EXHIBIT B

AMERICAN CIVIL LIBERTIES UNION OF UTAH FOUNDATION, INC
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February 19, 2009

Governor Gary R. Herbert
Utah State Capitol Complex
350 North State Street, Suite 200
PO Box 142220
Salt Lake City, Utah 84114-2220
Fax: 801-538-1528

Re: House Bill 12, "Criminal Homicide and Abortion Amendments"

Dear Governor Herbert:

On behalf of the American Civil Liberties Union of Utah, we urge you to veto H.B. 12, "Criminal Homicide and Abortion Amendments."

This bill has been touted as an attempt to close a so-called "abortion loophole," brought to the attention of the legislature by the recent unfortunate situation where a 17-year old pregnant girl took intentional steps to terminate her pregnancy.

In effect, H.B. 12 radically changes Utah's abortion law. Previously in Utah, and in keeping with the majority of states in our nation (as well as the common law, which we inherited from England), a woman could not be charged criminally for seeking an abortion. States have long recognized that the consequences of imposing criminal liability, on balance, are more harmful than the state's interest in prosecuting. For example, should a woman seek out an unlawful abortion from an unlicensed provider, she is unlikely to report that physician or provider to the state. Likewise, should a woman seek an unlawful abortion and suffer serious physical harm as a result, she would be unlikely to obtain necessary medical attention.

The language of H.B. 12 results in the removal of immunity for women who seek to obtain or obtain an unlawful abortion, defined as any and all action that results in the death of a fetus that is not considered a medical procedure done under a physician's care. Practically speaking however, this bill changes the presumption that abortions obtained by a woman in this state are legal. If this bill is signed into law, women in this state will essentially be in the uncomfortable and unfortunate position of having to prove that the abortions they obtain (or miscarriages that they suffer) are **not** unlawful.

H.B. 12 removes immunity for women and in its place sets forth very narrow exceptions for when a woman is not open to criminal liability; the implication of

course is that if her behavior does not fall within one of the explicit exemptions set forth in the law, she is subject to criminal penalties.

Consequently, there are many foreseeable examples (and certainly others that will arise should this bill go into effect) where a woman will be vulnerable to criminal prosecution despite the fact that her behavior is outside of the asserted "intent" of H.B. 12.

For example, a woman might seek what she believes to be a lawful abortion but through no fault of her own, the attending physician fails to appropriately follow procedures set forth in the law. The woman could be criminally charged if her particular situation does not fit within one of the very narrow exceptions contemplated by H.B. 12.

Moreover, women who engage in behavior that is perceived as "knowing" or "reckless" and who then suffer a miscarriage are potentially vulnerable to criminal investigation and prosecution under H.B. 12. For example, a woman who fails to wear a seatbelt and is in a car accident could be charged with reckless homicide, should she miscarry. Likewise, a pregnant woman who has a substance abuse problem is likely to forego necessary prenatal care out of fear that she could be prosecuted for "knowing" or "reckless" homicide by continuing to use illegal substances while pregnant.

In a previous legislative session, the Utah legislature recognized, in relation to a bill that would have required pregnant women with substance abuse problems to be incarcerated, that the unintended consequence of such legislation would be to drive these women underground. These women would likely forego needed medical attention out of a fear of incarceration. So too with H.B. 12; women with substance abuse problems will likely avoid care during pregnancy because their addiction will now make them liable for criminal homicide.

We know from past experience that overzealous prosecutors can and do bring cases against individuals that go far beyond legislative intent, particularly where a law leaves room for interpretation. In 2004 in Utah, a woman was arrested and prosecuted under Utah's existing criminal homicide statute for refusing to undergo a cesarean section when recommended by her physicians. Clearly Utah's criminal homicide statute was not intended as a means to charge women who opt not to follow a physician's recommendations, and yet, it was used in that fashion. It is not unreasonable to expect that, should H.B. 12 become law, it has the potential to be used as grounds for investigating and charging women who similarly do not intend to terminate pregnancy.

There is an old legal aphorism that hard cases make bad law. We believe that this phrase appropriately sums up the situation presented by H.B. 12. While the event in Vernal was unfortunate for many reasons, passing legislation to target a single instance, which is unlikely to be repeated, is misguided. This is especially true given

the very real potential for the law created by H.B. 12 to make criminally liable much more behavior than was intended.

Finally, we urge you to consider the glaring fact that the situation in Vernal does highlight: young people in Utah need appropriate and accurate information about sexual health and access to medical and mental health services.

We would be happy to discuss our concerns with you further should it be helpful.

Thank you.

