ALLIANCE DEFENDING
FREEDOM
FOR FAITH FOR JUSTICE

March 18, 2014

The Honorable Earl Ray Tomblin
Governor of West Virginia
Office of the Governor
State Capitol
1900 Kanawha Boulevard, East
Charleston, West Virginia 25305

Re: **Constitutionality of West Virginia Bill "Protecting Unborn Children Who Are Capable of Experiencing Pain by Prohibiting Abortion After Twenty Weeks"**

Dear Governor Tomblin:

Alliance Defending Freedom, an alliance-building national legal ministry that defends the sanctity of human life, understands that the West Virginia H.B. 4588 "Protecting Unborn Children Who Are Capable of Experiencing Pain by Prohibiting Abortion after Twenty Weeks" bill (herein the "Bill"), a copy of which is attached, has already been passed by the House 85-15 and by the Senate 25-9.

Summary of Opinion

It is our opinion that the Bill is constitutionally sound and should be upheld against any legal challenge should you sign it into law.

In view of the foregoing, Alliance Defending Freedom urges you to sign the Bill and thereby protect innocent women and children from pain.

Background

Medical advances in recent decades have provided a substantial and growing body of medical evidence that has led to a greater understanding of the development of unborn children and their capacity to feel pain at various stages of growth. The "Legislative Findings" in § 16-2M-1 of the Bill are supported by this medical evidence, including that unborn children respond to touch by eight weeks after fertilization and respond to painful stimuli by no later than 20

weeks' gestation. Moreover, surgeons routinely administer anesthesia to unborn children before performing surgery. In addition, limitations on later-term abortions protect women's health because later-term abortions can be hazardous to women's health.

The Bill

The Bill would prohibit any person from performing or attempting to perform an abortion except in conformity with the Bill, i.e., in general, at twenty weeks[1] after fertilization or later.

The Bill requires the physician performing the abortion to first determine the probable post-fertilization age of the unborn child, or reasonably rely upon such a determination as has been made by another physician, by making inquiries of the pregnant woman, and by performing such medical examinations and tests as a reasonably prudent physician knowledgeable about the case and the medical conditions involved would consider necessary, except in the case of a medical emergency.[2] *See* § 16-2M-3.

The Bill would, following this determination, prohibit the abortion from being performed if the probable post-fertilization age of the unborn child is determined to be 20 weeks or greater except where necessary to save the life of a pregnant woman or avert serious risk of substantial and irreversible physical impairment of a major bodily function, not including psychological or emotional conditions. *See* § 16-2M-4(a).

The Bill permits a physician to terminate a pregnancy under these exceptions only in the manner that provides the best opportunity for the unborn child to survive, unless that manner would pose a greater risk than other available methods would pose of the death or substantial and irreversible physical impairment of a major bodily function, excluding psychological or emotional conditions, of the pregnant woman. *See* § 16-2M-4(b).

Finally, the Bill subjects individuals in violation of the Bill (except the woman upon whom the abortion is performed) to a fine of not more than $5000 and/or between one and five

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[1] Most similar laws enacted by other states have restricted abortions after 20 weeks' gestation – gauged from the first day of the woman's last menstrual period. Similarly, when the Supreme Court discussed viability in *Roe v. Wade* and *Planned Parenthood v. Casey*, it likewise considered the gestational time from the woman's last menstrual period. By restricting abortions 20 weeks after *fertilization*, the Bill effectively limits abortions only after about 22 weeks' gestation, very near the generally accepted point of viability.

[2] A medical emergency is defined as "a condition that, in reasonable medical judgment, so complicates the medical condition of a pregnant woman that it necessitates the immediate abortion of her pregnancy without first determining post-fertilization age to avert her death or for which the delay necessary to determine post-fertilization age will create serious risk of substantial and irreversible physical impairment of a major bodily function." Such risk may not be based on a claim or diagnosis that the woman will engage in conduct which she intends to result in her death or in substantial and irreversible physical impairment of a major bodily function. *See* § 16-2M-2.

years in a state correctional facility, *see* § 16-2M-6, as well as civil remedies including actual and punitive damages, *see* § 16-2M-7(a), and injunctive relief, *see* § 16-2M-7(b).

