an unconstitutional ban on pre-viability abortions and does not adequately protect women's lives or health before or after viability. The bill also unconstitutionally restricts women's access to medication abortion and imposes numerous other harmful and cruel requirements on women seeking essential reproductive health care. We urge you to veto this bill. Please do not hesitate to contact us if you would like further information.

Sincerely,



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[20] *See MKB Mgmt. Corp v. Burdick*, No. 09-2011-CV-2205 (Cass Cty., N.D., Dist. Ct. Feb. 16, 2012); *Okla. Coalition for Reproductive Justice v. Cline*, Case No.CJ-2011-1722 (Okla. Cty. Dist. Ct. Oct. 19, 2011) (temporary injunction issued without written order). In addition, a federal lawsuit is ongoing in Ohio raising these and other constitutional issues. *See Planned Parenthood Cincinnati Region v. Taft,* 444 F.3d 502 (6th Cir. 2006); 531 F.3d 406 (6th Cir. 2008); 331 Fed. Appx. 387 (6th Cir. 2009), *remand pending* (S.D. Ohio 2011).

[21] *MKB Mgmt. Corp. v. Burdick*, No. 09-2011-CV-2205, at 52 (Cass Cty., N.D., Dist. Ct. Feb. 16, 2012).