Sincere regards,

Karen McCreary
Executive Director

Marina Lowe
Legislative and Policy Counsel

cc: John Pearce, Esq.
General Counsel

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House of Representatives
Utah State Capitol
Salt Lake City, Utah 84114

Re: House Bill 235 S1, "Abortion Law Revisions"

February 7, 2007

Dear Representative,

On behalf of the American Civil Liberties Union of Utah, we write to express our strong opposition to House Bill 235 S1, "Abortion Law Revisions." We urge you to uphold a woman's constitutional right to reproductive freedom by voting against this potentially costly and dangerous legislation.

HB 235 S1 will return Utah's abortion laws to those in effect prior to *Roe v. Wade*, the 1973 case in which the U.S. Supreme Court found that the constitutional right to privacy encompasses a woman's decision to continue or terminate her pregnancy. History has shown that when women are denied access to abortion care, they resort to desperate measures. Banning abortion in Utah will not protect women and their families, but will threaten the health and lives of women across the state. The women of Utah should benefit from the lessons learned from the past; they should not be doomed to repeat them.

Similarly, the state of Utah should benefit from its own history and avoid repeating it. On January 25, 1991, Utah amended and re-enacted its pre-Roe abortion ban. The ACLU of Utah and others challenged that law, which was ultimately held unconstitutional by the Tenth Circuit after the state spent more than 1.2 million dollars and six years unsuccessfully defending it. The U.S. Supreme Court ultimately denied review. *See Jane L. v. Bangerter*, 102 F.3d 1112 (10th Cir. 1996), cert. denied, 520 U.S. 1274 (1997). If this bill passes, the state of Utah will once again have to defend a clearly unconstitutional law. This time, however, the cost of the litigation will likely be much higher.

Rather than supporting an abortion ban, we ask that you focus your efforts on reducing the need for abortions by supporting common sense solutions aimed at reducing unintended pregnancies in Utah. In a recent Guttmacher Institute report, Utah ranked 47th in the nation in its efforts to help women avoid unintended pregnancy. (See www.guttmacher.org/statecenter/ccfs.html.) Criminalizing abortion immediately, as this bill seeks to do, will not reduce the number of unintended pregnancies in the state. It will, however, violate the constitution, put women at risk, and waste tax dollars much-needed elsewhere.

The ACLU of Utah is committed to protecting every person's right to make informed decisions free from government interference about whether and when to become a parent. Not only will HB 235 S1 violate this right, but it will also threaten the health and safety of Utah women and their families. Please vote against the bill when it comes before you for your consideration.

Sincerely yours,

Margaret Plane
Legal Director

Karen McCreary
Executive Director

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House of Representatives
Utah State Capitol
Salt Lake City, Utah 84114

Re: House Bill 85 Abortion by a Minor, Parental Notification and Consent

January 19, 2006

Dear Representative,

On behalf of the American Civil Liberties Union of Utah, I urge you to vote against House Bill 85, "Abortion by a Minor—Parental Notification and Consent," because it is constitutionally infirm.

The ACLU opposes laws like HB 85, which prevent teens from obtaining an abortion without first notifying or obtaining consent from a parent, because they put teens' health and safety at risk. Mandating parental notification and consent will not create good family communication where it does not already exist, and it could have dangerous consequences for a young woman already caught in a precarious family situation. It is the unfortunate fact that the teens who will be impacted by this law are those who are the most vulnerable because they lack family support.

HB 85 is constitutionally infirm because it fails to provide a bypass procedure for teens who can establish that notification is not in their best interest or that they are sufficiently mature to decide whether or not to continue a pregnancy. The rationale of the United States Supreme Court and myriad lower court decisions establish the unconstitutionality of a law that does not have an alternative to parental notification for these teens. This rationale was established in Bellotti v. Baird, 443 U.S. 622 (1979). In that case, the Court held that while a state may adopt a law requiring parental involvement, it may do so only if it provides a mechanism for the pregnant minor:

> to show either: (1) that she is mature enough and well enough informed to make her abortion decision, in consultation with her physician, independently of her parent's wishes, or (2) that even if she is not able to make this decision independently, the desired abortion would be in her best interests.

