WASHINGTON
LEGISLATIVE OFFICE

June 18, 2013

Vote "NO" on H.R. 1797, the "Pain-Capable Unborn Child Protection Act"

Dear Representative:

On behalf of the American Civil Liberties Union (ACLU), a non-partisan organization with more than a half million members, countless additional activists and supporters, and 53 affiliates nationwide, dedicated to protecting the principles of freedom and equality set forth in the Constitution and in our nation's civil rights laws, we urge you to vote against the misleadingly captioned Pain-Capable Unborn Child Protection Act, H.R. 1797, which would ban abortion care starting at 20 weeks of pregnancy.

H.R. 1797 is part of a wave of ever-more extreme legislation attempting to restrict a woman's right to make her own decision about whether or not to continue a pregnancy. We have seen state after state try to take these decisions away from women and their families; H.R. 1797 would do the same nationwide. We oppose H.R. 1797 because it interferes in a woman's most personal, private medical decisions and violates fundamental constitutional precepts.

Every pregnancy is different. For many women and families, it is a joyous event. However, none of us can presume to know what complications may arise during a pregnancy, or all the circumstances surrounding a personal, medical decision to continue or end a pregnancy. This is an inherently private decision that must be made by a woman and her family, not the government, and 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 could survive 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 reaffirmed repeatedly for four decades,[2] as well

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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.") (internal quotations and citation omitted); *see also* Planned Parenthood v. Casey, 505 U.S. 833, 871 (1992) (plurality opinion) ("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.").

they should. A woman should not be denied basic health care or the ability to make the best decision given her own circumstances just because some disagree with it. H.R. 1797 flouts these basic constitutional rules.

In conflict with law, in disregard of medical science, and for reasons unrelated to viability, H.R. 1797 unilaterally takes away a woman's decision-making ability before viability and fails to provide protection for a woman's health. Banning abortions starting at 20 weeks—which is a pre-viability stage of pregnancy—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.[3]

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.[4] Similarly here, the government cannot draw a line at a set number of weeks to prohibit abortion care. Thus, a ban on abortion starting at 20 weeks is "per se unconstitutional,"[5] regardless of the legislature's justification for it. A similar 20-week provision enacted by the Utah legislature was struck down years ago as unconstitutional by the United States Court of Appeals for the 10th Circuit because it "unduly burden[ed] a woman's right to choose to abort a nonviable fetus."[6] More recently, courts have preliminarily or permanently enjoined similar bans in Arizona (20 weeks), Georgia (20 weeks), Idaho (20 weeks), and Arkansas (12 weeks).[7] Last month, the United States Court of Appeals for the 9th Circuit struck down a 20 week ban, holding 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]

With only two exceedingly narrow exceptions,[9] H.R. 1797 bans abortions necessary to protect a woman's health, no matter how severe the situation. Many things can go wrong during a pregnancy and a woman's health could be at risk in ways that one cannot predict. Women may suffer blindness, kidney failure, or permanent infertility because they were denied the care they need by this bill. H.R. 1797 would force a woman and her doctor to wait until her condition was terminal to finally act to protect her health, but by then it may be too late. This restriction is not only cruel, it is blatantly unconstitutional. It is longstanding precedent that restrictions on even

[3] *Casey*, 505 U.S. at 851.
[4] Colautti v. Franklin, 439 U.S. 379, 388-89 (1979).
[5] Isaacson v. Horne, No. 12-16670, 2013 WL 2160171, at *1 (9th Cir. May 21, 2013).
[6] Jane L. v. Bangerter, 102 F.3d 1112, 1118 (10th Cir. 1996).
[7] *Isaacson*, No. 12-16670, 2013 WL 2160171; Lathrop v. Deal, No. 2012-cv-224423 (Ga. Super. Ct. Dec. 21, 2012); McCormack v. Hiedeman, 900 F. Supp. 2d 1128 (D. Idaho 2013); Erik Eckholm, *Abortion Law in Arkansas is Blocked by U.S. Judge*, N.Y. TIMES, May 18, 2013, at A10.
[8] *Isaacson*, No. 12-16670, 2013 WL 2160171, at *1.
[9] Pain-Capable Unborn Child Protection Act, H.R. 1797, 113th Cong. (2013) (providing exceptions for when the abortion is "necessary to save the life of a pregnant woman whose life is endangered by a physical disorder, physical illness, or physical injury," or in the case of reported rape or incest of a minor).

post-viability abortion care must have an exception to preserve a woman's health.[10] This is all the more true here where the ban impermissibly applies pre-viability.

In addition to ignoring—indeed, sacrificing—women's health, H.R. 1797 fails to take into consideration the severe or fatal fetal conditions that develop or are detected in mid or later pregnancy. The Judiciary Subcommittee on the Constitution and Civil Justice recently heard from Christy Zink, who learned mid-way through her pregnancy that if she carried to term, she would, tragically, give birth to a baby missing half his brain. "The answers were far from easy to hear, but they were clear. There would be no miracle cure. His body had no capacity to repair this anomaly, and medical science could not solve this tragedy."[11] Christy and her husband considered their situation and made the best decision for their family—to end the pregnancy. H.R. 1797 would rob Christy and her family, and families like hers, of the ability to make these personal, private decisions for themselves.

What is more, H.R. 1797 would impose criminal penalties on physicians who provide their patients with this needed care at a difficult time. "I am horrified to think," Christy testified, "that the doctors who compassionately but objectively explained to us the prognosis and our options for medical treatment, and the doctor who helped us terminate the pregnancy, would be prosecuted as criminals under this law for providing basic medical care and expertise."[12] We urge you to reject this attempt to turn politicians into doctors, and expert, compassionate doctors into criminals.

For four decades, the U.S. Supreme Court has recognized the irreducible right of every woman to determine the course of her pregnancy before viability. H.R. 1797 would take that right away. It would force some women to carry to term, even where the pregnancy jeopardizes their health or where the fetus has been diagnosed with a severe or lethal anomaly. H.R. 1797 would also force women's hands in the other direction. Some ill women, in the absence of this bill, would try to continue their pregnancies as long as possible to see if their health conditions were manageable or would resolve. If H.R. 1797 were enacted, however, they might feel forced to pre-emptively terminate a difficult pregnancy for fear of losing the ability to protect their health after the 20 week mark if their situation continued to worsen. The same may be true for women whose fetuses have been diagnosed with severe anomalies, which often does not happen until this point in pregnancy. Women in this position might be rushed into making decisions they otherwise would not, but for the fact that the bill would take away their ability to make a decision after 20 weeks.

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[10] Planned Parenthood v. Casey, 505 U.S. 833, 879 (1992) (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.

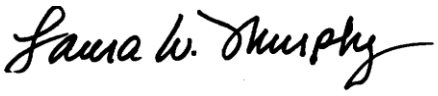
[11] *District of Columbia Pain-Capable Unborn Child Protection Act: Hearing Before Subcomm. on Constitution of H. Comm. on Judiciary*, 113th Cong. (2013) (statement of Christy Zink).

[12] *District of Columbia Pain-Capable Unborn Child Protection Act: Hearing Before Subcomm. on Constitution of H. Comm. on Judiciary*, 113th Cong. (2013) (statement of Christy Zink).

This bill should be rejected, not just because it is unconstitutional, but because it puts politics above a woman's health. We urge members of the House of Representatives to oppose passage of this bill.

Should you have any questions, please contact Sarah Lipton-Lubet at (202) 675-2334 or slipton-lubet@dcaclu.org.

Sincerely,



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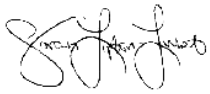

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