Written Testimony of Katie Glenn, Esq.
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On Massachusetts H. 3322, H. 3428, H. 3429, and H. 3434
Submitted to the Joint Committee on the Judiciary
June 17, 2019

Dear Senator Eldridge, Representative Cronin, and Members of the Committee:

My name is Katie Glenn and I work as Government Affairs Counsel with Americans United for Life (AUL), the oldest and most active pro-life non-profit advocacy organization. Established in 1971, AUL has dedicated nearly 50 years to advocating for comprehensive legal protections for human life from conception to natural death. Thank you for the opportunity to provide legal testimony on H. 3322, H. 3428, H. 3429, and H. 3434. I have thoroughly reviewed these bills, and it is my legal opinion that they would enact common-sense protections for women and girls in Massachusetts and would withstand constitutional scrutiny.

1. H. 3429

Informed Consent Laws Are Constitutional

In 1992, the U.S. Supreme Court upheld Pennsylvania's 24-hour informed consent law, which required "a woman seeking an abortion give her informed consent prior to the abortion procedure, and specifie[d] that she be provided with certain information at least 24 hours before the abortion is performed."[1] In doing so, the Court recognized that "the State has legitimate interests from the outset of the pregnancy in protecting the health of the woman and the life of the fetus."[2] It determined that "the giving of truthful, nonmisleading information about the nature of the abortion procedure, the attendant health risks and those of childbirth, and the probable gestational age of the fetus" as well as "requiring that the woman be informed of the availability of information relating to fetal development and the assistance available should she decide to carry the pregnancy to full term is a reasonable measure to ensure an informed choice," was not a substantial obstacle and did not impose an undue burden on abortion rights, even if it "might cause the woman to choose childbirth over abortion."[3]

[1] *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 844 (1992).
[2] *Id*. at 846.
[3] *Id*. at 882-83.

Informed Consent Presents Important Information That Helps Women Make Informed Choices

Informed consent laws "are part of the state's reasonable regulation of medical practice"[4] and reduce "the risk that a woman may elect an abortion, only to discover later, with devastating psychological consequences, that her decision was not fully informed."[5] The decision to abort "is an important, and often a stressful one, and it is desirable and imperative that it be made with full knowledge of its nature and consequences."[6] It is essential to the psychological and physical well-being of a woman considering an abortion that she receives complete and accurate information on abortion and its alternatives because "[t]he point of informed consent laws is to allow the patient to evaluate her condition and render her best decision under difficult circumstances."[7]

The knowledgeable exercise of a woman's decision to have an abortion depends on the extent to which she receives sufficient information to make an informed choice between two alternatives: giving birth or having an abortion. This Act would provide women with the information needed to make a fully informed choice. It would require the woman be informed of the medical risks associated with both abortion and carrying the child to term, the probable gestational age of the unborn child, and that medical assistance benefits are available for prenatal care, childbirth, and neonatal care. It would also require the woman be provided materials detailing agencies available to assist the woman through pregnancy, adoption agencies, and materials detailing the anatomical characteristics of the unborn child. With this information, the woman will be able to weigh all her options and, with all the facts, determine what the next step should be.

Additionally, the offer to view an ultrasound, as proposed by this Act, provides a woman the option to see her unborn child, an effective step the state can take to ensure that the woman's consent for an abortion is as fully informed as possible. Ultrasound provisions promote the woman's physical and psychological health[8] and serve an essential and irreplaceable medical purpose in that they are the only method of diagnosing ectopic pregnancies, which, if left undiagnosed, can result in infertility or even fatal blood loss.[9] Furthermore, an ultrasound enables the healthcare provider to more accurately date the gestational age of a child. Accurate dating of pregnancy both protects the woman by ensuring that the appropriate abortion procedure is

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[4] *Tex. Med. Providers Performing Abortion Servs. v. Lakey*, 667 F.3d 570, 576 (5th Cir. 2012).
[5] *Casey*, 505 U.S. at 882.
[6] *Planned Parenthood v. Danforth*, 428 U.S. 52, 67 (1976).
[7] *Lakey*, 667 F.3d at 579.
[8] In both *Gonzales v. Carhart* and *Casey*, the Supreme Court affirmed "the principle that the State has legitimate interests from the outset of pregnancy in protecting the health of the woman." *Gonzales*, 550 U.S. 124, 145 (2007) (quoting *Casey*, 505 U.S. at 846 (1992) (citing *Roe v. Wade*, 410 U.S. 113 (1973))).
[9] *See, e.g.*, Mayo Clinic, *Ectopic Pregnancy*, http://www.mayoclinic.org/diseases-conditions/ectopic-pregnancy/basics/complications/con-20024262 (last visited June 14, 2019).