ANALYSIS

1. Substantial Scientific Evidence Indicates that an Unborn Child Can Feel Pain by Twenty Weeks' Gestation

A growing body of credible evidence suggests that an unborn child can suffer pain by twenty weeks' gestation. Scientific literature has shown that a fetus at this stage has the human attributes necessary to feel pain. To suffer pain, a human must have a nervous system capable of responding to the stimuli causing pain. *See* Derbyshire, "Foetal Pain?," 24 *Best Practice & Research Clinical Obstetrics & Gynaecology* 653 (2010). In other words, the "first essential requirement for nociception [pain perception] is the presence of sensory receptors" in the human's body. Myers, "Fetal Endoscopic Surgery," 18 *Best Practice & Research Clinical Obstetrics & Gynaecology* 241 (2004). By twenty weeks, unborn children have pain receptors throughout their bodies. *See* Brusseau, "Developmental Perspectives," 46 *International Anesthesiology Clinics* 14 (2008).

In addition, a human can suffer pain only with a brain capable of reacting to the negative stimuli sent to it by the pain receptors. By twenty weeks, unborn children possess a brainstem and thalamus, which, evidence shows, permit the brain to receive, react to, and process pain. *See* Brusseau, at 20; Anand, "Fetal Pain?," 14 *Pain: Clinical Updates* 3 (2006). To prove this fact, scientists have looked to hydranencephalic infants, who are born with only a brainstem and thalamus. These infants "show responsiveness to their surroundings in the form of emotions or orienting reactions to environmental events." Merker, "Consciousness Without A Cerebral Cortex," 30 *Behavioral & Brain Sciences* 79 (2007). They also "express pleasure by smiling and laughter, and aversion by 'fussing,' arching of the back and crying (in many gradations), their faces being animated by these emotional states." *Id.* By analogy, unborn children at twenty weeks possess the same abilities to feel, as their brain development at least matches that of a hydranencephalic infant.

Reinforcing this literature on fetal development, scientific studies have illustrated that unborn children at twenty weeks gestation – two weeks prior to the twenty weeks from *fertilization* point regulated by the Bill -- exhibit numerous observable indications of pain. By that time, a fetus reacts to touch and exhibits complex movements observable through real-time ultrasound. *See* Glover, "The Fetus May Feel Pain from 20 Weeks," 25 *Conscience* 36 (2004). A twenty-week fetus, for example, reacts negatively to a needle prick with vigorous body and breathing movements, which the infant does not demonstrate during needling of the placenta, precisely because the placenta lacks pain receptors. *See* Giannakoulopoulos, "Fetal Plasma Cortisol & Beta-endorphin Response to Intrauterine Needling," 344 *Lancet* 77 (1994).

Painful stimuli, moreover, cause a twenty-week fetus to exhibit a hormonal stress response, another indication of advancing neural development. *See* Myers, at 242; Derbyshire, at 4; *see also* Giannakoulopoulos, at 77 ("[A]s with neonates, the fetus mounts a similar hormonal

response to that which would be mounted by older children and adults to stimuli which they would find painful."). Rapid movement, breathing, and cardiovascular changes accompany this stress response. *See* Gupta, "Fetal Surgery and Anaesthetic Implications," 8 *Continuing Education in Anaesthesia, Critical Care & Pain* 74 (2008); Fisk, "Effect of Direct Fetal Opiod Analgesia on Fetal Hormonal & Hemodynamic Stress Response to Intrauterine Needling," 95 *Anesthesiology* 828 (2001).

Painful stimuli in utero also correlate with long-term harm to a child's neurodevelopment, including altered pain sensitivity and developmental disabilities later in life. Van de Velde, "Fetal & Maternal Analgesia/Anesthesia for Fetal Procedures," *Fetal Diagnosis & Therapy* 206-07 (2012). That is why doctors use analgesia or anesthesia when operating on an unborn child, including at twenty weeks' gestation. Myers, at 236 ("Since substantial evidence exists demonstrating the ability of the second trimester fetus to mount a neuroendocrine response to noxious stimuli . . . , fetal pain management must be considered in every case.").

