



February 24, 2009

Hon. Paul Ray  
Utah House of Representatives  
350 State Capitol  
PO Box 145030  
Salt Lake City, UT 84114

**Re: Offer of Legal Representation in Defense of H.B. 90,  
Abortion Law Amendments**

Dear Representative Ray:

The Alliance Defense Fund (“ADF”) is aware that the House of Representatives is considering proposed amendments to the Utah Abortion Law to prohibit abortion after viability except where the procedure is necessary to save the life of the mother or to avert a serious risk of substantial and irreversible impairment of a major bodily function of the women, or under certain other very limited circumstances where the infant will not survive outside the womb. We are also aware that certain groups perceive such a proscription as a potential burden on women’s health, and may bring suit to challenge the amendments in court if they are enacted. *See, e.g., S. McFarland, “Defending an Abortion Ban Would Cost Millions,” Salt Lake Tribune, posted Feb. 04, 2009.*


In our view, H.B. 90 as currently drafted would likely withstand constitutional attack if challenged in court. The Supreme Court has made it clear that a State’s interests in restricting abortions are at their strongest after viability. *See Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 879 (1992)* (joint opinion of O’Connor, Kennedy, and Souter, JJ.). “We conclude the line should be drawn at viability.... there is no line other than viability which is more workable.... In some broad sense it might be said that a woman who fails to act before viability has consented to the State’s intervention on behalf of the developing child.” *Casey*, at 870. *Casey* affirmed *Roe*’s holding that subsequent to viability, “the State in promoting its interest in the potentiality of human life may, if it chooses, regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother.” *Casey*, at 879, quoting *Roe v. Wade, 410 U.S. 113 at 164-165 (1973)*. The United States Court of Appeals for the Tenth Circuit has likewise suggested that post-viability restrictions on the availability of late-term abortion are more likely to pass

Hon. Paul Ray  
February 24, 2009  
Page 2

constitutional muster than restrictions tied to other arbitrary points of gestation. *See Jane L. v. Bamgarter*, 102 F.3d 1112, 1115 (10<sup>th</sup> Cir. 1996). And while the Supreme Court has not had occasion to consider the constitutionality of legislation that defines the scope of the “health” exception, *see Women's Medical Professional Corp. v. Voinovich*, 130 F.3d 187 (6<sup>th</sup> Cir. 1997), *cert. den.*, 523 U.S. 1036 (1998), 118 S.Ct. 1347, 1348 (Thomas, J., dissenting, joined by Rehnquist, C.J., and Scalia, J.) (calling the view that an exception for “mental health” of the mother was required for a post-viability abortion ban an “unwarranted extension” of Supreme Court precedent), it seems clear that in light of the Court’s more recent precedent that a State’s determination to place reasonable objective limits on the circumstances that may arguably warrant a legal pos-viability abortion would receive favorable consideration in the federal courts.

ADF is a non-profit legal organization that engages in litigation to protect the sanctity of all human life, protect religious freedom and defend the family. ADF has litigated numerous high-profile cases to defend reasonable government restrictions on abortion such as the one under consideration in the House. Our attorneys have represented the Missouri Department of Health and Senior Services in multiple federal and state lawsuits filed against that state by Planned Parenthood, the Center for Reproductive Rights and other pro-abortion organizations who are objecting to a state law requiring abortion providers to make clinical renovations and improvements designed to protect women’s health and safety. ADF has also coordinated successful friend of the court briefs from many national organizations in several cases before the United States Supreme Court, including the most recent case in which the Court upheld federal restrictions on partial birth abortion, *Gonzales v. Carhart*. Because ADF is a non-profit legal organization, our attorneys represent governmental agencies and officers without charge. ADF would be privileged to represent the State of Utah or individual Members of the House and Senate who desire to defend the Abortion Law Amendments from litigious pro-abortion advocacy groups.

Sincerely yours,

A handwritten signature in black ink, appearing to read 'Steven H. Aden', written over a circular stamp or mark.

Steven H. Aden  
Senior Legal Counsel

cc: Attorney General Mark Shurtleff