CHARLOTTE LOZIER INSTITUTE

Written Testimony of Anna Higgins, J.D.

Associate Scholar, Charlotte Lozier Institute

Attorney, Member of the State Bar of Florida

to the

Ohio House Community and Family Advancement Committee

October 2015

To the Distinguished Chair and Honored Members of the Committee. Thank you for the opportunity to testify IN SUPPORT of SB 127, the Pain-Capable Unborn Child Protection Act. I am an attorney and legal researcher, currently working as an Associate Scholar for the Charlotte Lozier Institute in Washington, D.C.

Previously, I served as the Director of the Center for Human Dignity at the Family Research Council, where I wrote extensive research, model legislation, and opinion pieces on sanctity of life issues – ranging from conception to end of life care. I am testifying in my capacity as an attorney and legal researcher on behalf of the Charlotte Lozier Institute.[1]

I. International Norms and Abortion Law

The United States is one of only seven countries in the world that permit elective abortion past 20 weeks.[2] Such an extreme policy is out of step with international norms, which are, on average, much more protective of the life of the unborn and the health of the mother. Instituting 20 week

[1] Portions of this analysis adapted with permission from previous testimony of my colleagues, *see* Testimony in Support of Prohibition of Abortion At 20 Weeks by Clarke D. Forsythe, Esq.,Senior Counsel, Americans United for Life (AUL) 2012; Written Testimony of Angelina B. Nguyen, J.D. Associate Scholar, Charlotte Lozier Institute, Committee on Health and Human Services, Ohio Senate June 2015.

[2] Angelina Baglini Nguyen, Gestational Limits on Abortion in the United States Compared to International Norms, Charlotte Lozier Institute, Feb. 24, 2014, http://www.lozierinstitute.org/internationalabortionnorms/.

abortion prohibitions would position the U.S. much closer to mainstream international abortion laws.[3]

More than 75% of the countries permitting abortion without restriction as to reason do not permit elective abortions past 12 weeks gestation. Only 12% (7 out of 59) of the countries permitting abortion without restriction as to reason permit elective abortion past 20 weeks gestation. The U.S. is among these 7 countries that permit elective abortion past 20 weeks. This is true whether 20 weeks is measured from the last menstrual period (gestational age), conception, or implantation. No matter how duration of pregnancy is measured, whether by gestational age or conception or fertilization, or implantation, all countries in this category pass the 20-week threshold. These countries/territories are:

- Canada (no restriction in law)[4]
- China (no restriction in law)[5]
- Netherlands (24 weeks)
- North Korea (no restriction in law)
- Singapore (24 weeks)
- United States (viability)
- Vietnam (no restriction in law)[6]

The United States is within the top 4% of most permissive abortion policies in the world (7 out of 198) when analyzing restrictions on elective abortion based on duration of pregnancy.

Two states have had 20-week laws on the books since before Roe v. Wade. Eleven more states have enacted 20-week laws in recent years.[7] Most 20 week laws have not been challenged and remain in effect. Neither Planned Parenthood nor any other abortion group has challenged the 20 week law on constitutional grounds outside of the Ninth Circuit.[8] There is also interest at the

---

[3] In comparing international law, the sample group consisted of 198 countries, independent states, and semi-autonomous regions with populations exceeding 1 million. Of these 198 countries, independent states, and regions worldwide, 59 allow abortion without restriction as to reason, otherwise known as elective abortion or abortion on demand. The remaining 139 countries require some reason to obtain an abortion ranging from most restrictive (to save the life of the mother or completely prohibited) to least restrictive (socioeconomic grounds) with various reasons in between (e.g., physical health, mental health). Currently, the United States permits abortion on demand through viability, which is usually marked around 24 weeks.

[4] "Abortions by Gestational Age," Abortion in Canada, http://abortionincanada.ca/stats/abortions-bygestational-age/.

[5] Elina Hemminki, Zhuochun Wu, Guiyung Cao, and Kirsi Viisainen, "Illegal births and legal abortions - the case of China," Reproductive Health, 2005; 2:5.

[6] Nguyen Thanh Binh, "Abortion in Present Day Vietnam," International Journal of Academic Research in Business and Social Sciences, January 2012, Vol. 2, No. 1.

[7] Betsy Johnson, "Momentum for Late-Term Abortion Limits," Charlotte Lozier Institute, August 2013, http://www.lozierinstitute.org/momentum-for-late-term-abortion-limits

[8] http://www.lifenews.com/2015/05/11/why-hasnt-planned-parenthood-challenged-any-of-the-state-bans-on-abortion-after-20-weeks/

federal level in restricting elective abortion after 20 weeks. In September of this year, the U.S. House of Representatives passed a 20-week law that was withdrawn from consideration in the Senate.[9]

Policies imposing gestational limits on elective abortion have been overwhelmingly adopted by countries permitting abortion on demand, indicating policies that encourage woman's safety in limiting abortion to early pregnancy and policies that protect unborn children from pain and prolonged exposure to the risk of abortion.