Id. at 643-44. The Court emphasized that "[e]very minor must have the opportunity—if she so desires—to go directly to court *without first consulting or notifying her* parents." Id. at 647 (emphasis added). Following this decision, no court, looking to the merits, has upheld a parental notice statute that lacks a bypass. See, e.g., Hodgson v. Minnesota, 497

U.S. 417, 460-61 (1990) (holding two-parent notification law unconstitutional without bypass); Planned Parenthood v. Miller, 63 F.3d 1452, 1460 (8th Cir. 1995) (holding one-parent notification law without bypass facially unconstitutional); Zbaraz v. Hartigan, 763 F.2d 1532, 1536, 1539-44 (7th Cir. 1985) (holding unconstitutional parental notice law whose bypass did not meet previously established requirements), aff'd by equally divided Court, 484 U.S. 171 (1987); Indiana Planned Parenthood v. Pearson, 716 F.2d 1127, 1132 (7th Cir. 1983) (same); Akron Ctr. For Reprod. Health v. Slaby, 854 F.2d 852, 861 (6th Cir. 1988) (same), rev'd on other grounds, Ohio v. Akron Crt. For Reprod. Health, 497 U.S. 502 (1990).

Although HB 85 provides a judicial bypass for the consent provision, it does not do so for notification. Therefore, under HB 85 the situation could arise whereby a minor's parents may be notified (because the limited exceptions are not met), while at the same time, a court determines, through the consent bypass procedure, that it is not in the minor's best interests to obtain her parent's consent. This situation would not occur if there were a bypass requirement for the notice as well as the consent requirements.

As it is currently drafted, HB 85 is constitutionally deficient, and we therefore urge you to vote against it. If you have any questions about our position, you may call me at (801) 521-9862.

Yours,
/s

Margaret Plane
Legal Director

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Senate Judiciary, Law Enforcement,
and Criminal Justice Standing Committee
West Office Building
Utah State Capitol
Salt Lake City, Utah 84114

January 18, 2005

Dear Senator D. Chris Buttars, Chair, and Members of the Senate Judiciary, Law Enforcement, and Criminal Justice Standing Committee,

The American Civil Liberties Union of Utah appreciates the efforts of this Committee and of Senator Hillyard in working on Senate Bill 14, the Uniform Parentage Act. We write specifically to discuss Part 8 of S.B. 14, Gestational Agreements. As the Committee may be aware, the current statute outlining the scope of gestational agreements, Utah Code Annotated section 76-7-204, was ruled unconstitutional as applied in 2002. Therefore, it is sensible for the legislature to reconsider this issue and to bring state statute in line with constitutional standards.

As drafted, Part 8 of S.B. 14 raises several areas of concern:

- First, section 78-45g-806 too narrowly draws the provisions for termination of gestational agreements, and thereby violates the parental rights of the gestational mother. To adequately address the parental rights of the gestational mother, a gestational mother should have the right to terminate a gestational agreement not only throughout pregnancy, but also for a defined period of time after the child's birth. Safeguards similar to those in the adoption context should exist, whereby surrender of a birth mother's rights are not enforceable until "at least 24 hours after the birth of her child." *See* Utah Code Ann. § 78-30-4.19.

- Second, under section 78-45g-803(2)(b), a gestational agreement cannot be validated without a finding of "medical evidence [that] shows that the intended mother is unable to bear a child or is unable to do so without unreasonable risk to her physical or mental health or to the unborn child." The U.S. Supreme Court has enumerated a fundamental right to choose "whether to bear or beget a child." A woman exercises this fundamental right when she enters into a gestational agreement. There is no compelling interest for the state to restrict her right based on a diagnosis of infertility.

- Third, section 78-45g-801(2) requires that the intended parents of the child "shall be married." Equal protection principles demand that the state refrain from excluding a class of individuals from exercising their rights to privacy and procreation by entering into surrogacy contracts. Furthermore, surrogacy arrangements should not be limited to married couples, as the civil liberties exercised in surrogacy arrangements are individual liberties which are not dependent on a person's marital status.

- Finally, section 78-45g-808 states only that "a gestational agreement may not limit the right of the gestational mother to make decisions to safeguard her health or that of the embryo or fetus." The gestational mother's right to refuse or to consent to medical treatment is an essential element of the personal right to bodily integrity, a right that cannot be waived. Decisions concerning medical treatment, including whether to continue a pregnancy, should be left to the woman's personal discretion in conjunction with her doctor. Under section 78-45g-808, it is unclear whether a surrogate mother must impermissibly waive her right to privacy and bodily integrity.

The ACLU of Utah acknowledges that gestational agreements, and the issues surrounding such agreements, raise complex legal and ethical issues. It is for this reason that we hope the Committee will take a careful approach to this legislation to ensure that there are no unintended consequences. If you have any questions, please contact me directly at 801.521.9862, ext. 103.

