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March 4, 2009

Governor Jon Huntsman, Jr.
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Salt Lake City, Utah 84114-2220

Amanda Smith
Legislative Affairs Advisor
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Re: H.B. 90 Substitute - Abortion Law Amendments

Dear Governor Huntsman:

Since 1958, the American Civil Liberties Union (ACLU) of Utah has worked to protect the constitutional rights of all Utahans. With over 2,500 members in Utah, the ACLU is dedicated to working in the courts, legislatures, and communities to defend and preserve the individual rights and liberties guaranteed to all people. We strongly request you veto HB 90 because it is unconstitutional and threatens women's health.

The ACLU does not oppose constitutionally constructed bans on abortions performed after viability, but HB 90 is not such a ban. Because HB 90 neither conforms to constitutional standards nor adequately protects women's health and safety, we ask you to veto this dangerous and unconstitutional legislation.

HB 90 Fails to Pass Constitutional Muster.

As articulated in the decisions of the United States Supreme Court, Utah may constitutionally ban abortion after viability as long as there are adequate exceptions for the life and health of the pregnant woman. HB 90, however, contains an unconstitutional definition of "viability" and a constitutionally inadequate exception for when a woman's health is at risk.

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HB 90's definition of "viability" is broader than the limits prescribed by the Supreme Court. As a constitutional matter, "[v]iability is reached when, in the judgment of the attending physician on the particular facts of the case before him, there is a reasonable likelihood of the fetus' sustained survival outside the womb" ¹ HB 90, in contrast, defines "viability" as the "stage of fetal development when the unborn child is potentially able to live outside the womb, as determined by the attending physician to a reasonable degree of medical certainty." Defining "viable" as merely "potentially able to live outside the womb" exceeds constitutional limits. HB 90's definition could mean that the fetus has a remote possibility of life outside the uterus for even the briefest period. Physicians cannot know what the definition means and so would be chilled from providing constitutionally protected abortions.

The bill's unconstitutionality is not cured by its exemption for circumstances in which "two physicians who practice maternal fetal medicine concur, in writing, in the patient's medical record that the fetus has a defect that is uniformly diagnosable and uniformly lethal." Indeed, this language injects additional vagueness into the bill. Inasmuch as physicians – under pain of criminal sanction – must assume that the bill defines viable as having any potential for even the briefest life outside the uterus, it is not clear what it then means to exempt situations where the fetus has a uniformly diagnosable and lethal anomaly. That is because anomalies such as anencephaly (the absence of a brain above the stem) are always lethal – often before birth – but also sometimes result in death minutes, days, or even months after birth. Fetuses with such anomalies have no "reasonable likelihood of . . . sustained survival" – the constitutional standard for viability – but are "viable" as defined in H.B. 90. The question then becomes whether they meet the bill's exemption: Does an anomaly that may allow a neonate to live for minutes or days qualify as "lethal"? What about an anomaly, such as Trisomy 13 or 18, which are generally lethal but may allow survival in extremely rare cases? A physician cannot know what the legislation means, and so would be chilled from providing constitutionally protected abortions in cases where the fetus does not have a reasonable likelihood of sustained survival.

HB 90 also fails to contain the constitutionally required exception for where a woman's health is at risk. The Supreme Court has long held that after viability, a state may "proscribe[] abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health" of the woman.² HB 90, however, only contains an exception where there is "a serious risk of substantial and irreversible impairment of a major bodily function of the woman." Such a narrow medical exception does not comport with constitutional standards. Although the language of HB 90's medical exception has been approved by the Supreme Court as an adequate exception for restrictions such as a 24 hour waiting period or a parental consent requirement,³ the Supreme Court has never upheld this narrow language as an adequate health exception for an abortion ban such as HB 90. Such an exception is not only unconstitutional, but threatens women's health and safety.

¹ *Collautti v. Franklin*, 439 U.S. 379, 388 (1979).

² *Roe v. Wade*, 410 U.S. 113, 165 (1973); *Planned Parenthood v. Casey*, 505 U.S. 833, 879 (1992).

³ *Casey*, 505 U.S. at 880.

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HB 90 Does Not Offer Relief to Victims of Rape and Incest.

HB 90's rape and incest exceptions fail to provide real protection for many survivors. The exception is only available where the physician "verifies that the incident described . . . has been reported to law enforcement." Conditioning this exception on reporting makes it meaningless for the very women the legislation seeks to protect. In Utah, only 9.8% of rape victims report the crime to law enforcement.⁴ There are many reasons a victim may choose not to report the assault to the police, including fears of revictimization, reliving the trauma, retaliation by the offender, and not being believed. Requiring victims to report the crimes to law enforcement will only prevent women from seeking the care that they need.

We urge you to veto HB 90 because it is unconstitutional and fails to protect Utah women's health and safety.

Sincerely,

Karen McCreary
Executive Director

⁴ Utah Coalition Against Sexual Assault, *Rape and Sexual Violence Research Report*, available at <http://www.ucasa.org/Research%20Report.pdf>.