II. Constitutionality of The 20 Week Law

A state prohibition of abortion at or after 20 weeks gestation (with a *Casey* health exception) is permitted by the Supreme Court's decisions in *Roe v. Wade*, 410 U.S. 113 (1973), *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), and *Gonzales v. Carhart*, 550 U.S. 124 (2007) based on the State's interest in protecting maternal health and unborn life. Additionally, a prohibition at 20 weeks does not impose a "substantial obstacle" to a safe abortion, which is the key question under *Gonzales*.

A. The State has a Compelling Interest in Maternal Health after the First Trimester

In upholding a ban on partial-birth abortion, the Court in *Gonzales* deferred to the state based on medical data calling into question the safety and inhumanity of the partial-birth abortion procedure.[10] Likewise, the 20 week abortion laws rely on medical science showing that later term abortion is not safer than childbirth and that unborn children feel pain at least by 20 weeks gestation.

Ohio's interest in maternal health becomes compelling at the point where abortion becomes more dangerous than childbirth, based on the Court's reasoning in Roe.[11] Ohio, therefore, must also have an interest in ensuring that the Court's assumption that abortion is safer than childbirth prior to the second trimester is accurate.[12]

---

[9] H.R. 36, Pain-Capable Unborn Child Protection Act, 114 Congress (2015-2016).

[10] Gonzales, 550 U.S., at 141 (citing 117 Stat. 1202, notes following 18 U.S.C. § 1531 (2000 ed., Supp. IV), p. 768, ¶ (1) ("Congressional Findings").

[11] The Court said that the states "have an important and legitimate interest in preserving and protecting the health of the pregnant woman." Roe 410 U.S. at 162. This interest "grows in substantiality as the woman approaches term, and, at a point during pregnancy…becomes 'compelling.'" 410 U.S. at 162-63. The Court notes, "With respect to the State's important and legitimate interest in the health of the mother, the 'compelling' point, in the light of present medical knowledge, is at approximately the end of the first trimester. This is so because of the now-established medical fact, referred to above at 149, that until the end of the first trimester mortality in abortion may be less than mortality in normal childbirth. It follows that, from and after this point, a State may regulate the abortion procedure to the extent that the regulation reasonably relates to the preservation and protection of maternal health. 410 U.S. at 162-63 (emphasis added).

[12] In *City of Akron v. Akron Center for Reproductive Health*, 462 U.S. 416 (1983), the Court noted that "the State retains an interest in ensuring the validity of Roe's factual assumption that 'the first trimester abortion (is) as safe for the woman as normal childbirth at term"…." Id. at 430 n.12.

Whatever the strength of the data in 1973, however, the medical data showing the long-term risks to women has increased considerably since 1973.

1. Abortion, particularly late-term abortion, is not safer than childbirth

The medical sources that the Court cited in *Roe* – childbirth mortality rates compared to abortion mortality rates – did not support the medical assumption in 1973 because it did not contain reliable data on abortion mortality rates or maternal mortality rates, was not peer-reviewed, nor did it consider any long-term risks of abortion. The mechanical comparison of mortality rates looks only at immediate complications and short-term risks (those appearing by 42 days [6 weeks] after termination).

More recent advances in medical knowledge show that the risk to maternal health increases significantly with each passing week of pregnancy.[13] Most significantly, for the purposes of this bill, the risk of death from an abortion is about thirty-five times greater at sixteen to twenty weeks than it is before eight weeks gestation, and nearly one hundred times greater after twenty weeks.[14] Risks to the woman's mental health also increases significantly with later term abortions.[15]

2. The proposed law legitimately serves the state's interest in maternal health

Current medical data strongly suggests that at least by 20 weeks, abortion has greater short-term risks and long-term medical risks than childbirth. A prohibition thereafter is reasonably related to "ensur[e] maternal safety," which the states have a "compelling interest" in doing "once an abortion may be more dangerous than childbirth." City of Akron v. Akron Center for Reproductive Health, 462 U.S. 416, 460 (1983) (O'Connor, J., dissenting).

A prohibition at 20 weeks directly serves the state's interest in maternal health.

B. The State has a legitimate interest in protecting the fetus throughout pregnancy

The state's compelling interest in maternal health alone should be constitutionally sufficient to uphold a prohibition of abortion at 20 weeks; however, the state has a second significant interest: "the legitimate interest of the Government in protecting the life of the fetus that may become a child," *Gonzales* v *Carhart* 550 U.S. at 146.