Respectfully,

Margaret Plane
Staff Attorney

Prohibition of Public Funding for Abortion

Governor Olene Walker
210 State Capitol
Salt Lake City, Utah 84114-0601

March 10, 2004

Dear Governor Walker,

The ACLU of Utah appreciates the opportunity to comment on Third Substitute SB 68, Prohibition of Public Funding for Abortion.

The pending law would prohibit the use of public funds for abortion services, except in limited situations. We are concerned about SB 68 because the pending law has unclear and possibly widespread fiscal ramifications, and it inappropriately contradicts federal Medicaid regulations. We hope that your office recognizes that this law may therefore be impossible to implement without threatening Utah's Medicaid funding or the funding of public health facilities that perform abortions.

While it is problematic that the fiscal ramifications are both unclear and unknown, we are primarily concerned with SB 68's narrow waiver of the requirement that cases of rape or incest be reported to the police. The bill only allows waiver of the reporting requirement if the woman was unable to report for physical reasons or fear of retaliation. In contrast, under federal regulations concerning the use of public funds for abortion, the reporting requirement may be waived when a physician certifies that the patient cannot report for physical or psychological reasons. The Utah requirement is more restrictive and lacks the objective standard of a physician to determine whether a woman is unable to report a case of rape or incest.

By imposing eligibility requirements that are more restrictive than those permitted under federal law, SB 68 arguably places Utah's federal Medicaid funds at risk. Further, by not participating in the Medicaid program under the terms established by Congress, the bill violates the Supremacy Clause of the U.S. Constitution.

We believe the state has an interest in both following the federal regulatory requirements to receive Medicaid funding, and in keeping abortion safe and legal for women of all economic levels. This bill is not about abortion on demand—it is about the use of public funding in unique and limited circumstances.

Respectfully,

Dani Eyer
Executive Director

Margaret Plane
Staff Attorney

Second Substitute SB 69, Partial Birth Abortion Amendments

Governor Olene Walker
210 State Capitol
Salt Lake City, Utah 84114-0601

March 10, 2004

Dear Governor Walker,

The ACLU of Utah is obliged to comment on Second Substitute SB 69, Partial Birth Abortion Amendments. We respectfully request that this pending law be vetoed because it fails to include an exception to preserve the health of the pregnant woman and the wording employed is too broad.

First we would like to note that Utah's existing ban on so-called "partial birth abortions' has been cited law by U.S. Supreme Court Justice O'Connor as a model method wherein states can address this issue without violating the constitution. In contrast, SB 69 is constitutionally defective, in part because it fails to provide an exception to the ban in cases where the procedure is necessary to preserve the health of the pregnant mother. Case law makes clear that a law prohibiting or restricting abortion is unconstitutional if it lacks exceptions to preserve the life and health of the pregnant mother. See Stenberg v. Carhart, 530 U.S. 914 (2000), Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833 (1992), and Roe v. Wade, 410 U.S. 113 (1973).

There is also a concern that the range of safe abortion procedures prohibited is too broad. Because the prohibited range is too broad, the bill likely places an undue burden on a woman's right to seek an abortion, in violation of U.S. Supreme Court rulings stating that abortion laws may not place an undue burden on a woman's right to seek an abortion before viability. See Stenberg, 530 U.S. at 939.

Further, the recently enacted federal "Partial-Birth Abortion Ban Act of 2003" also lacks a health exception. This has prompted three federal courts to block the ban from taking effect. Because the federal cases are scheduled for trial this spring, it would be prudent for the state to wait for the outcome of those cases before passing a substantially similar law. In addition, so long as the federal ban is in place, a state law is unnecessary.

We understand the legislature's desire to take a stand on a controversial matter, but request that the leader of the state's executive branch act as the judiciary inevitably will, and acknowledge existing constitutional law.

Thank you for your time and consideration of this matter.

Respectfully,

Dani Eyer, Executive Director

Margaret Plane, Staff Attorney

S.B. 68 Prohibiting Public Funding for Abortion

Senate Judiciary, Law Enforcement,
and Criminal Justice Committee
Utah State Capitol
Salt Lake City, Utah 84114

January 21, 2004

RE: S.B. 68 Prohibiting Public Funding for Abortion

Dear Committee Members,

There was discussion yesterday (January 20, 2004), during the Senate Judiciary Committee meeting, concerning whether legislation similar to draft S.B. 68 (1st Sub.) has been passed in other states, specifically Colorado. The committee requested more information on this issue.

An initiative in Colorado amended the state's constitution in 1984 to prohibit the use of public funds for abortions, unless an abortion was necessary to prevent the death of the woman or her unborn child. Colo. Const. Art. V, § 50. In Hern v. Beye, 57 F.3d 906 (10th Cir. 1995), the Tenth Circuit held that the provision was not enforceable because it conflicted with federal Medicaid law. While the Colorado initiative, incorporated into Colorado statute, was broader than draft S.B. 68 (1st Sub.), the reasoning of the case demonstrates why the bill should not be passed.

