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Via Email, Facsimile and U.S. Mail

The Honorable Robert F. McDonnell
Office of the Governor
Patrick Henry Building, 3rd Floor
1111 East Broad Street
Richmond, Virginia 23219

Re: SB 484 and HB 462

Dear Governor McDonnell:

As the president of The Rutherford Institute¹, an organization equally committed to preserving the sanctity of human life at all stages of life—including opposing the death penalty—and safeguarding the United States Constitution’s prohibition against unreasonable searches and seizures by government agents, I have grave concerns about SB 484² and HB 462³, which require that “as a component of informed consent to an abortion, to determine gestation age, every pregnant female shall undergo ultrasound imaging and be given an opportunity to view the ultrasound image of her fetus prior to the abortion.”

While the bills’ sponsors insist that their purpose is to ensure that women choosing to abort their pregnancies are fully cognizant of the ramifications of their life-changing decisions⁴, SB 484 and HB 462 are not the solution, no matter how well-meaning. Despite the fact that the legislation does not specify what kind of ultrasound procedure should be used, transvaginal ultrasounds are often the primary means of

¹ The Rutherford Institute is a non-profit civil liberties organization that provides free legal representation to individuals whose civil rights are threatened or infringed.

² SB 484 Summary, <http://lis.virginia.gov/cgi-bin/legp604.exe?121+sum+SB484>.

³ HB 462 Summary, <http://lis.virginia.gov/cgi-bin/legp604.exe?121+sum+HB462>.

⁴ David Sherfinski, “Va. Senate passes mandate on ultrasounds before abortion,” *Washington Times* (Feb. 1, 2012), <http://www.washingtontimes.com/news/2012/feb/1/senate-passes-mandate-ultrasounds-abortion/>.

detecting gestational age in the early stages of pregnancy. In carrying out a transvaginal ultrasound procedure:

[t]he health care provider will place a probe, called a transducer, into the vagina. The probe is covered with a condom and a gel. The probe sends out sound waves, which reflect off body structures. A computer receives these waves and uses them to create a picture. The doctor can immediately see the picture on a nearby TV monitor. The health care provider will move the probe within the area to see the pelvic organs.⁵

Whether or not a transvaginal ultrasound is widely used or is medically necessary in order for a doctor to carry out an early-stage abortion, it is completely inappropriate for the state to *require* that doctors carry out such invasive procedures on a woman. In doing so, physicians are reduced to no more than agents of the state and, as a result, this procedure constitutes a state-mandated violation of a woman's body.

If the Fourth Amendment to our Constitution stands for one thing, it is the right to privacy and bodily integrity. As the U.S. Supreme Court has ruled, "The overriding function of the Fourth Amendment is to protect personal privacy and dignity against unwarranted intrusion by the State."⁶

In order to violate an individual's right to bodily integrity, the state has to show probable cause—that is, the state must have some evidence that the person who is subject to government scrutiny is engaged in criminal activity. Unless the Supreme Court declares otherwise, the fact remains that in getting an abortion, an individual is not engaging in criminal activity but in lawful activity in keeping with the U.S. Supreme Court's declaration in *Roe v. Wade* that abortion is a constitutional right.

Even those like The Rutherford Institute who are committed to advocating for the rights of the preborn must recognize this as the law and work within its parameters. This is not the case with SB 484 and HB 462, which, if enacted, would ensure that women seeking to exercise their court-sanctioned right to an abortion would be treated as if they were suspects and forcefully subjected to an invasive technique in violation of the Fourth Amendment. Doing so will render them as little more than criminal suspects in terms of this legislation.

No medical actor, doctor or otherwise, should be coerced *by the state* into probing a woman's body, especially not without informed consent. And by informed consent I mean that women have a right to be informed *in writing* that the procedure they are being

⁵ Susan Storck, MD, "Transvaginal ultrasound," *Medline Plus*, U.S. National Library of Medicine, <http://www.nlm.nih.gov/medlineplus/ency/article/003779.htm>.