performed and provides relevant information necessary to make an informed decision, since the risks of abortion increase as gestational age increases.[10]

Informed consent for elective procedures—such as an abortion—need not be made under pressure since there is time to discuss information the woman would consider relevant, such as the risks, benefits, and nature of the procedure she might undergo.[11] Reflection periods—like the 24 hour period required by this Act—help ensure the woman has the time she needs to take all the given information into account without the pressure of making an immediate decision since the "medical, emotional, and psychological consequences of an abortion are serious and can be lasting."[12] In fact, the Supreme Court determined waiting periods were not an "undue burden" and "the idea that important decisions will be more informed and deliberate if they follow some period of reflection" was not "unreasonable."[13]

The Majority Of States Have Informed Consent Laws

A majority of states have enforceable informed consent and reflection period laws. Twenty-nine states require written materials be either given or offered.[14] Twenty-six states require specific information be given on the abortion procedure.[15] Thirty-two states require the woman be informed of the probable gestational age of her fetus.[16] Twenty-seven states have a reflection period ranging from eighteen to seventy-two hours.[17] None of the notice requirements in H. 3429 remotely limit a woman's ability to obtain a legal abortion; however, they do ensure that every woman is fully informed about all of her options.

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[10] *See, e.g.*, John M. Thorp Jr., *Public Health Impact of Legal Termination of Pregnancy in the U.S.: 40 Years Later*, 2012 SCIENTIFICA (Oct. 15, 2012), https://www.hindawi.com/journals/scientifica/2012/980812/.
[11] *See, e.g.*, Owen A. Anderson & Mike J. Wearne, *Informed Consent for Elective Surgery—What is the Best Practice?*, 100 J. Royal Soc'y of Med. 97 (2007).
[12] *H.L. v. Matheson*, 450 U.S. 398, 411 (1981).
[13] *Casey*, 505 U.S. at 885.
[14] These states are Alabama, Alaska, Arizona, Arkansas, Florida, Georgia, Idaho, Indiana, Iowa, Kansas, Kentucky, Louisiana, Michigan, Minnesota, Mississippi, Missouri, Nebraska, North Carolina, North Dakota, Ohio, Oklahoma, Pennsylvania, South Carolina, South Dakota, Texas, Utah, Virginia, West Virginia, and Wisconsin.
[15] These states are Alabama, Alaska, Arizona, Arkansas, Florida, Idaho, Indiana, Iowa, Kansas, Kentucky, Louisiana, Michigan, Mississippi, Missouri, North Carolina, Ohio, Oklahoma, Pennsylvania, South Carolina, Utah, Virginia, and Wisconsin.
[16] These states are Alabama, Alaska, Arizona, Arkansas, Connecticut, Florida, Georgia, Indiana, Kansas, Kentucky, Louisiana, Maine, Michigan, Minnesota, Mississippi, Missouri, Nebraska, Nevada, North Carolina, North Dakota, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, West Virginia, and Wisconsin.
[17] These states are Alabama, Arizona, Arkansas, Georgia, Idaho, Indiana, Kansas, Kentucky, Louisiana, Michigan, Minnesota, Mississippi, Missouri, Nebraska, North Carolina, North Dakota, Ohio, Oklahoma, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, West Virginia, and Wisconsin.

2. H. 3322

The State Has A Legitimate Interest In Preventing Fetal Pain

Massachusetts law permits late-term abortions (after 24 weeks) in limited circumstances.[18] There is substantial medical evidence that an unborn child is capable of experiencing pain at least by 20 weeks after fertilization (22 weeks LMP), if not earlier.[19] According to one group of fetal surgery experts, "The administration of anesthesia directly to the fetus is critical in open fetal surgery procedures."[20] H. 3322 would require that physicians administer anesthesia to the fetus for the purpose of preventing fetal pain in abortions after 24 weeks.

A study from 2010 found that "the earlier infants are delivered, the stronger their response to pain"[21] because the "neural mechanisms that inhibit pain sensations do not begin to develop until 34-36 weeks[] and are not complete until a significant time after birth."[22] As a result, unborn children display a "hyperresponsiveness" to pain.[23]

The use of anesthesia in late-term abortion procedures is a humane way to lessen fetal pain. H. 3322 does include an opt-out provision in case of adverse health risk to the mother (like an allergy), based on the attending physician's reasonable clinical judgment. It also permits the mother to refuse anesthesia for the fetus for any reason.

Current medical science has firmly established the existence of pain in preborn infants at or before 20 weeks, four weeks before Massachusetts' 24 week mark. It is well within the legitimate interests of the Commonwealth of Massachusetts to minimize fetal pain as much as possible.[24] Eighteen states have lawful 20-week abortion bans precisely because of the fetal pain threshold.[25] Massachusetts seems well within bounds to address this same concern by enacting H. 3322 into law.

