



May 5, 2010

**VIA FACSIMILE AND FEDERAL EXPRESS**

The Honorable Charlie Crist  
Governor of Florida  
The Capitol  
400 S. Monroe Street  
Tallahassee, FL 32399

**Re: House Bill 1143**

Dear Governor Crist,

The Center for Reproductive Rights opposes House Bill 1143 and strongly urges you to veto this measure. House Bill 1143 would enact one of the most extreme ultrasound laws proposed in the nation, would jeopardize women's health, and would raise significant constitutional concerns.<sup>1</sup> The bill would also create discriminatory public health policy that will reduce women's access to essential reproductive healthcare.

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, including in Florida, to protect the rights of women to have safe and legal abortions. In light of our background and experience, we believe that House Bill 1143 would harm the women of Florida, violating patients' and physicians' rights under both the federal and Florida constitutions and seriously intruding on the doctor-patient relationship.

House Bill 1143 places restrictions on women seeking an abortion at any stage of pregnancy. It would require women to have an ultrasound, mandate that they view the ultrasound image or fill out state-mandated paperwork explicitly rejecting a viewing, force women to be subjected to an explanation of the image with no option to refuse, and impose these requirements even on patients who have experienced the incredible trauma of rape, incest, domestic violence, or trafficking unless those patients are able to produce documented proof of their terrible experiences.

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<sup>1</sup> Only the state of Oklahoma has enacted a more extreme ultrasound law, overriding the Oklahoma governor's veto of the legislation, and just last week the Center for Reproductive Rights challenged that bill in court as violating both patients' and physicians' constitutional rights. Earlier this week the Oklahoma District Court entered a temporary restraining order enjoining enforcement of the bill, based on an agreement between the Center and the Oklahoma Attorney General.

## I. HB 1143 Would Violate Patients' Right to Privacy Under the Florida Constitution

House Bill 1143 runs counter to the Florida Constitution's strong protection of a woman's right to choose an abortion. The Florida Supreme Court has explained that the Florida Constitution's privacy clause "embraces more privacy interests, and extends more protection to the individual in those interests, than does the federal Constitution."<sup>2</sup> Not only has the Court recognized that a woman's right to choose to terminate a pregnancy is implicated by the right to privacy, it has held that it could "conceive of few more personal or private decisions concerning one's body that one can make in the course of a lifetime," stating that:

Of all decisions a person makes about his or her body, the most profound and intimate relate to two sets of ultimate questions [including] first, whether, when, and how one's body is to become the vehicle for another human being's creation; . . . The decision whether to obtain an abortion is fraught with specific physical, psychological, and economic implications of a uniquely personal nature for each woman. The Florida Constitution embodies the principle that "[f]ew decisions are more personal and intimate, more properly private, or more basic to individual dignity and autonomy, than a woman's decision ... whether to end her pregnancy. A woman's right to make that choice freely is fundamental."<sup>3</sup>

House Bill 1143 would substantially interfere with that fundamental right in ways that hinder, rather than further, women's health. First, the bill would require all abortion patients to have ultrasounds, regardless of medical necessity. Second, the bill would require all abortion patients to either view the ultrasound image or complete state-mandated paperwork declining to view the image. The only women exempted from those requirements are those who both have experienced extremely traumatic events, such as rape, incest or abuse, or who are experiencing medical emergencies, and are able to prove their experiences or diagnosis with documentation. There are no exceptions for women with wanted pregnancies who have chosen to terminate the pregnancy to preserve their own health or because of a fetal anomaly. Third, the bill fails to permit women who agree to view the ultrasound image to decline to hear a contemporaneous explanation of that image. In fact, because the bill is written vaguely, it is possible that it will be read to require *all* abortion patients to hear an explanation of their ultrasounds regardless of whether they have declined to view the ultrasound image.

Accordingly, House Bill 1143 would be unconstitutional if enacted. As the Florida Supreme Court has explained, because the bill substantially intrudes on a woman's fundamental right to privacy, it can be justified only if the "regulation serves a compelling state interest and accomplishes its goal through the use of the least intrusive means."<sup>4</sup>

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<sup>2</sup> *In re T.W.*, 551 So.2d 1186 (Fla. 1989).

<sup>3</sup> *Id.*

<sup>4</sup> *Id.* at 1192. In fact, even "insignificant burden[s]" on women seeking abortions during the first and second trimester of pregnancy "must substantially further important state interests." *Id.* at 1193.

House Bill 1143 cannot meet that strict standard. Its intrusion into women’s “personal and intimate . . . private” decision, which is “basic to individual dignity and autonomy,”<sup>5</sup> cannot be justified by any recognized compelling or important state interest in the first or second trimester of pregnancy. Indeed, the Florida Supreme Court has recognized *no* state interest that merits any significant restriction in the first trimester, and only restrictions intended to further women’s health are permitted during the second trimester.<sup>6</sup> House Bill 1143 appears intended only to indicate to all abortion patients the state’s opposition to their decision to seek abortions and to dissuade women from having abortions, presumably based on the state interest in potential life. But while “restrictions to protect the state’s interest in the potentiality of life . . . may be imposed,” they may be imposed “*only after viability . . . is reached.*”<sup>7</sup> Moreover, any state interest in potential life could be served by a myriad of other, less intrusive, less obstructive means; means that would not intervene between a woman and her physician and co-op a medical procedure for the state’s own ends. For all of these reasons, House Bill 1143 would violate women’s rights to privacy under the Florida Constitution.

