CENTER FOR REPRODUCTIVE RIGHTS

April 13, 2010

VIA FACSIMILE AND FEDERAL EXPRESS

The Honorable Dave Heineman
Governor of Nebraska
P.O. Box 94848
Lincoln, NE 68509-4848

Re: Legislative Bill 1103

Dear Governor Heineman,

The Center for Reproductive Rights strongly opposes Legislative Bill 1103 and urges you to veto this measure. This bill is clearly unconstitutional and is the most extreme abortion law passed in this country in recent memory. This bill will endanger the health of pregnant women in Nebraska who have a constitutional right to access the essential reproductive healthcare banned by this bill.

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 Nebraska. Under the United States Constitution as it is currently interpreted, LB 1103 is unconstitutional for two reasons: it bans some abortions before viability and it fails to adequately protect women's health either before or after viability.

I. LB 1103 Would Enact an Unconstitutional Ban on Pre-Viability Abortion

LB 1103 bans abortions in Nebraska at twenty weeks gestation, with exceptions only when the woman's life is at risk, to prevent "a serious risk of substantial and irreversible physical impairment of a major bodily function," or possibly where it is necessary to terminate one fetus to save another. This bill flouts long-established constitutional precedent prohibiting states from banning abortion prior to viability. While 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."[1] Twenty weeks gestation is markedly before viability. Indeed, the legislature was fully aware that LB 1103 bans abortion before viability. The bill purports to ban abortion at the point when the legislature believes that fetuses may feel pain, despite constitutional precedent precluding states from banning abortion before viability for *any* reason.

[1] *Planned Parenthood Federation of America v. Gonzales*, 435 F.3d 1163, 1166 n.1 (9th Cir. 2006).

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

For more than thirty-five 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.[2] In *Planned Parenthood of Southeastern Pennsylvania v. Casey*,[3] the Supreme Court reaffirmed that central tenet of *Roe v. Wade*, specifically holding that "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 has also insisted that the determination of viability must be left to the physician's judgment.[7] LB 1103 directly contradicts these fixed constitutional principles.[8]

The sponsors and proponents of LB 1103 have argued that more recent precedent from the Supreme Court leaves open the potential for states to ban abortion based on factors other than 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*[9] ("*Carhart II*"), 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 ban, the Court emphasized that safe alternative abortion procedures were available at all times and in all cases. The Court did not revisit its previous holdings on the importance of viability. Indeed, the Court explained at length that its decision to uphold the

---

[2] *See Roe v. Wade,* 410 U.S. 11, 163-64 (1973).

[3] 505 U.S. 833 (1992).

[4] *Id.* at 860; *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 878-79.

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

[6] *Id.* at 64.

[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. Reproductive Health Services*, 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); *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 10th Circuit Court of Appeals struck down a Utah statute that, like LB 1103, banned abortion after 20 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 1116-17 (footnote omitted).

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

federal ban was fully consistent with past precedent.[10] By completely banning some pre-viability abortions, LB 1103 directly conflicts with all Supreme Court precedent on abortion.

II. LB 1103 Unconstitutionally Fails to Protect Women's Health

LB 1103 contains an extremely narrow health exception for abortions performed after 20 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," excluding mental health and explicitly prohibiting physicians from providing abortions to patients at risk for suicide. Even if LB 1103 applied only *after* viability, it would be unconstitutional because it does not allow all abortions that may be necessary to preserve the health of the woman. Since recognizing the constitutional right to choose an abortion, the Supreme Court has consistently held that while a state may ban abortions after viability, any such ban must make exception for 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 health can be defined as narrowly as it is in Legislative Bill 1103 and has emphasized that psychological health is a component of women's health.[12]

The Supreme Court's decision in *Carhart II* does not alter the requirement that even a post-viability abortion ban contain a comprehensive health exception. The Court was clear in *Carhart II* that, while the federal partial birth ban did not contain a health exception, the law could be upheld because it reached just *one method* of abortion and "other abortion procedures that are considered to be safe alternatives" would remain available in all instances.[13] In contrast, LB 1103 bans all abortions after 20 weeks after fertilization – not just one method. 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 – including *Carhart II* – has required for more than thirty-five years.

While supporters of LB 1103 claim that the Supreme Court has approved the language in the bill's exception, they misrepresent the case law. 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 forced to delay having the procedure twenty-four hours in order to undergo the state's mandated informed consent process or to seek parental

---

[10] *See, e.g., Carhart II*, 550 U.S. at 146 (stating that the Court was "apply[ing]" the standard set forth in *Casey*); *id.* at 151-52 (differentiating the federal ban from the Nebraska ban upheld in *Carhart I*).

[11] *Roe v. Wade*, 410 U.S. 113, 165 (1973); *Casey*, 505 U.S. at 879 (emphasis added).

[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") (emphasis added), *aff'd on other grounds*, 130 F.3d 187 (6th Cir. 1997).

[13] 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.").

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 LB 1103 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. Conclusion

LB 1103 is plainly unconstitutional both because it bans some pre-viability abortions and because it fails to adequately protect women's health before and after viability. We urge you to veto LB 1103. 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*

Cynthia Soohoo
Director*
United States Legal Program
917-637-3614
**Admitted in New York*

[14] *Casey*, 505 U.S. at 880.
[15] *See, e.g. Bolton*, 410 U.S. at 192; *Casey*, 505 U.S. at 882; *Thornburgh,* 476 U.S. at 768-69.