2. The United States House of Representatives and Many States Have Passed Legislation In Response To This New Medical Evidence of Fetal Pain

The Bill is virtually identical to H.R. 1797 - The Pain-Capable Child Protection Act, which was passed by the U.S. House of Representatives on June 18, 2013, and thus deemed constitutional by a majority of the Members of the U.S. House of Representatives – with the singular exception that it applies roughly two weeks later, even nearer to viability. *See, e.g.*, *United States v. Nixon*, 418 U.S. 683, 703 (1974) ("In the performance of assigned constitutional duties each branch of the Government must initially interpret the Constitution, and the interpretation of its powers by any branch is due great respect from the others."); *US West v. Public Utilities Comm'n*, 505 N.W.2d 115, 123 (S.D. 1993) (courts must read statutes as constitutional whenever possible).

Thirteen State legislatures have enacted legislation seeking to further the same interests as does the Bill,[3] adopting similar factual findings regarding the capacity of unborn children to experience pain by twenty weeks after fertilization. These laws are premised not on fetal viability determinations but rather on the separate and independent compelling State interest in unborn human life that exists once the unborn child has the capacity to feel pain.

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[3] **Nebraska**: Neb. Rev. Stat. §§ 28-3, 104, 28-3, 106 (2010); **Kansas**: Kan. Stat. Ann. §§ 65-6722, 65-6724(a); **Idaho**: Idaho Code Ann. §§ 18-502(11), 18-505(2011) *McCormack v. Hiedeman,* 900 F.Supp. 2d 1128 (D. Idaho 2013) (law enjoined, to be appealed); **Oklahoma**: Okla. Stat. tit. 63, § 1-738.7 (2011); **Alabama**: Ala. Code §§ 26-23B2, 26-23B-5; **Georgia**: O.C.G.A. 16-12-140, 11-12-141, O.C.G.Z. 31-9b-1 TO 31-9b-3 (2012) (preliminary injunction issued in *Lathrop, et al. v. Deal, et al.* No. CV224423) (Sup. Ct. of Fulton Cnty., Ga., Dec. 21, 2012); **Indiana**: Ind. Code §§ 16-34-1-9, 16-4-2-1; **Louisiana**: La. Rev. Stat. Ann. § 40:1299.30.1 (2012); **Arkansas**: Ark. Code § 36-2159(B); **North Carolina**: N.C. Gen. Stat. §§ 14-44, 14-45; **North Dakota**: N.D. Cent. Code § 14-02.1-05.3 (2013); **Arizona**: Ariz. Rev. Stat. § 36-2159; **Texas**: Act of July 18, 2013, 83rd Leg., 2nd C.S., ch. 1, Tex. Gen. Laws.

In pursuing this legislation, State legislatures have made clear their purpose is to protect the unborn child from pain. As Alabama's law notes, its "purpose" is "to assert a compelling State interest in protecting the lives of unborn children from the stage at which substantial medical evidence indicates that they are capable of feeling pain." Ala. Code § 26-23B-2(12).

Though there is substantial evidence that an unborn child can suffer pain by twenty weeks' gestation, medical unanimity is not required in order for State legislatures to make and act on determinations of medical fact. "The fact that the belief is not universal [in the medical community] is not controlling, for there is scarcely any belief that is accepted by everyone. The possibility that the belief may be wrong, and that science may yet show it to be wrong, is not conclusive; for the legislature has the right to pass laws which, according to common belief of the people, are adapted to [and address medical matters]." *Stenberg v. Carhart*, 530 U.S. 914, 970-72 (2000) (Kennedy, J., dissenting), citing *Jacobson v. Massachusetts,* 197 U.S. 11, 35 (1905) (quoting *Viemeister v. White,* 179 N.Y. 235, 241, 72 N.E. 97, 99 (1904)).

