Written Statement of the American Civil Liberties Union

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Submitted to the U.S. House of Representatives
Committee on the Judiciary
Subcommittee on the Constitution

Hearing on: H.R. 3803, the "District of Columbia Pain-Capable Unborn Child Protection Act"

Held May 17, 2012

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, and the American Civil Liberties Union of the Nation's Capital, with more than 5,000 members in the District of Columbia, both dedicated to protecting the principles of freedom and equality set forth in the Constitution and in our nation's civil rights laws, we thank you for giving us the opportunity to submit this statement for the record on the so-called District of Columbia Pain-Capable Unborn Child Protection Act, H.R. 3803, which would ban abortions in the District of Columbia at 20 weeks.

The ACLU has a long history of defending reproductive freedom. The ACLU has participated in nearly every critical case concerning reproductive rights to reach the Supreme Court, and we routinely advocate in Congress and state legislatures for policies that promote access to reproductive health care. We oppose H.R. 3803 because it is unconstitutional and interferes in a woman's most personal, private medical decisions, and unduly targets the residents of the District of Columbia.

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 the pregnancy, or all the circumstances surrounding a personal, medical decision to have an abortion. 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 specifically held that: (1) a state may never ban abortion prior to fetal viability; and (2) a state may only ban abortion after viability if there are adequate exceptions to protect a woman's life *and* health.[1] These principles have been repeatedly reaffirmed for more than three decades,[2] as well they should. A woman should not be denied basic health care or the ability to make the best decision for her circumstances just because some disagree with her decision. H.R. 3803 flouts these basic rules.

In conflict with law, in disregard of medical science, and for reasons unrelated to viability, H.R. 3803 unilaterally takes away a woman's decision-making ability before viability and fails to provide even adequate protection for a woman's health. Banning abortions starting at 20 weeks – which is a pre-viability stage of pregnancy – directly contradicts longstanding

[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 a woman to choose to have an abortion before viability and 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."). *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.").

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 been 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 based on any single factor to prohibit abortions. Thus, a 20-week ban on abortions, no matter the justification, is by definition unconstitutional. In fact, a similar 20-week provision enacted by the Utah legislature has already been struck down 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."[5]

Moreover, H.R. 3803 provides only a single, exceedingly narrow, exception to its ban: where 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."[6] Put differently, H.R. 3803 bans abortions necessary to protect a woman's health. Many things can go wrong during a pregnancy; a woman's health could be at risk in ways that we cannot predict. Women may suffer blindness, kidney failure, or permanent infertility because they were denied the care they need by this bill. H.R. 3803 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. Such a restriction is as unconstitutional as it is cruel. It is longstanding precedent that restrictions on abortion post-viability must have an exception to preserve a woman's health.[7] This is all the more so true here where the ban impermissibly applies pre-viability.

The disregard for women's health displayed by H.R. 3803 knows almost no limit. Even when a woman qualifies for the narrow life exception – that is, when her life is literally in peril – H.R. 3803 goes out of its way to further tie her doctor's hands. The bill dictates how the pregnancy termination must be performed, even if such a method will put a woman's health at greater risk.[8] In other words, this bill disallows a doctor from choosing the method of abortion that will best protect a woman's health.

In addition to ignoring – indeed, sacrificing – women's health, H.R. 3803 fails to take into consideration the fatal fetal conditions that develop or are detected in mid or later pregnancy. Consider the turmoil that Danielle Deaver suffered when her water broke months

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[3] *Casey*, 505 U.S. at 851.
[4] Colautti v. Franklin, 439 U.S. 379, 388-89 (1979).
[5] Jane L. v. Bangerter, 102 F.3d 1112, 1118 (10th Cir. 1996).
[6] District of Columbia Pain-Capable Unborn Child Protection Act, H.R. 3803, 112th Cong. § 3 (2012).
[7] *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.
[8] There are only two narrow exceptions to this provision: when such a method would pose greater risk of death or the substantial and irreversible physical impairment of a major bodily function.

early at 22 weeks. She sped to the hospital, only to be told that her fetus had no chance of survival – her lungs would never develop; she would never be able to breathe. Danielle and her husband made the best decision for their family – to end the pregnancy and their own suffering, and spare their baby any pain. Tragically for Danielle, the state of Nebraska had already enacted an abortion ban similar to H.R. 3803, and her doctors were therefore not able to give her the care she needed and so desperately sought. She was forced to sit and wait for 10 days until her body finally expelled the pregnancy. In Danielle's words: "There are no words for how awful the 10 days were from the moment my water broke to the day my daughter died. There are no words for the heartbreak that cut deeper every time she moved inside of me for those 10 days."[9]

Last, H.R. 3803 impinges on the autonomy of the District of Columbia. This ban tramples on the core concept of home rule. Although our Constitution gave Congress the authority to establish a federal district, the District of Columbia, Senators and Representatives holding widely divergent political views, finally recognized in 1973 that the citizens of the District of Columbia had been denied the most basic privilege enjoyed by all other Americans – the right to elect those men and women who would control their local governments. They enacted the Home Rule Act to "grant to the inhabitants of the District of Columbia powers of local self-government…and relieve Congress of the burden of legislating upon essentially local District matters."[10]

The 20 week ban is antithetical to the spirit of the Home Rule Act. It disenfranchises and marginalizes the District's leaders and residents. Through this provision, non-resident Members of Congress impose their own ideology, morality or belief upon the District's residents and disregard the needs or wishes of the broader community or those directly impacted. Members of the House who seek to impose this abortion ban and negate the will of the District's residents are not accountable to the people of the District.

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We may not all agree on abortion, but we can all agree that it is important to support a woman's health and well-being. This bill is should be rejected, not just because it is unconstitutional, but because it puts politics above a woman's health. We urge the members of the Subcommittee to oppose this dangerous bill.

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[9] *See* Mathew Hendley, *Nebraska Woman Lets Jan Brewer Know Proposed Abortion Bill Actually Affects People*, PHOENIX NEWS TIMES, April 5, 2012, *available at* http://blogs.phoenixnewtimes.com/valleyfever/2012/04/nebraska_woman_lets_jan_brewer_1.php.

[10] District of Columbia Home Rule Act, Pub. L. No. 93-198, 87 Stat. 774,777 (1973).