CENTER FOR REPRODUCTIVE RIGHTS

February 22, 2013

VIA FEDERAL EXPRESS AND ELECTRONIC MAIL

The Honorable Mike Beebe
Governor of Arkansas
State Capitol Room 250
Little Rock, AR 72201

Re: House Bill 1037

Dear Governor Beebe:

The Center for Reproductive Rights strongly opposes House Bill 1037 and urges you to veto this measure. This bill will endanger the health of pregnant women in Arkansas who have a constitutional right to access the essential reproductive healthcare banned by this bill and will prevent physicians in Arkansas from exercising their best medical judgment in caring for their patients.

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 Arkansas. HB 1037 would violate the United States Constitution for two reasons: it bans some abortions before viability and it fails to adequately protect women's health either before or after viability.

I. HB 1037 Would Enact an Unconstitutional Ban on Pre-Viability Abortion

HB 1037 violates long-established constitutional precedent prohibiting states from banning abortion prior to viability. This bill bans abortions in Arkansas at twenty weeks post-fertilization, with exceptions only to prevent a woman's death, in cases of rape or incest, or to "avert serious risk of substantial and irreversible physical impairment of a major bodily function," not including psychological or emotional conditions. 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."[1] Twenty weeks gestation is markedly before viability. Indeed, the findings

[1] *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).

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in HB 1037 do not suggest that viability begins at twenty weeks gestation. Instead, the bill purports to ban abortion at the point when the legislature (contrary to the best medical research) believes that fetuses may feel pain, despite constitutional precedent precluding states from banning abortion before viability for *any* reason.

For nearly forty 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] 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."[3] The Supreme Court has never wavered from this position, despite numerous opportunities to do so.[4] 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 1037 directly contradicts these well-established constitutional principles.[8]

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[2] *See Roe v. Wade,* 410 U.S. 113, 163-64 (1973).

[3] *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.

[4] In *Gonzales v. Carhart* ("*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. 550 U.S. 124 (2007). Rather, it banned only *one abortion procedure.* Although the Supreme Court upheld that law, the Court emphasized that safe alternative abortion procedures were available at all times and in all cases 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*).

[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).

[8] Notably, the United States Court of Appeals for the Tenth Circuit struck down a Utah statute that, like HB 1037, 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). While several states have recently passed bills very similar to HB 1037, at least two courts have enjoined those statutes as likely unconstitutional. *See Eva Lathrop, MD., et al., v. Nathan Deal, et al.*, No. 2012-cv-224423 (Fulton Cty. Super. Ct., Ga., Dec. 21, 2012) (granting a preliminary injunction of a very

II. HB 1037 Unconstitutionally Fails to Protect Women's Health

HB 1037 contains an extremely narrow health exception for abortions performed after twenty 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." The exception prevents physicians from considering *any* mental health issues in evaluating whether a woman's health is compromised by the pregnancy and explicitly prohibits physicians from providing abortions to patients at risk for suicide. Such a narrow health exception is unconstitutional at any stage of pregnancy, even *after* viability, because it does not adequately allow physicians to exercise their medical judgment to protect women's health in all circumstances.

Since recognizing the constitutional right to choose an abortion, 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.[9] The Supreme Court has rejected the notion that women's physical health can be defined as narrowly as it is in HB 1037[10] and has explicitly stated that psychological health is a component of women's health.[11] Thus, 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 has required for nearly forty years.[12]

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similar law in Georgia that bans abortion at 20 weeks post-fertilization age with limited exceptions*); Isaacson v. Horne*, 2012 WL 3126829 (9th Cir. 2012) (granting an emergency injunction of an Arizona law that bans abortion at 20 weeks lmp, two weeks earlier than the Georgia law and HB 1037, with only a medical emergency exception).

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

[10] Although supporters of HB 1037 may claim that the Supreme Court has approved the language in the bill's exception, they are incorrect. 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 required to delay the procedure twenty-four hours in order to undergo the state's mandated informed consent process or to seek parental consent. *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.

[11] *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 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).

[12] 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.").

III. Conclusion

HB 1037 is an unconstitutional ban on pre-viability abortions and does not adequately protect women's health before or after viability. We urge you to veto HB 1037. Please do not hesitate to contact us if you would like further information.

Sincerely,

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