As Justice Kennedy stated in his majority opinion in *Gonzales v. Carhart*, 550 U.S. 124 (2007):

> There is documented medical disagreement whether the [Partial Birth Abortion Ban] Act's prohibition would ever impose significant health risks on women. . . . The question becomes whether the Act can stand when this medical uncertainty persists. The Court's precedents instruct that the Act can survive this facial attack. The Court has given state and federal legislatures wide discretion to pass legislation in areas where there is medical and scientific uncertainty. See . . . *Marshall v. United States,* 414 U.S. 417, 427 (1974) ("When Congress undertakes to act in areas fraught with medical and scientific uncertainties, legislative options must be especially broad.").[4]

Gonzales v. Carhart, 550 U.S. at 162-64.

Whether one views an unborn child as a "life or a potential life," *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 852 (1992), allowing abortions to unnecessarily impose substantial pain on an unborn child "is incompatible with the concept of human dignity and has no place in a civilized society." *See Brown v. Plata*, 131 S.Ct. 1910, 1928 (2011).

3. Courts Support the Compelling State Interest in Protecting the Lives of Unborn Children

Even in *Roe v. Wade*, 410 U.S. 113, 162-64 (1973), the Court recognized two state interests: the "important interest" in protecting a pregnant woman's health and "still another

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[4] Compulsory vaccination upheld over claim by "members of the medical profession that the vaccination was of no value and, in fact, was harmful."

important and legitimate interest in protecting the potentiality of human life." "This is so," the Court explained, "because the fetus then presumably has the capability of meaningful life outside the mother's womb. State regulation protective of fetal life after viability thus has both logical and biological justifications." Thus, "if the State is interested in protecting fetal life after viability, it may go so far as to proscribe abortion during that period, except when it is necessary to preserve the life or health of the mother."

In *Casey*, the Court rejected *Roe*'s trimester framework, imposing instead a bifurcated pre-viability/post-viability framework and applying a newly adopted "undue burden" standard to gauge the constitutionality of abortion restrictions. Further, the Court reaffirmed *Roe*'s holding that "subsequent to viability, the State in promoting its interest in the potentiality of human life may, if it chooses, regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother." *Id.* at 878-79 (quoting *Roe*, 410 U.S. at 164-65).

For some time, under *Casey*, the Supreme Court left unanswered opportunities to review statutes that limit late-term abortions. *See, e.g.*, *Women's Medical Prof. Corp. v. Voinovich*, 130 F.3d 187 (6th Cir.), *cert. denied*, 523 U.S. 1036 (1998); *Jane L. v. Bangerter*, 809 F. Supp. 865 (D. Utah 1992), *aff'd in part, rev'd in part*, 61 F.3d 1493 (10th Cir. 1995), *rev'd and rem'd sub. nom.*, *Leavitt v. Jane L.*, 518 U.S. 137 (1996), *on remand*, 102 F.3d 1112 (10th Cir. 1996), *cert. denied*, 520 U.S. 1274 (1997). However, these cases did yet not contain the strength of modern medical knowledge and data on fetal pain and the increasing rate of maternal mortality and morbidity that subsequent laws and cases have.

Thus, under *Casey*, courts such as *Jane L.* were locked in to their holdings: "[A] statute which, while furthering the interest in potential life or some other valid state interest, has the effect of placing a substantial obstacle in the path of a woman's choice cannot be considered a permissible means of serving its legitimate ends." *Casey*, 505 U.S. at 877.

This began to change in 2000 with *Stenberg v. Carhart*. There, the Court held that the Nebraska partial-birth abortion law, which applied pre- and post-viability, imposed an "undue burden" on a woman's right to choose an abortion due to vague statutory language, *Stenberg v. Carhart*, 530 U.S. at 938-39, and that the statute was unconstitutional because it failed to give an exception for the "health" of the mother, *id.* at 937-38.

Yet Justice O'Connor, in concurrence and supplying the vote required to strike down the statute, provided what she obviously regarded as a road map for a constitutional proscription on partial-birth abortion:

> If Nebraska's statute limited its application to the D&X procedure and included an exception for the life and health of the mother, the question presented would be quite different than the one we face today. If there were adequate alternative methods for a woman safely to obtain an abortion before viability, it is unlikely that prohibiting the D&X procedure alone would "amount in practical terms to a substantial obstacle to a woman seeking an abortion." Thus, a ban on partial-birth

> abortion that only proscribed the D&X method of abortion and that included an exception to preserve the life and health of the mother would be constitutional in my view.

