STATE OF ARKANSAS
MIKE BEEBE
GOVERNOR

March 4, 2013

Dear Mr. President and Members of the Senate:

In accordance with Article 6, Section 15 of our Constitution, I write to inform you that today I have vetoed Senate Bill 134.

If passed into law, Senate Bill 134 would blatantly 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.

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). Current case law indicates that "viability" occurs at a gestational age somewhere between approximately 23 or 24 weeks. Senate Bill 134, with certain narrowly-drawn exceptions, would ban abortions after the fetus reaches a gestational age of 12 weeks. The State's interest in protecting fetal life is simply not strong enough at such a point to trump the constitutional rights of the mother. As the Court stated in *Casey*, *"[v]iability marks the earliest point* at which the State's interest in fetal life is constitutionally adequate to justify a legislative ban on nontherapeutic abortions." *Casey*. 505 U.S. at 860.

It has been suggested that the Court's decision in *Gonzales v. Carhart*, 550 U.S. 124 (2007) cleared the way for states to ban nontherapeutic, previability abortions. *Gonzales* did no such thing; this is clear when *Gonzales* is considered 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 a particular abortion procedure, so-called "Partial-

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Birth" abortion, regardless of whether the procedure was employed before or after the fetus attained viability. *Stenberg* held that Nebraska's statute was unconstitutional because the statutory language prohibited not just a specific, narrowly-defined, and rarely-used late-term 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 statutory language was sufficiently precise so that it did not prohibit the use of other safe, commonly-used procedures for performing second-trimester, previability abortions. *Gonzales* simply cannot be stretched to sanction a legislative ban on a woman's right to choose to terminate her pregnancy after 12 weeks. 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 well before viability, Senate Bill 134 blatantly contradicts the United States Constitution, as interpreted by the Supreme Court. 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.

The adoption of blatantly unconstitutional laws can be very costly to the taxpayers of our State. It has been suggested that outside groups might represent the State for free in any litigation challenging the constitutionality of Senate Bill 134, 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 – being ordered 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 Senate Bill 134 become law, will likely be significantly greater.

Sincerely,

Mike Beebe

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