CENTER FOR REPRODUCTIVE RIGHTS

December 4, 2018

Chairman Dave Burke
Senate Health, Human Services and Medicaid Committee
Senate Building
1 Capitol Square, Ground Floor

Ranking Member Charleta Tavares
Senate Health, Human Services and Medicaid Committee
Senate Building
1 Capitol Square, 2nd Floor

VIA ELECTRONIC MAIL

Re: Letter in Opposition to Ohio House Bill 258

Dear Chairman Burke, Ranking Member Tavares, and Members of the Health Human Services and Medicaid Committee:

The Center for Reproductive Rights ("Center") opposes House Bill 258 ("HB 258") and strongly urges the Committee to reject this measure. The Center is a legal advocacy organization dedicated to protecting the rights of women to access safe and legal abortion and other reproductive health care services. For more than 25 years, we have successfully challenged restrictions on abortion throughout the United States.

HB 258 is blatantly unconstitutional and would violate the Supreme Court precedent set in *Roe v. Wade* in 1973. In fact, during the 2016 legislative session, Governor Kasich vetoed a similar bill, House Bill 493, stating it was "clearly contrary to the Supreme Court of the United States' current rulings on abortion," and that it would "be struck down."[1] This bill would put Ohio at risk of costly litigation. Below, we outline the primary constitutional objections to HB 258.

HB 258 is an unconstitutional ban on abortion prior to viability. The Supreme Court has repeatedly held that the Constitution prohibits a state from enacting a law that bans abortion prior to the point in pregnancy when a fetus is viable.[2] As the Court has emphasized, "viability marks the earliest

[1] Press Release, Kasich Signs Six Bills, http://www.governor.ohio.gov/Media-Room/Press-Releases/ArticleId/576/kasich-signs-six-bills-12-13-16 (last visited Nov. 30, 2017).

[2] *E.g., Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2324 (2016); *Gonzales v. Carhart*, 550 U.S. 124, 146 (2007); *Planned Parenthood of Se. Pennsylvania v. Casey, 505 U.S. 833*, 879, 878, and 877 (1992); *Roe v. Wade*, 410 U.S. 113, 163-64 (1973).

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point at which the State's interest in fetal life is constitutionally adequate to justify a legislative ban on nontherapeutic abortions."[3] The Supreme Court has never wavered from this position, despite numerous opportunities to do so.[4] Based on this precedent, courts struck down bills similar to HB 258 in North Dakota, Arizona, and Arkansas.[5] The bill makes it a crime to provide an abortion in Ohio after doctors can detect a heartbeat—around six weeks of pregnancy.[6] At this point in pregnancy, a fetus is not viable. By completely banning abortions at the earliest stages of pregnancy, HB 258 wholly conflicts with all U.S. Supreme Court precedent on abortion.

HB 258 would violate the Constitution because it bans abortion long before the state has the right to do so and because it fails to adequately protect women's health at any stage of pregnancy. HB 258 contains an extremely narrow "medical emergency" exception for abortions after approximately six weeks, permitting them only when an abortion is necessary to avert death or a "serious risk of the substantial and irreversible impairment of a major bodily function."[7] Such a narrow exception is unconstitutional at any stage of pregnancy, because it does not adequately allow physicians to exercise their medical judgment to protect women's health in all circumstances.[8] For the same reason, HB 258's exclusion of an exception for mental health is also unconstitutional — in addition to being extremely harmful policy. Additionally, the Supreme Court has made it clear that no state may ban abortion prior to viability, regardless of the exceptions included in the law.[9]

Moreover, in November of 2018, the U.S. District Court for the Southern District of Mississippi struck down an even later, fifteen-week ban, determining that it violated the constitutional guarantee of due process under the Fourteenth Amendment. The judge in that case wrote "Mississippi's law violates Supreme Court precedent, and in doing so it disregards the Fourteenth Amendment guarantee of autonomy for women desiring to control their own reproductive health."[10] This decision recognizes what courts have repeatedly found: pre-viability abortion bans violate longstanding Supreme Court

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[3] *Planned Parenthood v. Casey*, 505 U.S. at 860, 870 ("We conclude the line should be drawn at viability, so that before that time the woman has a right to choose to terminate her pregnancy.").

[4] *MKB Mgmt. Corp. v. Stenehjem*, 795 F.3d 768, 772 (8th Cir. 2015), cert. denied, 136 S. Ct. 981 (2016); *Edwards v. Beck*, 786 F.3d 1113, 1119 (8th Cir. 2015), cert. denied, 136 S. Ct. 895 (2016);); *Isaacson v. Horne*, 716 F.3d 1213 (9th Cir. 2013), cert. denied, 134 S. Ct. 905 (2014).

[5] *Id.*

[6] *Accord MKB Mgmt. Corp.*, 795 F.3d at 772.

[7] Ohio Rev. Code Ann. § 2919.16 (West)

[8] Since recognizing the constitutional right to choose an abortion, the Supreme Court has consistently held that a ban on abortion after viability must include an exception for situations in which an abortion "is necessary, in appropriate medical judgment, for the preservation of the life or health" of the woman. *Roe*, 410 U.S. at 165; *Casey*, 505 U.S. at 879 (quoting *Roe*, same).

[9] *Casey*, 505 U.S. at 879 ("Our adoption of the undue burden analysis does not disturb the central holding of *Roe v. Wade*, and we reaffirm that holding. Regardless of whether exceptions are made for particular circumstances, a State may not prohibit any woman from making the ultimate decision to terminate her pregnancy before viability.").

[10] *Jackson Women's Health Org. v. Currier*, No. 3:18-CV-171-CWR-FKB, 2018 WL 6072127, at 7 (S.D. Miss. Nov. 20, 2018).

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precedent, established in *Roe* more than 45 years ago and reaffirmed in 2016 in *Whole Woman's Health v. Hellerstedt*.

A ban on abortion so early in pregnancy is a near total ban on abortions in the State. For over forty years, the U.S. Supreme Court has recognized that the rights to liberty and privacy as protected by the United States Constitution extend to individuals' right to choose when and whether to have children.[11] This bill would deny almost all pregnant women in Ohio their constitutional right to abortion, preventing them from making the basic and fundamental decision about whether to parent a child or terminate a pregnancy.

In conclusion, HB 258 is an unconstitutional ban on abortion in the earliest stage of pregnancy. It disregards women's fundamental right to determine when and whether to have children, poses a serious risk to women's health, and creates harmful criminal liabilities for physicians. One in four women will have an abortion in her lifetime, and this bill would seriously harm them.[12] Women in Ohio need to have all their medical options available when making the decision to end a pregnancy.

We urge you to vote no on HB 258. Please do not hesitate to contact us if you would like further information.

Sincerely,

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[11] *See Carey v. Pop. Servs.* Int'l, 431 U.S. 678, 685 (1977); *accord Casey.*, 505 U.S. at 851 (1992) (joint opinion of O'Connor, Kennedy & Souter, JJ); *Roe v. Wade*, 410 U.S. 113, 163-64 (1973).

[12] Rachel K. Jones & Jenna Jerman, *Population Group Abortion Rates and Lifetime Incidence of Abortion: U.S, 2008*, 107 Am. J Pub. Health 1904, 1904 (2017).