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March 14, 2012

Governor Gary R. Herbert
Utah State Capitol Complex
350 North State Street, Suite 200
PO Box 142220
Salt Lake City, Utah 84114-2220
Fax: 801-538-1344

Re: House Bill 461, "Abortion Waiting Period"

Dear Governor Herbert:

On behalf of the American Civil Liberties Union of Utah, we urge you to veto House Bill 461, "Abortion Waiting Period." This bill will substantially burden a woman's constitutional right to access abortion services, and wrongly assumes that women do not carefully consider the difficult decision of whether to have an abortion. HB 461 would expand the current mandatory wait time before a woman can get an abortion from 24 to 72 hours. This modification is extreme, unnecessary and thus, we encourage you to veto HB 461.

I. A 72-hour Mandatory Delay Would Make Utah the Most Extreme Law in the Nation

According to recent data, only 26 states require women seeking an abortion to wait a certain amount of time between receiving counseling and undergoing a procedure.¹ Of these 26 states, the mandatory waiting period is either 18 or 24 hours, consistent with United States Supreme Court jurisprudence upholding a 24-hour waiting period as likely constitutional.² By requiring women to wait 72 hours, Utah would be tripling or quadrupling the wait time any other state has tried to impose on a woman seeking an abortion.

Other than Utah, South Dakota is the only other state to pass legislation requiring women to wait 72 hours prior to obtaining an abortion. Litigation immediately ensued and the 72-hour wait provision was enjoined by a federal district court, stating:

¹ *State Policies In Brief: Counseling and Waiting Periods for Abortion*, Guttmacher Institute, March 1, 2012, available at www.guttmacher.org/statecenter/spibs/spib_MWPA.pdf

² *Planned Parenthood v. Casey*, 505 U.S. 833, 881-87, 902 (1992).

When considering the numerous substantial obstacles created by the 72-Hour Requirement, there can only be one conclusion: it creates a substantial obstacle for a large fraction of the women who choose to undergo an abortion in South Dakota. Plaintiffs have therefore demonstrated that they are likely to succeed on their claim that the 72-Hour Requirement constitutes an undue burden on a woman's ability to obtain an abortion.³

Utah would be wise to retain our current law instead of following the uncertain path of South Dakota.

II. HB 461 Fails to Recognize an Exception for Fetal Anomaly

HB 461 and existing Utah code contemplate various circumstances under which the mandatory delay is not required, including death or substantial bodily impairment of the woman undergoing the abortion. Curiously, the version of HB 461 that passed the legislature does not also provide for an exception to the 72-hour mandatory delay for those women seeking an abortion because of a fatal fetal anomaly. Utah code consistently recognizes that abortion requirements are waived in the event the fetus is considered to be nonviable.⁴ Requiring a woman to wait 72 hours upon discovering the fetus she is carrying will not survive pregnancy is nothing short of cruel, and certainly could not survive constitutional scrutiny.

III. As Amended, HB 461 Substantially Burdens Non-Utah Residents

Finally, the amendment to HB 461 clarifying that women seeking abortion in Utah may obtain counseling at any facility in the state of Utah, may have the unintended consequence of substantially and unconstitutionally burdening women outside of Utah who obtain abortions in our state. The amendment to HB 461 was added in an attempt to somewhat ease the burden on women residing in rural Utah by allowing for counseling to happen locally. Unfortunately, the amended bill now imposes greater burdens on women who reside outside of Utah. Women who travel long distances from out of state will now have to wait three days, and will either have to stay in Utah - and find someplace to sleep, take time off from their jobs, and find child care - or make two long trips (one to obtain the counseling, and the second to obtain abortion care). This creates a substantial obstacle in the path of women seeking abortion, which is precisely what the Supreme Court has said is unconstitutional. Moreover, this unequal treatment of out-of-state women is likely not consistent with the intent of the amendment. Women coming from out of state should be able to get consent in their home state before traveling to Utah.

³ *Planned Parenthood v. Daugaard*, No. 11-4071-KES, slip op at 34 (D.S.D. June 30, 2011).

⁴ See e.g. Utah Code Ann. § 31A-22-726.

For the foregoing reasons, we strongly urge you to veto HB 461. We would be happy to discuss our concerns with you further should it be helpful.

Thank you.

Sincere regards,



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cc: John Pearce, Esq.
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