## **II. House Bill 1143 Lacks An Adequate, Constitutionally Required Medical Emergency Exception**

For women experiencing certain serious medical conditions, an immediate abortion is essential to protect their health and lives. The United States Supreme Court has clearly held that an adequate medical emergency exception is required for every abortion restriction, explaining that “the essential holding of *Roe* forbids a State to interfere with a woman's choice to undergo an abortion procedure if continuing her pregnancy would constitute a threat to her health.”<sup>8</sup> Accordingly, if any restriction “foreclose[s] the possibility of an immediate abortion despite some significant health risks . . . [the Court] would be required to invalidate the restrictive operation of the provision.”<sup>9</sup> House Bill 1143 would be unconstitutional because its medical emergency exception fails to meet this standard.

House Bill 1143 purports to waive its multiple ultrasound-related requirements for women who “ha[ve] been diagnosed as having a condition that, on the basis of a physician’s good faith clinical judgment, would create a serious risk of substantial and irreversible impairment of a major bodily function if the woman delayed terminating her pregnancy.” However, a woman may avail herself of this “medical emergency” exception only if she provides “documentation . . . that evidences [her condition]” either when she “schedules or arrives for her appointment.” Because this documentation requirement would “foreclose the possibility of an immediate abortion” when significant health risks are present, House Bill 1143 would be unconstitutional under both the state and federal constitutions.<sup>10</sup>

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<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> *Id.* at 1193 n.6 (emphasis added).

<sup>8</sup> *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 880 (1992).

<sup>9</sup> *Id.*

<sup>10</sup> *See Casey*, 505 U.S. at 880; *see also T.W.*, 551 So.2d at 1182 (noting that Florida’s constitutional protection of privacy “extends more protect to the individual . . . than does the federal constitution” and that even after viability the state may only act to “protect its interest in the potentiality of life by regulating abortion . . . [if] the mother’s health is not jeopardized”).

### **III. House Bill 1143 Would Violate Patients' Constitutional Rights to Free Speech**

House Bill 1143 would raise significant concerns under the First Amendment of the federal constitution. While the bill clearly gives patients the right to decline to view the ultrasound image, if the woman agrees to view the image, she *must* listen to a contemporaneous explanation of the image as well. Moreover, the language of the bill makes it unclear whether *any* abortion patient, even those that decline to view the ultrasound image, has the right to refuse to hear the image explanation.<sup>11</sup>

Requiring physicians to provide a description of the ultrasound image to patients without giving them any right to refuse would force patients to hear information that they may not want to hear and that might not be relevant to their care. Ultrasounds are not part of the informed consent process: Patients are already given detailed information about their pregnancies, full information about their options, and counseling about their decision to terminate their pregnancies. They need not be forced to listen to an unwanted description of an ultrasound in order to understand the decision they are making. Moreover, under the federal constitution, forcing unwilling patients to listen to this description may violate their right to avoid unwanted, government-mandated speech in the privacy of a medical office.<sup>12</sup>

### **IV. House Bill 1143 May Violate Physicians' Constitutional Rights to Due Process**

House Bill 1143 may be unconstitutionally vague, threatening physicians' due process rights. 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.<sup>13</sup> House Bill 1143 fails to meet that standard because it does not clearly indicate whether physicians and their colleagues must provide an explanation of a state-mandated ultrasound to each abortion patient, regardless of whether she wants to hear it, or must provide such explanations only to patients who have agreed to view the ultrasound image. This vagueness in the language of the bill leaves physicians in an untenable position: They can choose, in order to ensure compliance with the law, to follow an overly-broad interpretation of the language and force many patients to hear unwanted explanations of their ultrasound images. Conversely, they can choose to protect their patients from unwanted information by allowing women who have declined to view the image the right to decline to hear the explanation as well, knowing that doing so subjects them to the risk of liability. Any violation of this bill would constitute unprofessional conduct, which could lead to the revocation or suspension of the physician's medical license, and carry with it significant civil penalties. Faced with such serious consequences, it is all the more important

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<sup>11</sup> See Section IV, below, regarding physicians' due process rights.

<sup>12</sup> The Supreme Court has recognized that in some contexts, individuals have a right to avoid unwanted speech in certain private settings, such as doctor's offices. See *Hill v. Colorado*, 530 U.S. 703 (2000) (upholding buffer zone law, recognizing that "interests of unwilling listeners in situations where 'the degree of captivity makes it impractical for the unwilling view or auditor to avoid exposure'"); *Madsen v. Women's Health Center, Inc.*, 512 U.S. 753 (1994) (medical office); *Frisby v. Schultz*, 487 U.S. 474 (1988); *Erznoznik v. City of Jacksonville*, 422 U.S. 205 (1975); *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974); *Cohen v. California*, 403 U.S. 15 (1971); *Rowan v. United States Post Office Dep't*, 397 U.S. 728 (1970). See also Fl. Const. Art. I, §4.

