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October 5, 2011

The Honorable Cynthia Stone Creem
Senate Chair—Joint Committee on the Judiciary
State House, Room 405
Boston, MA 02133

The Honorable Eugene L. O'Flaherty
House Chair--Joint Committee on the Judiciary
State House, Room 136
Boston, MA 02133

RE: H.B. 1333, *An Act Relative to Banning Partial Birth Abortions*

Dear Chairwoman Creem, Chairman O'Flaherty and Members of the Committee:

I am writing to express my strong opposition to H.B. 1333, *An Act Relative to Banning Partial Birth Abortions*, which seeks to criminalize certain safe, medically appropriate abortion methods. Because it is significantly more expansive than the federal law currently in effect and unfairly exposes physicians to criminal prosecution, I am particularly concerned that constitutional infirmities would make this law ripe for challenge.

Like the federal Partial-Birth Abortion Act ("the federal ban"), the legislation before the Committee would make it a crime for a doctor to perform a certain type of abortion procedure known as an "intact D & E". While we recognize that the federal ban was upheld by the United States Supreme Court in 2007, *see Gonzales v. Carhart*, 550 U.S. 124 (2007), the scope of the bill before you reaches much farther than the federal ban, and thus, is incredibly vulnerable to a constitutional challenge.

The federal ban was upheld as constitutional in large part because it contains sufficiently narrowly tailored provisions. H.B. 1333, however, does not contain such narrowly tailored provisions and therefore is extremely vulnerable to a constitutional challenge as overly broad, vague, and a violation of privacy.

As an initial matter, H.B. 1333 fails to include sufficient mental state requirements that the perpetrator "knowingly, intentionally and deliberately" perform the acts described in the bill, as elements of the crime. Although the bill does include an intentional requirement, it is critical to also require that the act be knowing and deliberate, because without that, physicians could be subject to criminal prosecution for a wide array of medical procedures. The federal ban includes those elements, and the Supreme Court in *Gonzales* relied heavily on these mental state requirements as limiting the potential for vagueness in the law.

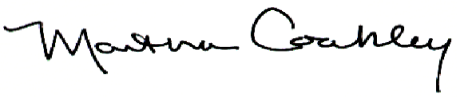
Moreover, H.B. 1333 fails to provide an adequate exception in cases where a woman's life is in danger. If enacted, physicians could be charged with this crime for providing the most appropriate procedure to protect the life of their patients. Furthermore, the legislation contains no exception where a woman's health is at stake. The result is an approach to medical care that undermines the discretion of qualified medical providers in prescribing the safest, most appropriate procedure to address a pregnant woman's serious medical conditions.

The proposed legislation also carries excessive criminal penalties, including a prison term of up to five years, as opposed to the maximum two-year sentence under the federal law. This criminal liability is likely to have a substantial chilling effect on the willingness of physicians to provide safe and medically appropriate traditional D & E procedures to women in their second trimester. Many of these providers will be forced to limit their practices significantly and may stop performing second trimester abortions altogether rather than risk criminal liability. As a result, this bill may result in detrimental and unlawful restrictions on women's access to reproductive health care and potentially life-saving treatment.

It is well established that the state may not impermissibly burden a right protected by a constitutional guarantee of due process. In its opinions relative to the question of regulating abortion, our SJC has emphasized the "negative constitutional principle," which "forbids the State to interpose material obstacles to the effectuation of a woman's counseled decision to terminate her pregnancy." Moe v. Secretary of Administration and Finance, 382 Mass. 629, 648 (1981). If enacted, this legislation is likely to be challenged as impinging upon rights guaranteed by the Constitution and the Massachusetts Declaration of Rights, which has historically afforded greater protection of a woman's right to access abortion than the federal Constitution.

For all of these reasons, I strongly urge the Committee give H.B. 1333 an unfavorable report. As always, we are available to discuss this matter further with you.

Cordially,



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