



Utah

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March 19, 2019

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: H.B. 136, "Abortion Amendments"

Dear Governor Herbert,

We strongly urge you to veto House Bill 136 "Abortion Amendments." This bill seeks to prohibit Utahns from seeking constitutionally protected abortions post 18 weeks gestation.

The American Civil Liberties Union ("ACLU") has a long history of defending reproductive freedom and a strong commitment to woman's health. The ACLU has participated in nearly every critical case concerning reproductive rights to reach the Supreme Court of the United States, and we routinely advocate in Congress and state legislatures for policies that promote access to reproductive health care. We oppose H.B. 136 because it interferes with a woman's most personal medical decisions and violates fundamental constitutional principles.

The Supreme Court of the United States has long recognized as much: in *Roe v. Wade*, the Court held that a state may never ban abortion prior to fetal viability—that is, before the fetus has a reasonable likelihood of sustained survival outside a woman's body. This principle has been applied and reaffirmed repeatedly for over four decades, most recently in *Whole Woman's Health v. Hellerstedt*¹ in 2016.

By banning abortions beginning at 18 weeks—a pre-viability stage of pregnancy—HB 136 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. The Supreme Court has 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.²

¹ 136 S. Ct. 2292 (2016), 195 L. Ed. 2d 665.

² *Colautti v. Franklin*, 439 U.S. 379, 388 (1979).

Indeed, courts have struck down as unconstitutional state laws banning abortion beginning at 20 weeks in Arizona³ and Idaho⁴, as well as a law banning abortion at 15 weeks in Mississippi⁵, 12 weeks in Arkansas⁶ and 6 weeks in North Dakota.⁷ Our own United States Court of Appeals for the Tenth Circuit struck down Utah's 20 week ban in 1996, which prompted the Utah legislature to revise the statute and replace a numerical limit with viability instead.⁸ In so holding, the Tenth Circuit stated:

“[T]he Utah legislature’s intent in passing the abortion provisions was to provide a vehicle by which to challenge *Roe v. Wade*, as demonstrated by the legislature’s establishment of an abortion litigation trust account. In so doing, the State made a 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. In our view, the State’s determination to define viability in a manner specifically and repeatedly condemned by the Court evinces an intent to prevent a woman from exercising her right to choose an abortion after twenty weeks in those instances in which the fetus is not viable.”⁹

For the above-mentioned reasons, we strongly urge you to veto H.B. 136, “Abortion Amendments.” We would welcome any questions or concerns you may have.

Sincere Regards,

A handwritten signature in black ink, appearing to read "Brittney Nystrom", with a long horizontal flourish extending to the right.

Brittney Nystrom, Esq.
Executive Director

cc: Ron Gordon, Esq.

³ *Isaacson v. Horne*, 716 F.3d 1213 (9th Cir. May 21, 2013), *cert. denied*, 134 S. Ct. 905 (2014).

⁴ *McCormack v. Herzog*, 788 F.3d 1017 (9th Cir. 2015).

⁵ *Jackson Women’s Health Org. v. Currier*, 349 F. Supp. 3d 536 (S.D. Miss. 2018)

⁶ *Edwards v. Beck*, 786 F.3d 1113 (8th Cir. 2015), *cert. denied*, 136 S.Ct. 895 (2016)

⁷ *MKB Management Corp. v. Stenehjem*, 795 F.3d 768 (8th Cir. 2015), *cert. denied*, 136 S.Ct. 981 (2016). A federal district court in Kentucky just days ago issued a temporary restraining order against a similar law in that state. See *EMW Women’s Surgical Center, P.S.C., v. Beshear*, Civil Action No. 3:19-cv-178-DJH, 2019 WL 1233575, (W.D. Ky. March 15, 2019).

⁸ *Jane L. v. Bangert*, 102 F.3d 1112 (10th Cir. 1996).

⁹ *Id.* at 1116, 1117.