Id. at 950-51.

Finally in *Gonzales v. Carhart*, 550 U.S. 124 (2007), the Court again addressed the constitutionality of statutory prohibitions on "partial-birth abortion." Congress had responded to *Stenberg v. Carhart* by passing the Partial-Birth Abortion Ban Act of 2003, which sought to remedy the deficiencies in the Nebraska statue through an extensive set of factual findings on the necessity of partial-birth abortion. Congress found that "[a] moral, medical, and ethical consensus exists that the practice of performing a partial-birth abortion . . . is a gruesome and inhumane procedure that is never medically necessary and should be prohibited" and that "[t]here is no credible medical evidence that partial-birth abortions are safer than other abortion procedures." *Id.* at 176. This time, Congress included a limited health exception: "This subsection does not apply to a partial-birth abortion that is necessary to save the life of a mother whose life is endangered by a physical disorder, physical illness, or physical injury, including a life-endangering physical condition caused by or arising from the pregnancy itself."

Planned Parenthood and abortionist Leroy Carhart, characterizing this limited exclusion as a ban, challenged the ban in separate lawsuits. The lower courts in both cases struck down the law based on their readings of *Stenberg v. Carhart*, and the Eighth and Ninth Circuits agreed, both concluding that the absence of a health exception rendered the Act unconstitutional.

The Supreme Court *rejected each challenge* to the Partial-Birth Abortion Ban Act. In the Court's view, the Federal Act furthered the government's interest in preserving and promoting respect for life, as Congress could reasonably conclude that "the type of abortion proscribed by the Act requires specific regulation because it implicates additional ethical and moral concerns that justify a special prohibition. . . . Whether to have an abortion requires a difficult and painful moral decision," Justice Kennedy said. Citing to the amicus brief filed by Sandra Cano – the "Jane Doe" of *Doe v. Bolton*, the companion case to *Roe v. Wade* – and others, Justice Kennedy observed that because "some women come to regret their choice to abort the life they once created and sustained," the state has an interest in ensuring that such a choice is made with full information:

> It is self-evident that a mother who comes to regret her choice to abort must struggle with grief more anguished and sorrow more profound when she learns, only after the event, what she once did not know: that she allowed a doctor to pierce the skull and vacuum the fast-developing brain of her unborn child, a child assuming the human form.

Id. at 159.

The *Gonzales* Court was concerned with humane treatment of unborn children: "The Act's stated purposes are protecting innocent human life from a brutal and inhumane procedure

and protecting the medical community's ethics and reputation. The government undoubtedly 'has an interest in protecting the integrity and ethics of the medical profession.'" *Id.* at 128 (citing *Washington v. Glucksberg*, 521 U.S. 702, 731 (1997)).

The Court declined to accept the invitation to revisit the scope of the constitutionally required "health" exception, stating that it assumed that the Act would be unconstitutional "if it subjected women to significant health risks." Here, however, "whether the Act creates significant health risks for women has been a contested factual question." *Id.* at 161. In view of this "documented medical disagreement," the Court concluded, "[t]he question becomes whether the Act can stand when this medical uncertainty persists. The Court's precedents instruct that the Act *can survive this facial attack*." *Id.* at 163 (emphasis supplied).

Abortion jurisprudence, Justice Kennedy suggested, had distorted the usual deference afforded legislative determinations. "Medical uncertainty does not foreclose the exercise of legislative power in the abortion context any more than it does in other contexts." *Id.* at 164. The lower courts' interpretations of *Stenberg v. Carhart* "to leave no margin of error for legislatures to act in the face of medical uncertainty" operated as a kind of judicial "zero tolerance policy" for legitimate abortion regulations. "This is too exacting a standard to impose on the legislative power . . . to regulate the medical profession," the Court concluded. *Id.* at 166.