<sup>13</sup> *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972); see also Fl. Const. Art. I, §9.

that physicians be given adequate notice of how to comply with the law, something House Bill 1143 fails to do.

#### **V. HB 1143 Would Seriously Infringe Upon the Doctor/Patient Relationship**

House Bill 1143 would damage the patient/physician relationship, ignoring standards of medical treatment and jeopardizing women's ability to get the best possible health care. While ultrasound technology is often but not always part of the provision of abortions, this bill requires physicians to perform ultrasounds prior to every abortion, co-opting the use of ultrasound in abortion care for the state's purposes regardless of the patient's needs. Moreover, the bill requires doctors or medical professionals to offer to display the ultrasound image, and may require the doctor to describe the ultrasound image, to each patient regardless of whether it is appropriate for that patient. Patients trust their physicians to provide them with relevant and necessary medical information, not to deliver unnecessary information mandated by the state.

While the bill purports to exempt victims of rape, incest, domestic violence, or trafficking, it requires those women to provide documented proof of those conditions or situations. This means that the health care provider will be forced to offer a review and description of the image to any woman who was raped or a victim of incest, but was afraid to or did not report her situation to the police or seek medical treatment. Moreover, the bill fails to provide an exception for women with wanted pregnancies who seek abortions because of health conditions or severe fetal anomalies. By requiring physicians to make these offers regardless of the patient's best interests, potentially compelling physicians to deliver unwanted speech in the form of undesired explanations of the ultrasound image, House Bill 1143 will damage the physician/patient relationship, especially for those patients in particularly difficult circumstances.

#### **VI. House Bill 1143 Would Prevent Women and Families From Protecting Their Health By Prohibiting Them From Insuring Against Unexpected Health Risks**

House Bill 1143 would create discriminatory and misguided health policy by prohibiting many women and small businesses from purchasing insurance plans that cover abortion. These provisions respond to, but are even more restrictive than, the recently-enacted federal health care reform act.<sup>14</sup> Enactment of these provisions would be a significant and detrimental shift in insurance policy in Florida and could result in many women losing coverage they currently have—most employers today offer abortion coverage in their insurance policies.<sup>15</sup>

Abortion is one of the most common surgical procedures sought by women in America. By the age of forty-five, approximately one in three women in this country will have had an abortion.<sup>16</sup> Women seek abortions for many reasons: some choose to terminate unwanted

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<sup>14</sup> While House Bill 1143 would allow individuals to use their own private funds to purchase a secondary plan, or a "rider," that would cover abortion, it is possible that many healthcare providers operating in the exchange will not offer such riders at all.

<sup>15</sup> Adam Sonfield et al., *U.S. Insurance Coverage of Contraceptives and the Impact on Contraceptive Coverage Mandates, 2002*, 36 *Persp. on Sexual & Reprod. Health* 72, 75 (2004), available at <http://www.guttmacher.org/pubs/psrh/full/3607204.pdf>.

<sup>16</sup> Guttmacher Institute, "An Overview of Abortion in the United States," <http://www.guttmacher.com/media/presskits/2005/06/28/abortionoverview.html> (last visited April 22, 2010).

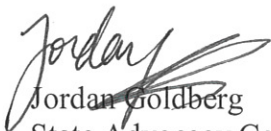
pregnancies, while other women with wanted pregnancies ultimately must seek abortions to protect their own health, to allow them to seek life-saving medical treatment such as chemotherapy, or because of a serious fetal anomaly. Abortions performed in the latter sets of circumstances can be complicated, necessitating that they be performed in hospitals, and thus very costly.<sup>17</sup>

Health insurance is intended to allow people to protect themselves from the unpredictable, difficult and expensive healthcare costs that may arise over the course of their lives. By prohibiting small businesses and individuals from using their own money to protect themselves in this manner, House Bill 1143 goes against the very purpose of insurance while discriminating against women in the most fundamental way.

## VII. Conclusion

House Bill 1143 would violate the constitutional rights of patients and physicians in Florida. Moreover, enacting this bill into law would not improve the health or wellbeing of the women of Florida and would subject even women who have experienced personal trauma to intrusive regulation by the state. In light of the strong policy and constitutional objections to this bill, we urge you to veto this legislation. Please do not hesitate to contact us if you would like further information.

Sincerely,



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<sup>17</sup> Even in the early stages of pregnancy, abortions can be a high out-of-pocket expense, and women may be forced to delay obtaining abortions while they gather the funds necessary to pay, increasing their health risks. *See, e.g., E. Steve Lichtenberg, MD and David A. Grimes, MD, Surgical complications: Prevention and management, in Management of Unintended Pregnancy and Abnormal Pregnancy 224 (Maureen Paul et al. ed. 2009).*