AMERICAN CIVIL LIBERTIES UNION of MARYLAND

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**Testimony for the House Health and Government Operations**
**March 11, 2016**

**HB 603 Pain-Capable Unborn Child Protection Act**

**OPPOSE**

The ACLU of Maryland of Maryland opposes HB 603, which would ban abortions at 20 weeks of pregnancy[1] and require physicians to report information regarding abortions performed.

**The 20-week abortion ban is dangerous to women's health and unconstitutional**

The most important reason to oppose HB 603 is that it endangers women's health. Moreover, this bill violates Maryland law, Md. Code Ann., Health-Gen. § 20-209, and the federal Constitution.

Under longstanding Maryland law, the State may not interfere with the decision of a woman to terminate a pregnancy:

(1) Before the fetus is viable; or
(2) At any time during the woman's pregnancy, if:
  (i) The termination procedure is necessary to protect the life or health of the woman; or
  (ii) The fetus is affected by genetic defect or serious deformity or abnormality.

Md. Code Ann., Health-Gen. § 20-209. HB 603 seeks to ban abortions at 20 weeks, which is pre-viability. Most experts believe that the current limit of viability is 23 or 24 weeks. According to a survey conducted among members of the American College of Obstetrics and Gynecology, the majority of respondents considered 24 weeks the earliest age a fetus is potentially viable.[2] Also, according to ACOG, fewer than 40% of infants born from 23 to 25 weeks' gestation survive.[3] The Ninth Circuit Court of Appeals also recently recognized, "viability varies among pregnancies."[4] Therefore, HB 603 violates current Maryland law and longstanding precedent on the issue.

SB 603 also violates Maryland's law as it does not provide adequate exceptions to protect a woman's life or health. The bill does not allow physicians to consider the woman's psychological or emotional health in determining whether the pregnancy threatens the woman's health.

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[1] The bill states it would ban abortions after 20 weeks post-fertilization. However, post-fertilization is not the medically accepted definition of pregnancy, which is calculated from the woman's last menstrual period. For simplicity, we will use the bill's term of 20 weeks in this testimony.

[2] Morgan, Goldenberg, and Schulkin, Obstetrician-gynecologists' practices regarding preterm birth at the limit of viability (Feb 2008).

[3] Sheryl Gay Stolberg, *Senate Tries to Define Fetal Viability*, New York Times (May 16, 1997).

[4] *Isaacson v. Horne*, 716 F.3d 1213, 1224 (9th Cir. 2013) *cert. denied*, 134 S. Ct. 905 (U.S. 2014).

Finally, HB 603 violates Maryland law because it does not provide an exception for fetal deformity or defect. There is no sound policy reason—and certainly no legal justification—for Maryland to ban abortions for women when they decide to end their pregnancies because they learn they are carrying extremely compromised, non-viable fetuses. Whereas § 20-209 requires an exception for cases of fetal anomalies (even if those anomalies do not preclude viability), HB 603 would ban abortions after 20 weeks with no exception for these very difficult, often tragic circumstances. There is, again, no sound justification for legislative interference in these highly personal, sensitive decisions that women and their families make in consultation with their doctors, pastors, and others from whom they are comfortable seeking advice and comfort.

For all the reasons stated above, HB 603 also violates the federal Constitution. Under the federal Constitution, a state may not ban abortions prior to fetal viability. *Planned Parenthood v. Casey*, 505 U.S. 833, 870-1, 879 (1992)("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."); *Roe v. Wade*, 410 U.S. 113, 164-65 (1973). After viability a state may ban abortion, but again, the state must provide exceptions for instances in which abortion is necessary to preserve the woman's life or health, which HB 492 does not.

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Finally, and precisely on point, just last year the Ninth Circuit struck down a 20 week ban on abortions, deeming it

> "is facially unconstitutional because it categorically bans some abortions before viability…The Supreme Court reaffirmed in Casey that an undue burden exists if the purpose or effect of a provision of law places a substantial obstacle in the path of a woman seeking an abortion before the fetus obtains viability. *Casey v. Planned Parenthood*, 505 U.S. at 846. In *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 64, 96 S.Ct. 2831, 49 L.Ed.2d 788 (1976), the Court further explained that 'it is not the proper function of the legislature or the courts to place viability, which essentially is a medical concept, at a specific point in the gestation period.' Because [the 20 week ban] places an arbitrary time limit on when women can obtain abortions, the statute is unconstitutional." *McCormack v. Herzog*, 2015 WL 3429396 (9th Cir. May 29, 2015).

Earlier, in 2013, the Ninth Circuit Court of Appeals also struck down a similar ban on abortions that was passed in Arizona. The Court reiterated the well-established principle, "a woman has a constitutional right to choose to terminate her pregnancy before the fetus is viable without undue interference by the state" *Isaacson v. Horne*, 716 F.3d 1213, 1221 (9th Cir. 2013) *cert. denied*, 134 S. Ct. 905 (2014).

**The reporting requirement constitutes an invasion of privacy**

HB 603 requires physicians to report data concerning the abortions attempted or actually provided. The right to seek an abortion is a right of privacy and

information pertaining to a woman's abortion should remain private. *Roe v. Wade* recognized that women have many reasons for seeking abortions:

> This right of privacy, whether it be founded in the 14th Amendment's concept of personal liberty […] is broad enough to encompass a woman's decision whether or not to terminate her pregnancy […]" *Roe v. Wade*, 410 U.S. 113, 153 (1973).

The Supreme Court also recognized in *Eisenstadt v. Baird*, "if the right of privacy means anything, it is the right of the individual, married or single, to be free from unwanted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child." *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972). We suggest HB 603 is just such "unwanted governmental intrusion."

For the foregoing reasons, the ACLU of Maryland urges an unfavorable report on HB 603.

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