March 9, 2018

Delegate Shane Pendergrass, Chair
Delegate Eric Bromwell, Vice Chair
Members of the House Health and Government Operations Committee
House Office Building
6 Bladen St.
Annapolis, MD 21401

Re: Testimony by Evangeline Bartz, Esq., of Americans United for Life, before the Maryland House Health and Government Operations Committee on March 9, 2018, *in support of HB 1424*: Pain-Capable Unborn Child Protection Act

Dear Chair Pendergrass, Vice Chair Bromwell, and Honorable Members of the Committee:

I am Evangeline Bartz, Corporate Counsel & Vice-President of Operations at Americans United for Life (AUL). Americans United for Life, the legal architect of the pro-life movement, is a national law and policy nonprofit organization with a specialization in abortion and bioethics law. *Our vision at AUL is a nation where everyone is welcome in life and protected in law.* AUL attorneys are experts on constitutional law and abortion jurisprudence, including the constitutionality of laws setting gestational limits on legal abortion. We appreciate the opportunity to submit legal written testimony concerning the constitutionality of Maryland HB 1424, the "Pain-Capable Unborn Child Protection Act."

I. INTRODUCTION.

In 1973, abortion was enshrined as a constitutional "right" by the U.S. Supreme Court without any real consideration of the impact of abortion on maternal health. No medical data was entered into the legal record. In fact, when *Roe v. Wade* was decided four decades ago, there were few, if any, peer-reviewed studies related to the long-term risks of abortion.[1]

Now the medical landscape paints a different picture than that before the Supreme Court in 1973. We now know what the Justices did not know (or refused to consider) then: abortion harms women, and the risk of harm increases substantially with gestational age.

[1] For more on the legal and medical landscape in 1973, *see* C.D. Forsythe, ABUSE OF DISCRETION: THE INSIDE STORY OF THE SUPREME COURT'S CREATION OF THE RIGHT TO ABORTION (2013).

HB 1424 is a commonsense bill to limit the availability of abortion after 20 weeks to medical emergencies. This limitation protects women's health and the lives of unborn children who are capable of experiencing pain.

II. LATE TERM ABORTIONS CARRY HIGH RISKS.

It is undisputed that abortion carries even higher medical risk when performed later in pregnancy. Gestational age is the strongest risk factor for abortion-related mortality, and the incidence of major complications is highest after 20 weeks gestation.[2] Compared to an abortion at eight weeks gestation, the relative risk of mortality increases exponentially (by 38 percent for each additional week) at higher gestations.[3]

Specifically, the risk of death at eight weeks is 1 death per 1 million abortions; at 16 to 20 weeks, that risk rises to 1 in every 29,000 abortions; and at 21 weeks or more, the risk of death is 1 per every 11,000 abortions.[4]

In other words, **a woman seeking an abortion at 20 weeks is 35 times more likely to die from abortion than she was in the first trimester. At 21 weeks or more, she is 91 times more likely to die from abortion than she was in the first trimester**.

Even Planned Parenthood, the largest abortion provided in the United States, agrees that abortion become riskier later in pregnancy. Planned Parenthood states on its national website, "The chances of problems gets higher the later you get the abortion, and if you have sedation or anesthesia," which would be necessary for an abortion at or after 20 weeks gestation.[5]

To put this in context, later-term abortions account for approximately 51,000 abortions annually—with 36,000 taking place between 16 and 20 weeks, and 15,600 occurring after 20 weeks gestation.[6] **This means that at least 2 to 3 women die every year following a later-term abortion—not to mention those that suffer from non-fatal complications.**

---

[2] L.A. Bartlett et al., *Risk Factors for Legal Induced Abortion—Related Mortality in the United States*, OBSTETRICS & GYNECOLOGY 103(4):729, 731 (2004); J.P. Pregler & A.H. DeCherney, WOMEN'S HEALTH: PRINCIPLES AND CLINICAL PRACTICE 232 (2002).
[3] L.A. Bartlett et al., *supra*.
[4] *Id.*
[5] *See* Planned Parenthood, *How safe is an in-clinic abortion?* (2017), https://www.plannedparenthood.org/learn/abortion/in-clinic-abortion-procedures/how-safe-is-an-in-clinic-abortion (last visited Mar. 8, 2018).
[6] P.K. Coleman et al., *Late-Term Elective Abortion and Susceptibility to Posttraumatic Stress Symptoms*, J. PREGNANCY 2010:1, 7 (2010).

