Written Testimony of Catherine Glenn Foster, Esq.
President & CEO, Americans United for Life
On H.B. 52, The Pain-Capable Unborn Child Protection Act
Submitted to the House Health and Human Development Committee
April 17, 2019

Dear Chair Bentz and Members of the Committee:

My name is Catherine Glenn Foster, and I serve as President and CEO of Americans United for Life (AUL), America's original and most active pro-life advocacy organization. Founded in 1971, two years before the Supreme Court's decision in *Roe v. Wade*, AUL has dedicated nearly 50 years to advocating for comprehensive legal protections for human life from conception to natural death.

I write to strongly support Delaware's H.B. 52, the Pain-Capable Unborn Child Protection Act, which would protect maternal health, as well as the lives of unborn children who can feel pain, by limiting the availability of abortion after 20 weeks except when necessary to protect the life or physical health of the mother.

H.B. 52 Is Constitutional

From its inception in *Roe v. Wade*, the abortion "right" has been explicitly qualified. In *Roe*, while the U.S. Supreme 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."[1] Affirming what is 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."[2] Additionally, the Court specifically affirmed that states have "legitimate interests from the outset of the pregnancy in protecting the health of the woman."[3]

In *Gonzales v. Carhart*, the Supreme Court upheld a prohibition on partial-birth abortion

[1] *Roe v. Wade*, 410 U.S. 113, 150 (1973).
[2] *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 869 (1992).
[3] *Id.* at 846; *see also Gonzales*, 550 U.S. at 145.

that operated throughout pregnancy, pre- as well as postviability, in deference to Congress's legislative findings that the prohibition protected against fetal pain and upheld the integrity of the medical profession by drawing a bright line between abortion and infanticide.[4] The Court also credited Congress's policy judgment that "the practice of performing a partial-birth abortion . . . is a gruesome and inhumane procedure that is never medically necessary and should be prohibited," except where "necessary to save the life of the mother."[5] The ban applied "both previability and postviability because, by common understanding and scientific terminology," the Court noted, "a fetus is a living organism while within the womb, whether or not it is viable outside the womb."[6]

Gonzales, then, establishes that factors other than viability matter to the Court's abortion jurisprudence. As with the federal Partial-Birth Abortion Ban Act upheld in *Gonzales*, Delaware's Pain-Capable Act does not ban all pre-viability abortions. It continues to allow them prior to 20 weeks postfertilization (22 weeks from a woman's last menstrual period (LMP)) when, as even abortion proponents acknowledge, the overwhelmingly large majority of second-trimester abortions are performed. The Act would also continue to allow abortions even after 20 weeks when terminating the pregnancy is necessary to avert death or serious health risk to the mother. But in response to current medical understanding, the Act proposes limitations on abortions after the 20-week mark in order to protect against fetal pain and a significant increased risk to maternal health. These are the very kind of State interests based on evolving medical evidence that are not captured by the viability line, but that the Court credited in *Gonzales*.

Many states have acted on the legitimate interests of protecting maternal health as well as the unborn child. Currently, 18 states maintain an enforceable limitation on abortion at 20 weeks postfertilization: Alabama, Arkansas, Georgia, Indiana, Iowa, Kansas, Kentucky, Louisiana, Mississippi, Nebraska, North Dakota, Ohio, Oklahoma, South Carolina, South Dakota, Texas, West Virginia, and Wisconsin.[7] Arizona's 20-week LMP restriction was struck down by the Ninth Circuit Court of Appeals[8] and Idaho's 20-week postfertilization (22 weeks LMP) restriction was enjoined as well.[9] North Carolina's law was recently temporarily enjoined by a trial court, adopting reasoning similar to the Ninth Circuit's holdings in *Isaacson v. Horne* and *McCormack v. Herzog* that pre-viability restrictions are "per se unconstitutional."[10] Consequently, Idaho is the only state in which a 20-week postfertilization law (22 weeks LMP) similar to H.B. 52 has been challenged in court. The fact that none of the 20-week postfertilization laws that rely on fetal pain have been challenged outside of the Ninth Circuit Court of Appeals is striking, especially in light of the current wave of ongoing litigation over state abortion regulations. I believe the reason is simple:

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[4] *Gonzales v. Carhart*, 550 U.S. 124, 158 (2007).
[5] *Id.* at 141–42, 158.
[6] *Id.* at 147; *see also id*. at 156 (concluding the Act did not impose a "substantial obstacle to late-term, but previability, abortions").
[7] Mississippi's limitation begins two weeks earlier at 20 weeks LMP (18 weeks postfertilization).
[8] *Isaacson v. Horne*, 716 F.3d 1213 (2013), *cert denied*, 571 U.S. 1127 (2014).
[9] *McCormack v. Herzog*, 788 F.3d 1017, 1029 (9th Cir. 2015).
[10] *Bryant v. Woodall*, No. 16-1368, slip op. at 45 (M. Dist. N.C. Mar. 25, 2019).

abortion advocates know that these measures are likely to withstand scrutiny in the Supreme Court.

