CENTER FOR REPRODUCTIVE RIGHTS

April 19, 2017

The Honorable Steve Bullock
Office of the Governor
PO Box 200801
Helena MT 59620-0801

Dear Governor Bullock:

The Center for Reproductive Rights urges you to veto Senate Bill 329, which is clearly unconstitutional and will endanger the health of Montana women by preventing physicians in Montana 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. Indeed, just last June, we won the landmark case *Whole Woman's Health v. Hellerstedt*, in which the U.S. Supreme Court reaffirmed the Federal Constitution's robust protections for a woman's decision to have an abortion. Those constitutional protections extend to abortion care in the second trimester. This letter sets forth the constitutional flaws contained in Senate Bill 329.

I. Senate Bill 329 Violates the Montana Constitution.

The Montana Constitution contains one of the strongest protections for privacy in the United States. Article II, Section 10 provides that "[t]he right of individual privacy is essential to the well-being of a free society and shall not be infringed without the showing of a compelling state interest." Senate Bill 329 likely violates the Montana Constitution's strong protections for privacy and personal autonomy for the reasons set forth below.

According to the Montana Supreme Court, the right to privacy in the health care context encompasses two distinct, but related, personal autonomy rights. First, the Montana Constitution "broadly guarantees each individual the right to make medical judgments affecting her or his bodily integrity and health in partnership with a chosen health care provider free from government interference."[1] By banning abortion care after 20 weeks, Senate Bill 329 unconstitutionally interferes with a woman's right to receive the medical care of her choice—and the narrow health exception may even put her health and life at risk by denying needed care.

[1] Armstrong v. State, 989 P.2d 364, 367 (Mont. 1999). *See also* Gryczan v. State, 942 P.2d 112, 126 (Mont. 1997) (articulating a "personal autonomy" component to the privacy right); Collins v. Itoh, 503 P.2d 36, 40 (Mont. 1972) ("Each man is considered master of his own body and may request or prohibit even lifesaving surgery.").

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In addition, the privacy clause *specifically* protects the right to abortion. In *Armstrong v. State*, the Montana Supreme Court considered a challenge to a statute banning physicians' assistants from performing abortions. In striking down the law, the court held that the Montana Constitution "protects a woman's right of procreative autonomy"—the right to obtain a lawful, pre-viability abortion from a health care provider of her choice.[2] The court held that "[i]mplicit in this right of procreative autonomy is a woman's moral right and moral responsibility to decide, up to the point of fetal viability, what her pregnancy demands of her in the context of her individual values, her beliefs as to the sanctity of life, and her personal situation."[3] As a pre-viability abortion ban, Senate Bill 329 is clearly unconstitutional under the strong protections offered by the Montana Constitution.

II. Senate Bill 329 Violates the Federal Constitution by Enacting a Ban on Pre-Viability Abortion.

Senate Bill 329 violates long-established constitutional precedent prohibiting states from banning abortion prior to viability. This bill would ban abortions in Montana at twenty weeks gestational age, calculated from the point of fertilization.[4] The bill contains only limited exceptions to prevent a woman's death or to prevent "serious risk of substantial and irreversible impairment of a major bodily function of the woman," not including psychological or emotional conditions.

For over forty years, the U.S. Supreme Court has recognized that the Constitution both prohibits a state from banning abortion prior to viability and from defining viability at a fixed gestational age.[5] 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."[6] The Supreme Court has never wavered from this position.[7] The Court has emphasized

[2] *Armstrong*, 989 P.2d at 390.
[3] *Id*. at 379.
[4] S.B. 329, 2017 Sess. (Mont.).
[5] *See* Roe v. Wade, 410 U.S. 113, 163-64 (1973); Colautti v. Franklin, 439 U.S. 379, 388-89.
[6] Planned Parenthood of Se. 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; *accord Whole Woman's Health*, 136 S.Ct. at 2320 ("[W]e now use 'viability' as the relevant point at which a State may begin limiting women's access to abortion for reasons unrelated to maternal health.").
[7] In *Gonzales v. Carhart*, the law at issue did not ban abortion at any particular point in pregnancy, but rather, it banned only *one abortion procedure.* Although the Supreme Court upheld that law, the Court emphasized that safe alternative abortion procedures were available. *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*). *See also Whole Woman's Health*, 136 S.Ct. at 2320 ("[W]e now use 'viability' as the relevant point at which a State may begin limiting women's access to abortion for reasons unrelated to maternal health.").

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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."[8] Moreover, because "[t]he time when viability is achieved may vary with each pregnancy,"[9] the Court also has insisted that the determination of viability must be left to the physician's judgment.[10]

Senate Bill 329 directly contradicts these well-established constitutional principles. According to the American College of Obstetricians and Gynecologists, "most obstetrician-gynecologists understand fetal viability as occurring near 24 weeks gestation utilizing [last menstrual period] dating."[11] Senate Bill 329's abortion ban after 20 weeks falls well short of viability and thus is blatantly unconstitutional.

Moreover, since *Roe v. Wade*, the Supreme Court has consistently held that a ban on abortion *after* viability must include an exception for situations in which an abortion "is necessary, in appropriate medical judgment, for the preservation of the life *or health*" of the woman.[12] The Supreme Court has not accepted the notion that women's physical health can be defined as narrowly as it is in Senate Bill 329.[13] It has also explicitly stated that psychological health is a component of women's health.[14]

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

[9] *Id.*

[10] 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.").

