WASHINGTON
LEGISLATIVE OFFICE

October 2, 2017

RE: Vote NO on H.R. 36, the "Pain-Capable Unborn Child Protection Act"

Dear Representative:

On behalf of the American Civil Liberties Union (ACLU) and our more than two million members and supporters, we urge you to vote NO on H.R. 36, an extreme and unconstitutional nationwide pre-viability ban on abortion. We oppose H.R. 36 because it interferes with a woman's most personal medical decisions and violates fundamental constitutional principles. The decision to continue or end a pregnancy is one that must be made by a woman in consultation with those she trusts—not by the government.

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The United States Supreme Court has long recognized as much: in *Roe v. Wade*, the Court held that: (1) a state may never ban abortion prior to fetal viability—that is, before the fetus has a reasonable likelihood of sustained survival outside the woman's body; and (2) a state may ban abortion after viability only if there are adequate exceptions to protect a woman's life *and* health.[1] These principles have been applied and reaffirmed repeatedly for over four decades,[2] most recently in *Whole Woman's Health v Hellerstedt*.[3] H.R. 36 fails on both counts by eliminating a woman's decision-making ability before viability and by failing to protect a woman's health.

By banning abortions beginning at 20 weeks post-fertilization—a pre-viability stage of pregnancy—H.R. 36 directly contradicts longstanding precedent holding that a woman should "be free from unwarranted governmental intrusion" when deciding whether to continue or terminate a pre-viability pregnancy.[4] The Supreme Court has long made it clear that a legislature cannot declare any one element—"be it weeks of gestation or fetal weight or any other single factor—as the determinant" of viability.[5] Therefore, because the government cannot draw a line at a set number of

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[1] 410 U.S. 113, 163-64 (1973).
[2] *Gonzales v. Carhart*, 550 U.S. 124, 145 (2007) ("'It must be stated at the outset and with clarity that *Roe's* essential holding, the holding we reaffirm, has three parts. First is a recognition of the right of the woman to choose to have an abortion before viability and to obtain it without undue interference from the State. Before viability, the State's interests are not strong enough to support a prohibition of abortion or the imposition of a substantial obstacle to the woman's effective right to elect the procedure.'") (quoting *Planned Parenthood v. Casey*, 505 U.S. 833, 871 (1992)); *see also Casey*, 505 U.S. at 871 ("The woman's right to terminate her pregnancy before viability is the most central principle of *Roe v. Wade*. It is a rule of law and a component of liberty we cannot renounce.").
[3] 579 US___ (2016).
[4] *Casey*, 505 U.S. at 851.
[5] *Colautti v. Franklin*, 439 U.S. 379, 388-89 (1979).

weeks to prohibit abortion care, a ban on abortion starting at 20 weeks is *per se* unconstitutional, regardless of the legislature's justification for it.[6]

Indeed, courts have struck down as unconstitutional state laws banning abortion beginning at 20 weeks in Arizona and Idaho, as well as laws banning abortion at 12 weeks in Arkansas and 6 weeks in North Dakota.[7] In its 2013 decision striking down the Arizona 20-week ban, the United States Court of Appeals for the 9th Circuit said that the U.S. Supreme Court has been "unalterably clear" that "a woman has a constitutional right to choose to terminate her pregnancy before the fetus is viable."[8] The Court has recognized the right of every woman to determine the course of her pregnancy before viability for more than 40 years. H.R. 36 would, quite simply, violate that right.

H.R. 36 also fails to protect women's health. It includes a narrow exception to preserve a woman's life only—not her health, as longstanding precedent requires.[9] Many things can go wrong during a pregnancy and a woman's health could be at risk in complex ways that require urgent care. This bill would effectively force a woman and her doctor to wait until her condition is life threatening to finally act to protect her health, and she may suffer serious health consequences as a result. Additionally, H.R. 36 contains no exception for fetal conditions, and would rob families of the ability to make private decisions about whether to continue a pregnancy in light of severe or fatal fetal conditions that develop or are detected in mid or later pregnancy.

Further, the exceedingly narrow exceptions for survivors of rape and incest erect barriers to care that may be impossible for some women to meet. The bill would impose a 48-hour mandatory delay on adult survivors of rape, requiring them to seek medical care or counseling from a separate provider at least two days prior to an abortion. This burdensome requirement would completely deny care to many women as a result of the limited availability of abortions at this stage of pregnancy. Minors who are pregnant as a result of rape or incest would be required to report the assault to authorities in order to access care after 20 weeks. These callous requirements clearly demonstrate both serious insensitivity towards survivors and an appalling lack of trust in women.

The many restrictions H.R. 36 places on access to basic medical care are made all the worse by the fact that the bill would impose harsh criminal penalties, including up to five years imprisonment, on the physicians who provide such care. By exposing medical professionals to prosecution for providing their patients with much-needed compassionate treatment, this bill attempts to turn politicians into doctors, and doctors into criminals.

This bill is yet another attack on women's health, and this vote follows a months-long effort in Congress to pass legislation to repeal key provisions of the Affordable Care Act and severely undermine access to a broad range of reproductive health care, including abortion.

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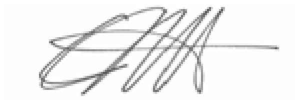
[6] *Isaacson v. Horne,* 716 F.3d 1213 (9th Cir. 2013), *cert. denied,* 134 S. Ct. 905 (2014).
[7] *Id.*; *McCormack v. Herzog,* 788 F.3d 1017 (9th Cir. 2015); *Edwards v. Beck*, 786 F.3d 1113 (8th Cir. 2015); *MKB Mgmt. Corp. v. Stenehjem,* 795 F.3d 768 (2015) (8th Cir. 2015), *cert. denied,* 126 S. Ct. 981 (2016).
[8] *Isaacson v. Horne,* 716 F.3d 1213 (9th Cir. 2013), *cert. denied,* 134 S. Ct. 905 (2014).
[9] *Casey*, 505 U.S. at 879 (a post-viability ban must make an exception where an abortion is "necessary, in appropriate medical judgment, for the preservation of the life *or health*" of the woman) (emphasis added); *see also Roe*, 410 U.S. at 164-65.

Congress should be focused on expanding, not restricting, access to reproductive health care services that allow women to lead full, healthy lives. We urge members of the House to oppose passage of this bill, because it is both unconstitutional and a serious threat to women's health.

Should you have any questions, please contact Georgeanne Usova at (202) 675-2338 or gusova@aclu.org.

Sincerely,

Faiz Shakir
National Political Director



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