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[18] Mass. Gen. Laws ch. 112 § 12M

[19] Federal Pain Capable Act S. 160, Sec. 2(1)-(11).

[20] Maria J. Mayorga-Buiza et al., *Management of Fetal Pain During Invasive Fetal Procedures. Lessons Learned From a Sentinel Event*, 31 EUROPEAN JOURNAL OF ANAESTHESIOLOGY, 188 (2014).

[21] Lina K. Badr et al., *Determinants of Premature Infant Pain Responses to Heel Sticks*, 36 PEDIATRIC NURSING, 129 (2010).

[22] Charlotte Lozier Institute, *Fact Sheet: Science of Fetal Pain*, https://lozierinstitute.org/fact-sheet-science-of-fetal-pain/#_ednref14 (last updated Dec. 17, 2018) (citing Benjamin Kloesel and Michaela K. Farber, *Anesthesia for Fetal Intervention*, *in* ESSENTIAL CLINICAL ANESTHESIA, 399 (Linda S. Aglio et al., 2015)).

[23] Christine Greco and Soorena Khojasteh, *Pediatric, Infant, and Fetal Pain*, *in* CASE STUDIES IN PAIN MANAGEMENT, 379 (Alan David Kaye, et al., 2014).

[24] *Gonzales*, 550 U.S. 124 at 163 ("The Court has given state and federal legislatures wide discretion to pass legislation in areas where there is medical and scientific uncertainty.")

[25] These states are Alabama, Arkansas, Georgia, Indiana, Iowa, Kansas, Kentucky, Louisiana, Mississippi, Nebraska, North Dakota, Ohio, Oklahoma, South Carolina, South Dakota, Texas, West Virginia, and Wisconsin.

3. H. 3428

Coercive Abortion Is No "Choice" At All

Coercive abuse can take many forms and is intended to force a woman into "choosing" an abortion. Many women who arrive on the doorstep of an abortion clinic are not there of their own free "choice." Instead, they are there because someone influential in their life, such as a boyfriend or parent, is pressuring or forcing them to undergo the abortion. Hundreds of women have testified to the devastating effects of their coerced abortions.[26]

H. 3428 creates safeguards against coerced abortion. Conspicuously posting signs in patient waiting rooms and consultation rooms ensures that women and whoever accompanies them to the facility read and understand that coercion is illegal and wrong. Furthermore, the attending physician would have a conversation with the woman, in private, and place a copy of the woman's written certification that she understands the notice and is not being coerced into having an abortion into her medical file.

Coercive abortion is a serious women's health issue because it violates a woman's rights to physical and emotional health, freedom of conscience and to freely choose either to continue her pregnancy or to have an abortion. At least eighteen states currently have some form of coercive abuse prevention law.[27] Massachusetts should adopt this common-sense protection to make sure that no woman suffers the trauma and abuse of coerced abortion.

4. H. 3434

Abortions Based on Sex Are Discriminatory

A sex-selection abortion is an abortion undertaken to eliminate a child of an undesired sex. It is important and telling that the targeted victims of such abortions are overwhelmingly female. The practice of sex-selection abortion has drawn increasing attention in the U.S. and worldwide. The problem is so severe in some countries that, in 2005, the United Nations Population Fund (UNFPA) termed the practice "female infanticide." The UNFPA described this as a "symptom of pervasive social, cultural, political and economic injustices against women, and a manifest

[26] *See, e.g., Testimony Directory, Silent No More* http://www.silentnomoreawareness.org/testimonies/ (last visited June 14, 2019).
[27] These states include Arizona, Delaware, Idaho, Kansas, Louisiana, Michigan, Minnesota, Missouri, Montana, Nebraska, North Dakota, Ohio, Oklahoma, South Dakota, Tennessee, Texas, Utah, and Wisconsin.

violation of women's human rights."[28] According to the UNFPA, recent studies have shown 126 million girls "were missing in 2010 due to gender-biased sex selection," which includes prenatal sex selection, and by 2020, "more than 142 million women will be missing."[29] Writer Mara Hvistendahl estimates the number is closer to 163 million worldwide.[30] Even Hillary Clinton identified sex-selection abortions as part of the abuse against women. In a 2009 interview, then-Secretary Clinton stated that "unfortunately with technology, parents are able to use sonograms to determine the sex of a baby, and to abort girl children simply because they'd rather have a boy."[31]

Some studies have found that sex-selection abortions are being performed in the United States.[32] For example, researchers concluded that the most logical explanation for the irregularity in boy-birth percentages in the United States is gender selection. Given the high expense and rarity of advanced reproductive technologies such as *in vitro* fertilization (IVF) or sperm sorting, this gender selection is most likely taking place by abortion.[33] Analysis also revealed that a deviation in favor of sons in Western society to be evidence of sex selection, most likely at the prenatal stage.[34] One survey found that there still exists a moderate "tendency for American adults to express overall preferences for a boy over a girl."[35] Even the efforts of pro-abortion advocates to defeat bans on sex-selection abortions by claiming these abortions are rare acknowledge that sex-selection abortions happen.