Gonzales recognized "the principle that the State has legitimate interests from the outset of the pregnancy in protecting the health of the mother and the life of the fetus that may become a child." Gonzales, 550 U.S., at 145 (citing Casey, 505 U.S., at 846; see also Akron v. Akron Ctr. for Reprod. Health, 462 U.S. 416, 458, 461 (1983), at 459 [O'Connor, J., dissenting]).

---

[13] L. Bartlett et al., Risk Factors for Legal Induced Abortion-Related Mortality in the United States, 103:4 Obs. & Gyn. 729-737 (2004); Priscilla K. Coleman et al., Late-Term Elective Abortion and Susceptibility to Posttraumatic Stress Symptoms, 2010 J. OF PREGNANCY 1, 7 (citing S. V. Gaufberg, Abortion Complications (2008); Bartlett, Risk Factors).

[14] L. Bartlett et al., Risk Factors for Legal Induced Abortion-Related Mortality in the United States, 103:4 Obs. & Gyn. 729-737 (2004).

[15] P. K. Coleman, Abortion and Mental Health: Quantitative Syntheses and Analysis of Research Published 1995-2009, 199 Brit. J. of Psychiatry 180-86 (2011).

By 20 weeks gestation an eventual live birth is overwhelmingly likely. Medical science now indicates that an infant in utero can feel pain as early as 16 weeks gestation and most definitely by 20 weeks gestation. Such findings create new, legitimate concerns over the inhumane and gruesome nature of later term abortion procedures, just as they did in the federal Partial-Birth Abortion Ban Act (PBABA) considered in *Gonzales*. The Court in *Gonzales* took into account the "gruesome and inhumane procedure" of the partial birth abortion and its potentially negative effects on the medical profession and maternal health, despite the fact that partial birth abortion ban would be applied to previability as well as postviability abortions.[16]

Because the Court used medical findings to uphold the PBABA, similar findings can be used to sustain a prohibition on the inhumane practice of performing abortion on pain-capable infants in utero.

The *Gonzales* majority determined that even a previable late-term fetus is similar enough to a newborn that partial-birth abortion procedures come too close to blurring the line between abortion and infanticide.[17] As with the PBABA, a 20 week prohibition "draw[s] boundaries to prevent certain practices that extinguish life and are close to actions that are condemned." Id. at 550.

The *Gonzales* Court then upheld the PBABA using the "rational basis" standard of review. Id., at 158 holding that where "it has a rational basis to act, and it does not impose an undue burden, the State may use its regulatory power to bar certain procedures and substitute others, all in furtherance of legitimate interests in regulating the medical profession in order to promote respect for life, including life of the unborn." The Court's use of the rational basis review further indicates that they defer to the state in matters where medical findings demonstrate that the state has at least a rationally based interest in acting to protect potential life. The Court gives the state this deference despite the viability rule, which goes to show that it did not view the viability rule as a per se rule.

C. Viability is not a bar to 20 week laws

1. Gonzales widens the abortion jurisprudence focus to factors outside viability

The Court in *Planned Parenthood of Southeastern Pa*. v. *Casey* 505 U.S. 833 (1992) established an "undue burden" test for proposed abortion regulation, holding that a law is invalid "if its purpose or effect is to place substantial obstacles in the path of a woman seeking an abortion before the fetus attains viability." However, "viability" and "substantial obstacle" are not tied to each other.

---

[16] Gonzales, 550 U.S., at 141 (citing 117 Stat. 1202, notes following 18 U.S.C. § 1531 (2000 ed., Supp. IV), p. 768, ¶ (1) ("Congressional Findings").

[17] Randy Beck, Gonzales, Casey and the Viability Rule, 103 Nw. U. L. Rev. 249, 278 (2009). See also Randy Beck, The Essential Holding of Casey: Rethinking Viability, 75 UMKC L. Rev. 713 (2007), noting that the Court "deemed a late-term fetus, even prior to viability, sufficiently similar to a newborn infant that partial delivery of the fetus in the abortion process could make abortion and infanticide hard to distinguish." See *Gonzales*, 550 U.S. at 158.

The Court's decision in *Gonzales* signals a shift in emphasis from the viability rule to the "substantial obstacle" test. The *Gonzales* Court concluded that the federal PBABA did not create a substantial obstacle even though it (1) applied to pre-viability abortions and (2) did not include a "health" exception. Thus, *Gonzales* seems to indicate a relaxation in the Court's attitude toward the importance of the viability rule. The more important question, under *Gonzales,* is not whether the fetus is strictly viable but whether a prohibition creates a "substantial obstacle."[18]

2. The 20 week prohibition is not a substantial obstacle

Ohio's proposed Pain-Capable Unborn Child Protection Act will not ban all previability abortions nor will it limit all postviability abortions. Ohio continues to allow abortion prior to twenty weeks gestational age when, as even abortion proponents acknowledge, the overwhelmingly large majority of second trimester abortions are performed.[19]

The "undue burden" standard assumes the safety of abortion. Justice Kennedy observed in his dissent in *Stenberg* v. *Carhart*, 530 U.S. 914, that Nebraska was "entitled to conclude that its ban [on partial birth abortion], while advancing important interests regarding the sanctity of life, deprived no woman of a safe abortion and therefore did not impose a substantial obstacle on the rights of any woman." 530 U.S. at 965.