Later-Term Abortions Carry High Risks

When abortion was enshrined as a constitutional "right" by the Supreme Court, it was done 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* was decided four decades ago, there were few, if any, peer-reviewed studies related to the long-term risks of abortion.[11] Now the medical field paints a different picture than that before the 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.

It is undisputed that abortion carries a 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 significantly higher after 20 weeks' gestation.[12] For example, compared to an abortion at 8 weeks' gestation, the relative risk of mortality increases exponentially (by 38 percent for each additional week) at higher gestations.[13] Specifically, the risk of death at 8 weeks is reported to be one death per one million abortions; at 16 to 20 weeks, that risk rises to 1 per every 29,000 abortions; and at 21 weeks or more, the risk of death is 1 per every 11,000 abortions.[14] 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. And at 21 weeks or more, she is 91 times more likely to die from abortion than she was in the first trimester.

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."[15] This is because in later-term abortions, the cervix needs to be dilated to a greater degree, the increased blood flow predisposes to hemorrhage, and the myometrium is relaxed and more subject to perforation. Thus, even setting aside the debate over whether abortion at early gestational ages is relatively safe,[16] its risks at 20 weeks and beyond put the lie to *Roe*'s assumptions that access to the procedure must be guaranteed for virtually any reason. Protecting women from a highly risky,

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[11] *See* C.D. Forsythe, ABUSE OF DISCRETION: THE INSIDE STORY OF THE SUPREME COURT'S CREATION OF THE RIGHT TO ABORTION (2013) (providing information on the legal and medical landscape in 1973).
[12] L.A. Bartlett et al., *Risk Factors for Legal Induced Abortion—Related Mortality in the United States*, 103 OBSTETRICS & GYNECOLOGY 729, 731 (2004); J.P. Pregler & A.H. DeCherney, WOMEN'S HEALTH: PRINCIPLES AND CLINICAL PRACTICE 232 (2002).
[13] Barlett, *supra* note 12.
[14] *Id*.
[15] *Id.* at 735.
[16] It is impossible to definitively state how safe abortion is in the United States, when only 27 states require providers to report injuries and complications from abortion. Guttmacher Institute, *Abortion Reporting Requirements* (2017), https://www.guttmacher.org/state-policy/explore/abortion-reporting-requirements (last visited Apr. 16, 2019). Moreover, abortion is predominantly practiced by contract physicians, who are often unavailable for follow-up; abortion complications consequently are usually treated in hospital emergency departments, where they are not reflected in complications data.

elective medical procedure is surely a compelling state interest.

Even Planned Parenthood, the largest abortion provider in the United States, agrees that abortion becomes riskier later in pregnancy. On its national website, Planned Parenthood states: "The chances of problems gets higher the later you get the abortion, and if you have sedation or general anesthesia . . . ," which would be necessary for an abortion at or after 20 weeks of gestation.[17] 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.[18]

As to why women may seek late-term abortions, and post-20-week abortions specifically, a report published in the Alan Guttmacher Institute journal Perspectives on Sexual and Reproductive Health states, "[D]ata suggest that most women seeking later terminations are not doing so for reasons of fetal anomaly or life endangerment."[19] They cite "five general profiles of women who sought later abortions, describing 80% of the sample."[20] These women were "raising children alone, were depressed or using illicit substances, were in conflict with a male partner or experiencing domestic violence, had trouble deciding and then had access problems, or were young and nulliparous [had never given birth]."[21] The primary reasons referenced in the study, such as financial concerns, personal and relationship issues, and feeling unprepared for pregnancy, are unrelated to fetal anomaly or risk to the mother's health, and are all areas where communities can and should come alongside women and girls in need to offer support, resources, and holistic care.

Today, I strongly encourage this Committee to protect maternal health and unborn children who feel pain and pass H.B. 52. It is constitutionally sound and will protect women from the harms inherent in later-term abortions, including the increased risk of death. It will also respect the humanity and lives of unborn children capable of feeling pain. Thank you.

Sincerely,

Catherine Glenn Foster
President and CEO
Americans United for Life

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[17] *See* Planned Parenthood, *How Safe Is An In-Clinic Abortion?*, https://www.plannedparenthood.org/learn/abortion/in-clinic-abortion-procedures/how-safe-is-an-in-clinic-abortion (last visited Apr. 16, 2019).
[18] P.K. Coleman et al., *Late-Term Elective Abortion and Susceptibility to Posttraumatic Stress Symptoms*, J. PREGNANCY (2010).
[19] Diana Greene Foster & Katrina Kimport, WHO SEEKS ABORTIONS AT OR AFTER 20 WEEKS? Perspectives on Sexual and Reprod. Health, (2013) https://onlinelibrary.wiley.com/doi/full/10.1363/4521013.
[20] *Id.*
[21] *Id.*