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[28] United Nations Population Fund Asia & Pacific Regional Offices, Sex Imbalances at Birth: Current Trends, Consequences and Policy Implications (Aug. 2012) https://www.unfpa.org/sites/default/files/pub-pdf/Sex%20Imbalances%20at%20Birth.%20PDF%20UNFPA%20APRO%20publication%202012.pdf.

[29] United Nations Population Fund, Gender-Biased Sex Selection https://www.unfpa.org/gender-biased-sex-selection (last visited June 14, 2019).

[30] Mara Hvistendahl, Unnatural Selection: Choosing Boys Over Girls, and the Consequences of a World Full of Men, 5-11 (2011). Over the past few decades, approximately 300,000 to 700,000 girls in India were selectively aborted annually. Sital Kalantry, *How to Fix India's Sex-Selection Problem*, New York Times (Jul. 27, 2017) https://www.nytimes.com/2017/07/27/opinion/how-to-fix-indias-sex-selection-problem.html; *see also* Nicholas Eberstadt, *The Global War Against Baby Girls*, The New Atlantis (2011). https://www.thenewatlantis.com/docLib/20111214_TNA33Eberstadt.pdf (noting sex-selective infanticide is also occurring in other countries, including China and Vietnam).

[31] Mark Landler, *A New Gender Agenda*, The New York Times Magazine, Aug. 18, 2009 http://www.nytimes.com/2009/08/23/magazine/23clinton-t.html?_r=0.

[32] *See* J. Coppage, *Here's the "Missing" Evidence for S.D.'s Sex-Selective Abortion Ban* (Apr. 1, 2014), http://www.theamericanconservative.com/here's-the-missing-evidence-for-sex-selective-abortion-bans-south-dakota/ (citing D. Almond & L. Edlund, *Son-Biased Sex Ratios in the 2000 United States Census*, Proceedings of the Nat'l Acad. of Sci. of the U.S.A.(2008) http://www.pnas.org/content/105/15/5681.full; J. Abrevaya, *Are There Missing Girls in the United States? Evidence from Birth Data*, Amer. Econ. J. Applied Econ. (2009), http://www.aeaweb.org/articles.php?doi=10.1257/app.1.2.1.

[33] *Id.*

[34] *Id.*

[35] Frank Newport, Slight Preference for Having Boy Children Persists in U.S., Gallup https://news.gallup.com/poll/236513/slight-preference-having-boy-children-persists.aspx (July 5, 2018).

Massachusetts Has a Legitimate Interest in Preventing Discrimination Which Is Not Trumped by the "Right" to Abortion

It is far from clear that banning abortions on the basis of sex is unconstitutional. The U.S. Supreme Court has not held that a woman's interest in abortion trumps the state's interest in preventing sex discrimination, and federal lower courts are split on whether and how *Roe* and *Casey* apply. By passing H. 3434, Massachusetts can speak on the issue and affirm that this form of discrimination should not be protected under *Roe* or *Casey*.

H. 3434, and bills like it, are about preventing discrimination on the basis of sex. "None of the Court's abortion decisions holds that states are powerless to prevent abortions designed to choose the sex, race, and other attributes of children."[36] As stated in *Gonzales v. Carhart*, the Supreme Court "has confirmed the validity of drawing boundaries to prevent certain practices that extinguish life and are close to actions that are condemned."[37] If the State has an interest in stopping discrimination based on gender amongst those of us already born, the State should also have an interest in preventing discrimination on the basis of gender via sex-selective abortion. H. 3434 protects the unborn against sex discrimination disproportionately committed against baby girls and is an important measure in furthering equality for all.

In conclusion, I strongly encourage this Committee to support the passage of H. 3322, H. 3428, H. 3429, and H. 3434, thereby continuing to uphold its duty to protect the lives of all its citizens and to protect women's health.

Sincerely,

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[36] *Planned Parenthood of Ind. & Ky., Inc. v. Comm'r of the Ind. State Dep't of Health*, 917 F.3d 532 (7th Cir. 2018) (Easterbrook, J. dissenting).
[37] 550 U.S.124 at 158 (2007).