[11] Statement from American College of Obstetricians and Gynecologists (ACOG) on H.R. 3803 (June 18, 2012), *available at* http://www.acog.org/~/media/Departments/Government%20Relations%20and%20Outreach/20120618DCAborStmnt.pdf.

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

[13] Although supporters of SB 329 may claim that the Supreme Court has approved the language in the bill's exception, they are incorrect. The Supreme Court has addressed similar 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. *Casey*, 505 U.S. at 880. 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 recognized that health *includes mental health*. *See, e.g., id.* at 882.

[14] *See 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

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Thus, a woman needing an abortion to protect her health whose condition does not meet the bill's narrow exceptions would not have a safe alternative to end her pregnancy, as Supreme Court precedent has required for more than forty years.[15]

Consistent with this precedent, federal courts have continually blocked pre-viability bans from taking effect. In 2013, the United States Court of Appeals for the Ninth Circuit struck down an Arizona statute that banned abortion after twenty weeks.[16] The court was clear that a pre-viability abortion ban is *unquestionably* unconstitutional, noting that "[s]ince *Roe*, the Supreme Court and lower federal courts have repeated over and over again that viability remains the fulcrum of the balance between a pregnant woman's right to control her body and the state's interest in preventing her from undergoing an abortion."[17] The Supreme Court refused to review the case—allowing the Ninth Circuit's ruling striking the measure as unconstitutional to stand. In addition to Arizona, a 20-week ban was challenged in Idaho in federal court,[18] which blocked the law. In addition, earlier pre-viability abortion bans in Arkansas[19] and North Dakota[20] suffered the same fate in federal courts, and the Supreme Court refused to hear appeals to those cases, letting court orders permanently enjoining the bans stand.

Lastly, the Court in *Whole Woman's Health* issued a strong rebuke against abortion restrictions that rely on junk science and requires courts to carefully scrutinize the facts presented by the state in

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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). In another context, the Court recognized that "[t]he mental health of our citizenry, no less than its physical health, is a public good of transcendent importance." Jaffee v. Redmond, 518 U.S. 1, 11 (1996) (holding that the doctor-patient privilege extends to psychotherapy).

[15] The Supreme Court's decision in *Gonzales* does not alter the requirement that any law banning all methods of abortion must contain a comprehensive health exception. In *Gonzales*, 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.").

[16] Isaacson v. Horne, 716 F.3d 1213, 1225 (9th Cir. 2013), *cert. denied*, 82 U.S.L.W. 3404 (U.S. Jan. 13, 2014) (No. 13-402).

[17] *Id*. at 1223.

[18] McCormack et al. v. Hiedeman, 900 F. Supp. 2d 1128, 2013 WL 823318 (D. Idaho 2013).

[19] Edwards v. Beck, 786 F.3d 1113, 1117 (8th Cir. 2015) (affirming permanent injunction on abortion ban at approximately 12 weeks), *cert. denied*, 136 S.Ct. 895 (Jan.19, 2016).

[20] MKB Mgmt. Corp. v. Stenehjem, 795 F.3d 768, 776 (8th Cir. 2015) (affirming permanent injunction on abortion ban as early as six weeks), *cert. denied*, 136 S.Ct. 981 (Jan. 25, 2016).

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support of the restriction.[21] Here, the legislature's stated purpose for the bill includes assertions—refuted by medical evidence—that a fetus can feel pain at 20 weeks gestation. Rigorous scientific reviews of the evidence on fetal pain have concluded there is no evidence of pre-viability pain perception.[22] This bill is clearly rooted in opposition to legal abortion, rather than credible medical evidence.

III. Conclusion

Senate Bill 329 is unconstitutional, medically unsound, and presents an unwarranted interference into private medical decisions. Further, legislation similar to Senate Bill 329 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. In addition, the Montana Constitution's strong protection of the right to privacy provides an independent basis upon which this legislation could be invalidated. We urge you to veto this legislation.

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

Sincerely,

Amanda Allen*
Senior State Legislative Counsel
Center for Reproductive Rights

**admitted in New York*

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[21] *Whole Woman's Health,* 136 S.Ct. at 2113 ("[W]hen determining the constitutionality of laws regulating abortion procedures," courts must place "considerable weight upon evidence . . . presented[.]"); *id*. at 2310 (courts cannot give "uncritical deference" to the facts supporting the government's position).

[22] Articles published in the Journal of the American Medical Association, the Journal of Maternal-Fetal and Neonatal Medicine, and by the Royal College of Obstetricians and Gynaecologists concluded as recently as 2012 that fetal perception of pain is unlikely before the third trimester. 16 Carlo Valerio Bellieni & Giuseppe Buonocore, Is Fetal Pain Real Evidence?, The Journal of Maternal Fetal Neonatal Medicine, vol. 25, no.8, 1203-1208 (2012); Royal College of Obstetricians and Gynaecologists, Fetal Awareness - Review of Research and Recommendations for Practice, (March 2010) https://www.rcog.org.uk/globalassets/documents/guidelines/rcogfetalawarenesswpr0610.pdf. *See also* West Alabama Women's Ctr. v. Miller, 2016 WL 6395904, at *16 n.21 (M.D. Ala. Oct. 27, 2016) (finding that "[f]etal pain is not a biological possibility until 29 weeks").