STATE OF ARKANSAS
MIKE BEEBE
GOVERNOR

February 26, 2013

Dear Mr. Speaker and Members of the House of Representatives:

In accordance with Article 6, Section 15 of our Constitution, I write to inform you that today I have vetoed House Bill 1037. I have done so for several reasons.

First, if it became law in its present form, it would violate the United States Constitution. In *Roe v. Wade*, 410 U.S. 113 (1973), the Supreme Court held that women have a right under the United States Constitution to choose to terminate their pregnancies, and that the Constitution places restraints on government's ability to prohibit or regulate the exercise of that right. In *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), the Court held that "the essential holding of *Roe v. Wade* should be retained and once again reaffirmed." The "essential holding" reaffirmed in *Casey* included "a recognition of the right of the woman to choose to have an abortion *before viability* and to *obtain it without undue interference* from the State." *Casey*, at 846. "Viability marks the earliest point at which the State's interest in fetal life is constitutionally adequate to justify a legislative ban on nontherapeutic abortions." *Id.* at 860.

Under prevailing case law, "viability" is the stage of fetal development at which, in the judgment of the attending physician, there "is reasonable likelihood of the fetus' sustained survival outside the womb, with or without artificial life support." *Colautti v. Franklin*, 439 U.S. 379, 388-89 (1979). House Bill 1037, with certain narrowly-drawn exceptions, purports to prohibit abortions after 20 weeks from the time of fertilization, regardless of fetal viability. Current case law indicates that "viability" occurs somewhere between approximately 23 or 24 weeks. None of the legislative findings recited in the bill address viability, as that term is used in the relevant case law.

It has been suggested that the "essential holding" of *Roe*, reaffirmed in *Casey*, was rejected or modified by the Court in *Gonzales v. Carhart*, 550 U.S. 124 (2007). I do not think that the *Gonzales* decision did any such thing, especially when *Gonzales* is viewed in tandem with the Court's earlier decision in *Stenberg v. Carhart*, 530 U.S. 914 (2000). At issue in both *Gonzales* and *Stenberg* was the validity of legislation that purported to ban so-called "Partial-Birth" abortions, regardless of whether the procedure was employed before or after viability. *Stenberg* held that Nebraska's statute was unconstitutional because, among other things, the statutory language prohibited not just a specific, narrowly-defined, rarely-used, late-term

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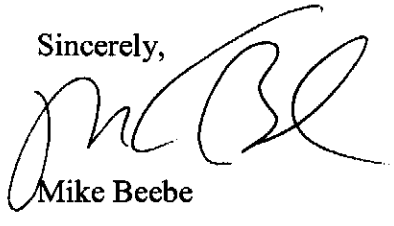
abortion procedure, but also banned the most commonly used method for safely performing previability second-trimester abortions. *Stenberg, at* 945-46. *Gonzales* arose from a facial challenge to a much more narrowly-drawn federal statute. The Court in *Gonzales* upheld the federal law only *after* the Court was satisfied that the statute was sufficiently narrowly drafted to permit, and not prohibit, the use of other safe, commonly-used procedures for performing second-trimester, previability abortions. In context, then, *Gonzales* simply cannot be read to sanction a legislature's ban, or even a substantial limitation, on a woman's right to choose a previability abortion. Indeed, the Court in *Gonzales* clearly stated that its decision assumed the principle that "[b]efore viability, a State 'may not prohibit *any* woman from making the ultimate decision to terminate her pregnancy.'" *Gonzales,* at 146 (quoting *Casey*).

In short, because it would impose a ban on a woman's right to choose an elective, nontherapeutic abortion before viability, House Bill 1037, if it became law, would squarely contradict Supreme Court precedent. When I was sworn in as Governor I took an oath to preserve, protect, and defend *both* the Arkansas Constitution *and* the Constitution of the United States. I take that oath seriously.

Second, the adoption of unconstitutional laws can be very costly to the taxpayers of our State. It has been suggested that outside groups or others might represent the State for free in any litigation challenging the constitutionality of House Bill 1037, but even if that were to happen, that would only lessen the State's own litigation costs. Lawsuits challenging unconstitutional laws also result in the losing party – in this case, the State – having to pay the costs and attorneys' fees incurred by the litigants who successfully challenge the law. Those costs and fees can be significant. In the last case in which the constitutionality of an Arkansas abortion statute was challenged, *Little Rock Family Planning Services v. Jegley,* the State was ordered to pay the prevailing plaintiffs and their attorneys nearly $119,000 for work in the trial court, and an additional $28,900 for work on the State's unsuccessful appeal. Those fee awards were entered in 1999, and litigation fees and costs have increased extensively since then. The taxpayers' exposure, should HB 1037 become law, will be significantly greater.

While I must therefore veto HB 1037, I wish to express my appreciation to its principal sponsor, Representative Mayberry, for his candor and for his respect for the Governor's role in the legislative process.

Sincerely,



Mike Beebe

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