⁶ *Schmerber v. California*, 384 U.S. 757, 767 (1966).

forced to undergo violates their Fourth Amendment right to not be searched by a government agent—which is exactly what the doctor would become in that instance. As such, they should also be advised that they have a right to legal counsel. In fact, if this nonconsensual probe occurred anywhere outside of a doctor’s office, the individual operating the probe would be charged with rape, or at the very least, criminal assault.

Moreover, sponsors of the ultrasound bills claim they are aimed at “merely bring[ing] in line the current informed-consent rules with current reproductive technology.”⁷ However, their understanding of informed consent falls way short of what the Constitution requires. Rather than providing the patient with written information about the state-mandated violation of the patient’s Fourth Amendment rights in the form of an ultrasound and gaining her consent, the legislation provides for informed consent only as it relates to the actual abortion procedure. In other words, the women violated by this procedure must be informed that they have a right to refuse a search of their body in the performance of a government-mandated act.

The General Assembly has committed a serious error in judgment by passing this legislation. Should you codify their error by signing it into law, you will render yourself an accessory to a crime against women. Indeed, as one who has both studied and practiced law, you should know better than to sign this into law, given that it is highly unlikely such an invasive search will withstand judicial scrutiny. Failing that, you should amend this law in accordance with the guidelines set forth in this letter to require the patient’s informed consent in order to be subjected to this invasive vaginal probe and/or allow the acting physician to opt out of doing the procedure at his discretion.

Should this legislation be enacted as is, the future ramifications will be far-reaching. Rapid advances in science and technology without corresponding constitutional limits on the government’s use of these emerging technologies have already resulted in a steady erosion of Americans’ Fourth Amendment rights. We have seen this on almost every front, from the use of whole-body scanners in airports and mobile body scanners on police cars to facial-recognition software on law enforcement smart phones and surveillance drones flying over American cities.⁸ In order to preserve bodily integrity, we must draw the line somewhere, and that line is the U.S. Constitution.

If you do not establish rigid constitutional guidelines against such orifice probes now, this legislation will open the door to the government’s ability to mandate further

⁷ David Sherfinski, “Va. Senate OKs pre-abortion ultrasounds,” *Washington Times* (Feb. 1, 2012), <http://www.washingtontimes.com/news/2012/feb/1/va-senate-oks-pre-abortion-ultrasounds/>.

⁸ John W. Whitehead, “U.S. v. Jones: The Battle for the Fourth Amendment Continues,” The Rutherford Institute (Jan. 23, 2012), https://www.rutherford.org/publications_resources/john_whiteheads_commentary/us_v_jones_the_battle_for_the_fourth_amendment_continues.

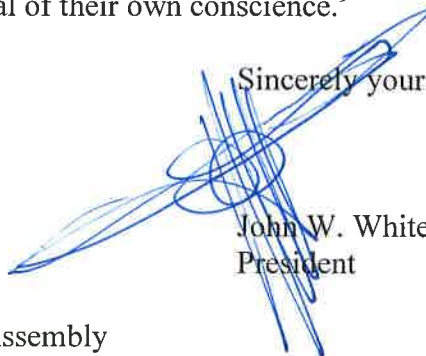
invasions of the body for a variety of purportedly well-intentioned purposes, and it will be applied to both men and women.

While all of us who value the sanctity of life hope to see the day when life at all stages is protected, this legislation, well-meaning though it may be, is a misguided attempt at bringing about a change of heart in women opting for an abortion. Compelling women to undergo invasive and unconstitutional ultrasounds in order to have an abortion will only further politicize and polarize an issue that has little to do with politics and everything to do with human rights.

As the renowned author and ethicist C.S. Lewis observed:

Of all tyrannies, a tyranny sincerely exercised for the good of its victims may be the most oppressive. It would be better to live under robber barons than under omnipotent moral busybodies. The robber baron's cruelty may sometimes sleep, his cupidity may at some point be satiated; but those who torment us for our own good will torment us without end for they do so with the approval of their own conscience.⁹

Sincerely yours,



John W. Whitehead
President

cc: Virginia General Assembly

⁹ C.S. Lewis, "The Humanitarian Theory of Punishment," *God in the Dock* (1948), <http://www.angelfire.com/pro/lewiscs/humanitarian.html>.