In so ruling, the Court affirmed once again that challenges to restrictions on abortion must play by the same juridical rules as constitutional challenges in other contexts. Notably, there has been no "as-applied" challenge brought to the federal Partial-Birth Abortion Act since *Gonzales* was decided over six years ago, belying the argument that a health exception was necessary as abortion advocates contended.

The United States Supreme Court has not yet considered whether, after a certain stage of development the unborn child is capable of experiencing pain, a State's assertion of such an interest is, at that stage, compelling.[5] Now, with the aid of modern medicine and science, as discussed *supra*, if anything, medical certainty points toward the humanity of the unborn child and protecting unborn children from pain. Following the *Gonzales* Court, the legislature of West Virginia, too, is concerned with "protecting innocent human life from a brutal and inhumane procedure." At the very least, medical advances have demonstrated enough evidence to allow for "the exercise of legislative power" as indicated in *Gonzales*.

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[5] A petition for a writ of certiorari was filed with the United States Supreme Court on September 27, 2013, regarding the decision of the United States Court of Appeals for the Ninth Circuit holding unconstitutional Arizona's effort to limit abortion after 20 week's gestational age (except when necessary to protect against serious health risks or death of the mother) because of, among other things, well-documented concerns about fetal pain at that gestational age. Certiorari was denied on January 13, 2014. *Horne v. Isaacson,* 884 F. Supp. 2d 961 (D. AZ), 716 F.3d 1213 (9th Cir. May 21, 2013, *cert. denied* Jan. 13, 2014.

Moreover, the Supreme Court's precedents emphasize that the validity of laws regulating abortion depends on delicate balances that weigh the State's articulated interests along with a woman's liberty interests. *See Webster v. Reprod. Health Servs.*, 492 U.S. 490, 569 (1989); *Thornburgh v. Am. Coll. of Obstetricians and Gynecologists*, 476 U.S. 747, 778 (1986) (Stevens, J., concurring). In *Thornburgh*, Justice Stevens opined that a State's interest "increases progressively and dramatically as the organism's capacity to feel pain, to experience pleasure, to survive, and to react to its surroundings increases day by day." 476 U.S. at 778.

In considering this balance, the Supreme Court has assessed the "interest in protecting fetal life" and "in preserving and protecting the health of the pregnant woman." *Casey*, 505 U.S. at 876. The Court has also considered such interests as "express[ing] respect for the dignity of human life," *Gonzales*, 550 U.S. at 157; "protecting the integrity and ethics of the medical profession,'" *id.* at 157; ensuring that a woman makes her decision with "informed consent," *Casey*, 505 U.S. at 882; and encouraging a minor "to seek the help and advice of her parents," *Hodgson v. Minnesota*, 497 U.S. 417, 480 (1990) (Kennedy, J., concurring in the judgment in part and dissenting in part); *see also Casey*, 497 U.S. at 899.

Importantly, in regard to *Casey,* Justice Kennedy wrote:

> [In *Casey*] [w]e held it was inappropriate for the Judicial Branch to provide an exhaustive list of State interests implicated by abortion. 505 U.S. at 877. *Casey* is premised on the States having an important constitutional role in defining their interests in the abortion debate. It is only with this principle in mind that Nebraska's interests can be given proper weight. . . . States also have an interest in forbidding medical procedures which, in the State's reasonable determination, might cause the medical profession or society as a whole to become insensitive, even disdainful, to life, including life in the human fetus. . . . A State may take measures to ensure the medical profession and its members are viewed as healers, sustained by a compassionate and rigorous ethic and cognizant of the dignity and value of human life, even life which cannot survive without the assistance of others.

Stenberg, 530 U.S. at 958-59 (Kennedy, J., dissenting). The analysis, then, does not turn only on the question of "viability"; as the U. S. Supreme Court has recognized, there is to be a balance in the State's interest in protecting the unborn child's potential life and the mother's health. *Casey*, 505 U.S. at 860-61, 896; *see also Gonzales*, 550 U.S. at 146.

4. The Bill Furthers a Compelling State Interest Based on the Ability of an Unborn Child to Feel Pain and the Exponential Increase in Maternal Morbidity and Mortality at that Gestation.