Medicaid is a jointly funded federal-state program, and Utah, as a participant, must comply with Title XIX of the Social Security Act of 1965 establishing Medicaid, and with applicable regulations. States are obligated to fund abortions for which federal funding is available, including pregnancies resulting from rape or incest or pregnancies that put the woman's life at stake. S.B. 68 imposes narrower requirements for reporting cases of rape or incest than the federal requirements, and therefore violates the Supremacy Clause of the United States Constitution. The exception in the Utah bill only allows use of public funding where rape or incest was reported, "unless the woman was unable to report the crime for physical reasons or fear of retaliation." This exception is narrower than the requirements stated under the Hyde Amendment, a rider to Title XIX, which waives the reporting requirement "if the treating physician certifies that in his or her professional opinion, the patient was unable, for physical or psychological reasons, to comply with the requirement." Utah's bill should reflect this broader waiver of the reporting requirement to comport with federal law.

Respectfully,

Margaret Plane

S.B. 69 Partial Birth Abortion

Senate Judiciary, Law Enforcement,
and Criminal Justice Committee
Utah State Capitol
Salt Lake City, Utah 84114

January 21, 2004

RE: S.B. 69 Partial Birth Abortion

Dear Committee Members,

During yesterday's (January 20, 2004) Senate Judiciary Committee meeting, and following testimony by the ACLU of Utah, the committee asked for more information on the Sixth Circuit Court of Appeals case, Women's Medical Professional Corp. v. Taft, 2003 U.S. App. LEXIS 25413, 2003 FED App. 0446P (6th Cir.). The Ohio bill varies from Utah's draft Senate Bill 69 (1st Sub.) as follows.

The Ohio law differs from the ban proposed in S.B. 69 (1st Sub.), section 76-7-326, in two important respects. First, the Ohio ban includes an exception to preserve the health of the woman. In upholding Ohio's law, the appeals court recognized that without an exception to protect women's health, the ban would have been unconstitutional. The proposed ban on partial birth abortions in S.B. 69 lacks a health exception, stating only that the section does not apply "to a partial birth abortion that is necessary to save the life of a mother . . . ." Additionally, contrary to suggestions yesterday, section 76-7-301(2) of S.B. 69 is not a health exception for the prohibition on partial birth abortion, but rather a definition of what constitutes a medical emergency.

Second, the definition of the conduct prohibited under the Ohio law differs significantly from the definition contained in the Utah bill. Unlike the Utah bill, the Ohio law includes an exception for the most common procedure used in the second trimester. Without such an exception, the Utah law prohibits a range of safe abortion procedures performed after the first trimester.
Respectfully,

Margaret Plane

S.B. 69 Partial Birth Abortion

Senate Judiciary, Law Enforcement,
and Criminal Justice Committee
Utah State Capitol
Salt Lake City, Utah 84114

January 20, 2004

RE: Unconstitutionality of S.B. 69 Partial Birth Abortion

Dear Committee Members,

The ACLU of Utah implores the committee to vote against Senate Bill 69 because it is constitutionally defective and therefore subject to legal challenge. S.B. 69, which is nearly identical to federal legislation struck down in Stenberg v. Carhart, 530 U.S. 914 (2000), is unconstitutional on two grounds: it fails to include an exception for the health of the pregnant woman and it is too broad.

The Supreme Court of the United States has consistently required exceptions to preserve both the health and life of the pregnant mother when the government attempts to prohibit abortion. Stenberg v. Carhart, following precedent established in Roe v. Wade, 410 U.S. 113 (1973) and Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833 (1992), made clear that any prohibition on abortion that does not contain both exceptions is unconstitutional. While S.B. 69 provides a life exception in section 76-7-326, the bill fails to provide a health exception. Absent a health exception the bill is unconstitutional. The recently enacted federal "Partial-Birth Abortion Ban Act of 2003" also lacks a health exception, which has prompted three federal courts to block the ban from taking effect.

S.B. 69 is also unconstitutional because the range of safe abortion procedures it prohibits is too broad. By prohibiting a range of procedures, the bill likely places an "undue burden" on a woman's right to seek an abortion before viability. See Stenberg, 530 U.S. at 939.

The committee should vote against S.B. 69 because it constitutes an unconstitutional restriction on abortion access and is subject to attack in court.

Sincerely,

Margaret Plane
Staff Attorney