Further, researchers have concluded that it may not be possible to reduce the risk of death in later-term abortions because of the "inherently greater technical complexity of later abortions."[7] This is because later-term abortions require a greater degree of cervical dilation, the increased blood flow in a later-term abortion predisposes to hemorrhage, and the myometrium is relaxed and more subject to perforation.[8]

III. HB 1424 IS CONSTITUTIONAL.

The medical basis for HB 1424 supports its constitutionality. From its inception in the 1973 *Roe v. Wade* decision to its articulation in the 2007 *Gonzales v. Carhart* case, the abortion "right" announced by the U.S. Supreme Court has been explicitly qualified. Affirming what it considered the essential holding of *Roe*, the Supreme Court in *Planned Parenthood v. Casey* asserted that "it is a constitutional liberty of the woman to have some freedom to terminate her pregnancy.... The woman's liberty is not so unlimited, however, that from the outset [of pregnancy] the State cannot show its concern."[9]

In *Roe*, while the Court established a constitutional "right" to abortion, it simultaneously expressed that "[t]he State has a legitimate interest in seeing to it that abortion, like any other medical procedure, is performed under circumstances that [ensure] maximum safety for the patient."[10] In *Casey* and *Gonzales*, the Court continued to affirm its "essential holding" that states have a "legitimate interests from the outset of the pregnancy in protecting the health of the woman."[11] This means that states can enact regulations aimed at protecting the health of the mother even in the earliest stages of pregnancy.

Moreover, the Court held that state and federal legislatures are given "wide discretion to pass legislation in areas where there is medical and scientific uncertainty."[12] Specifically, the Court stated that the "law need not give abortion doctors unfettered choice in the course of their medical practice, nor should it elevate their status above other physicians in the medical community."

Thus, because states are given wide discretion to legislate in areas where there is medical and scientific uncertainty, anyone challenging a 20-week limitation must demonstrate that the State has no medical evidence that abortion after 20 weeks poses serious risks to maternal health. However, the undisputed medical data demonstrating

---

[7] L.A. Bartlett et al., *supra*, at 735.
[8] *Id.*
[9] *Planned Parenthood v. Casey*, 505 U.S. 833, 869 (1992).
[10] *Roe v. Wade*, 410 U.S. 113, 150 (1973).
[11] *Casey*, 505 U.S. at 846; *see also Gonzales v. Carhart*, 550 U.S. 124, 145 (2007) (quoting this "essential holding" of *Roe* and *Casey*).
[12] *Gonzales*, 550 U.S. at 163.

that abortion at and after 20 weeks can be significantly harmful to women effectively strips challengers of their ability to meet this high standard.

Currently, at least 18 states maintain limitations of abortion at 20 weeks: Alabama, Arkansas, Georgia, Indiana, Iowa, Kansas, Kentucky, Louisiana, Mississippi, Nebraska, North Dakota, Ohio, Oklahoma, South Carolina, South Dakota, Texas, West Virginia, and Wisconsin. While three state laws are in litigation or enjoined,[13] it is important to note that no federal court challenges to pain-capable based laws have been raised in states outside of the Ninth Circuit.

Maryland HB 1424, the "Pain-Capable Unborn Child Protection Act," is constitutionally sound and will protect women from the harms inherent in later-term abortions, including the undisputed increased risk of death. This limitation will also respect the humanity of unborn children capable of feeling pain, many of whom are capable of surviving outside of the womb. Thank you.

For more information, please contact Catherine Glenn Foster, Esq., President & CEO of Americans United for Life and Maryland resident, at 202-289-1478.

---

[13] These states are Arizona (9th Circuit), North Carolina (Federal District Court), and Idaho (9th Circuit).