A prohibition of abortion after 20 weeks, when it is generally more dangerous than childbirth, cannot be considered a "substantial obstacle" because there is no right to *unsafe* abortions. Even the Court in *Roe* rejected the notion that the right to privacy means "an unlimited right to do with one's body as one pleases…." 410 U.S. at 154.

If a ban is premised on the relative risk of late-term abortion, and permits abortion for five months before abortion becomes more dangerous than childbirth, then it does not "impose a substantial obstacle on the rights of any woman."

Ohio proposes to impose a prohibition on abortion after the twenty-week mark in order to protect against fetal pain and a significant increased risk to maternal health. Rather than a substantial obstacle, the prohibition serves the purpose of protecting both the mother and child. Additionally, legislative findings that highlight the inhumane nature of an abortion procedure and the risk of that procedure to a woman's health are the very type of findings to which the Court in *Gonzales* deferred, despite the possibility of a prohibition on some previability abortions.

3. The Viability Standard is Unworkable

---

[18] In section IV of its opinion in *Gonzales*, the Court emphasized the "substantial obstacle" test, and, in observing that the PBABA affected "both previability and postviability" abortions, the Court explained that "the question is whether the Act, measured by its text in this facial attack, imposes a substantial obstacle to late-term but previablity, abortions." 550 U.S. at 156. Justice Kennedy, in his Stenberg dissent, twice emphasized that the Nebraska law "deprived no woman of a "safe abortion" and therefore did not impose a "substantial obstacle" on the rights of any woman." Id. at 965, 967.

[19] See, e.g., Guttmacher Institute, "Facts on Induced Abortion in the United States" (July 2013) (available at http://www.guttmacher.org/pubs/fb_induced_abortion.html) (noting that 88% of abortions are performed in the first twelve weeks and 98.5% are performed by the twentieth week).

In a recent publication, Thomas Messner states, "the viability rule is unworkable, arbitrary, unjust, poorly reasoned, inadequate, and extreme."[20]

Professor Randy Beck of the University of Georgia states, "Due to advances in neonatal care, the state may be able to protect a fetus from abortion today when, just a few years before, it would have been constitutionally disabled from protecting an identical fetus."[21] A recent publication in The New England Journal of Medicine states that hospital practices influence the survival rate and health outcome of infants born as young as 22 weeks gestation.[22]

The Pain-Capable Unborn Child Protection Act creates a bright-line rule that is equally applicable to all persons, regardless of situations and services that may change the determination of viability. Messner quotes Beck when he argues that "a child's viability can vary based on factors including race, gender, whether the mother smokes, the altitude of where the baby and mother live and access to treatment facilities."[23] This law would protect all pain-capable unborn children, who have the capacity to feel pain by at least 20 weeks and likely sooner.

Even if the viability rule remains intact, Beck makes the argument that the "Court could appropriately confine the viability rule to the state interest the Court designed the rule to cover, a purely moral assessment of the value of unborn human life, and recognize different durational limits for the new state interests now permitted under Gonzales."[24] An unborn child's ability to feel pain at twenty weeks is a compelling state interest that the Court can accommodate with or without the viability rule.

The Pain-Capable Unborn Child Protection act reflects Ohio's compelling interest in maternal health and its interest in protecting fetal life based on an unborn child's ability to feel pain at twenty weeks. These two predominant interests are legally significant and sufficient to support its implementation. Additionally, international law compels us to come closer to the norm of removing elective abortion from the territory of late pregnancy. This piece of legislation is neither extreme nor unreasonable, but is a well-reasoned and well supported by medical science and law.

I urge you to pass SB 127, the Pain-Capable Unborn Child Protection Act.

---

[20] Thomas M. Messner, "The Constitutional Viability of Five-Month Abortion Laws," Charlotte Lozier Institute, January 2015, https://www.lozierinsitute.org/the-constitutional-viability-of-five-month-abortion-laws.
[21] Randy Beck, Gonzales, Casey, and the Viability Rule, 103 Nw.U.L.REV. 249 (2009) at 38-39
[22] Matthew A. Rysavy, et. al. Between-Hospital Variation in Treatment and Outcomes in Extremely Preterm Infants, May 7, 2015, http://www.nejm.org/doi/full/10.1056/NEJMoa1410689.
[23] Beck, supra, at 39-40.
[24] Randy Beck, The Essential Holding of Casey: Rethinking Viability, 75 UMKC L. REV. 713 (2007)