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Testimony in Opposition to SB238
To: Montana House Judiciary Committee
American Civil Liberties Union of Montana
Presented by Jan VanRiper (443-8590)
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ACLU of Montana strongly urges the members of this Committee to vote against SB238 because, if passed, the resultant legislation would be clearly unconstitutional. Various of the bill's provisions are either exactly, or extremely similar to, the kinds of anti-reproductive rights legislation that has been struck down by both the U.S. and Montana Supreme Courts. I will highlight but five:

I. By requiring physicians to give women inaccurate medical information, the bill is unconstitutional under the United States Supreme Court decision in *Planned Parenthood v. Casey*¹.

We are aware of no scientific or medical evidence in support of the claim that a fetus can feel pain at 16 weeks gestational age. In the *Casey* decision, the U.S. Supreme Court articulated the constitutional prohibition against "bias counseling," stating that a physician may only be required to provide information that is "truthful and not misleading."² This legislation, which suggests that fetuses experience pain at 16 weeks gestational age, fails this constitutional test.

II. The Montana Supreme Court has made it clear that invasions of a woman's privacy in relation to the exercise of her reproductive rights run afoul of the Montana Constitutional right of privacy.

In *Armstrong v. Montana*³, the Montana Supreme Court struck down the Legislature's attempt to restrict a woman's access to an abortion by requiring that only physicians, and not physician assistants, perform abortions. Because the licensing of medical providers to perform various medical procedures is normally left up to the medical community itself, the Court struck down that statute. Importantly, for purposes of your consideration of SB238, the Court strongly objected to legislation that imposes political ideology on medical practice and procedures: "[L]egal standards for medical practice and procedure cannot be based on political ideology, but, rather, must be grounded in the methods and procedures of science and in the collective professional judgment, knowledge and experience of the medical community acting through the state's medical examining and licensing authorities."⁴ The language in this bill has the State telling physicians what to counsel women who seek abortions in all situations, regardless of her particular circumstances, and regardless of the current state of accepted medical knowledge and practice. SB238 represents exactly the kind of state meddling that the *Armstrong* court ruled against.

¹505 U.S. 833 (1992).

²*Casey* at 882.

³296 MT 362, 989 P.2d 364 (1999)

⁴*Armstrong* at 380.

III. The 24 hour waiting period is impermissible under current Montana law.

Imposing a 24 hour mandatory delay before a woman can access an abortion has already been held to violate a woman's right to privacy under the Montana Constitution by a district court.⁵ In ruling on the Legislature's attempt to impose a 24 hour waiting period before a woman could obtain an abortion, the court clearly held that the state cannot tell a woman that she cannot access a fundamental constitutional right for 24 hours. This legislation, which also requires a woman to delay her abortion for 24 or 72 hours, violates the states constitution's explicit privacy protection as held in that case.

IV. SB238 would be constitutionally "void for vagueness."

The proposed legislation imposes inconsistent requirements on the physician. Although section 4 states that the physician or the physician's agent "shall inform the woman if an anesthetic or analgesic would eliminate or alleviate organic pain," section 12(c) mandates that the physician inform the woman of the choice of receiving anesthesia. Although section 4 might not require a physician who, based on a lack of medical evidence that a fetus feels pain at such an early stage, to include the information, section 12(c) contains the conflicting mandate of giving the woman a choice about receiving an anesthetic or analgesic. In addition, the bill uses the term "gestational age," which physicians will find ambiguous as it is unclear whether the calculation begins at conception or since the woman's last menstrual period. As such, this law is void for vagueness.

V. Section 11 is a presumption against privacy, and hence would likely be unconstitutional.

Section 11 would be better titled "Presumption against privacy in court proceedings." Under this section, if a court proceeding were held to determine whether the statute has been violated, the judge must decide whether a woman's right of privacy is less compelling than the merits of public disclosure. Note that the right of privacy is not presumed. Rather, the right of the public to know about the matter is presumed. The judge, if he/she decides to keep the matter private, must write detailed findings about "*why the woman's privacy should be preserved,*" and why it is "*necessary*" to preserve her privacy. The Court must even explain "how the order is *narrowly tailored* to preserve the privacy interest."

Certainly, under Montana law courts must often *balance* rights of privacy against the public's right to know. No where, however, can we find an instance in which the burden of proof is clearly on the holder of the privacy interest. Given the Montana Supreme Court's strong regard for our constitutional right to privacy, it is hard to see how such a presumption against it would pass constitutional muster.

For all these reasons, the ACLU of Montana urges you to vote against this bill, and leave medical treatment up to a woman's health care provider, where it properly belongs.

⁵*Planned Parenthood of Missoula v. Montana*, Cause No. BDV 95-722 (Mont.1st Jud. Dist. Ct. Mar. 12, 1999) (partial granting of summary judgment).