In *Casey,* the Supreme Court adopted the "undue burden" standard to balance the competing interests that it found to be at stake in the abortion context. Under that standard, a State law violates the Constitution "if its purpose or effect is to place a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability." *Casey*, 505 U.S. at 878.

However, "not all regulations must be deemed unwarranted." *Id.* at 876. "The fact that a law which serves a valid purpose, one not designed to strike at the right itself, has the incidental effect of making it more difficult or more expensive to procure an abortion cannot be enough to invalidate it." *Id.* at 874.

The purpose of the Bill is to ensure that the life being ended does not suffer severe physical pain during the procedure. This legislative finding is based on the well-documented medical evidence that an unborn child by at least twenty weeks after fertilization (22 weeks' gestation) has the capacity to feel pain during an abortion.

An ancillary purpose is to protect the mother from the health risks that increase exponentially at higher gestations. Indeed, the incidences of major complications are highest after this point in pregnancy. The Alan Guttmacher Institute[6] has agreed that later-term abortions pose increased risk.

Pursuant to the Bill, all women may choose an elective abortion for a full twenty-two weeks of pregnancy, meaning that all women have five months in which to decide. Only during the next three or four weeks, at a time that an abortion causes pain to an unborn child and magnifies the health risks to the woman, does the Bill generally prohibit a woman from obtaining an abortion before viability. Even then, the Bill permits abortions necessary to save the life of a pregnant woman or avert serious risk of substantial and irreversible physical impairment of a major bodily function, not including psychological or emotional conditions.

Thus, the Bill does not have the effect of imposing a substantial obstacle on abortion, particularly in the context of a facial challenge.

In summary, the goals of protecting against fetal pain and promoting maternal health are compelling ones and lack any purpose or effect to impose any obstacle on the abortion right that *Casey* reaffirmed. It can therefore be expected that the Bill will survive a facial challenge.

5. The Bill Contains the Constitutionally Necessary Exceptions

The Bill's exception is nearly identical to that of *Gonzales.* The *Gonzales* partial-birth abortion act's limited health exception, found constitutional in *Gonzales*, provides, "This subsection does not apply to a partial-birth abortion that is necessary to save the life of a mother whose life is endangered by a physical disorder, physical illness, or physical injury, including a life-endangering physical condition caused by or arising from the pregnancy itself."

"Litigants in the federal courts can attack the constitutionality of legislative enactments in two ways: they can bring a facial challenge to the law, alleging that it is unconstitutional in all of

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[6] *See* http://www.guttmacher.org/pubs/fb_induced_abortion.html#12 (citing L.A. Bartlett et al., "Risk Factors for Legal Induced Abortion-Related Mortality in the United States," 103 *Obstetrics & Gynecology* 729 (2004).

its applications, or they can bring an as-applied challenge, alleging that the law is unconstitutional as applied to the particular facts that their case presents." Marc E. Isserles, "Overcoming Overbreadth: Facial Challenges and the Valid Rule Requirement," 48 *Am. U.L. Rev.* 359, 361 (1998). Any possible opposition to the bill is unlikely to overcome the presumption in favor of an as-applied challenge.

In the medical arena, "the proper means to consider exceptions [to the law] is by as-applied challenge," which is defined as those involving "discrete and well-defined instances [when] a particular condition has or is likely to occur in which the procedure prohibited by the Act must be used." *Gonzales v. Carhart*, 550 U.S. at 167. "In an as-applied challenge the nature of the medical risk can be better quantified and balanced than in a facial attack." *Id.* There has been no "as-applied" challenge brought to the federal Partial-Birth Abortion Act since *Gonzales v. Carhart*, and the presumption in favor of an as-applied challenge would be equally difficult for any opposition to overcome here.

6. Conclusion

As stated above, should you sign the Bill into law and it be subsequently challenged, Alliance Defending Freedom believes that the Bill will be upheld as constitutional by the U.S. Supreme Court.

Alliance Defending Freedom urges the passage of the Bill. Should you sign the Bill into law, Alliance Defending Freedom would be pleased to assist the State of West Virginia in defending the its constitutionality without any charge for our services.

Sincerely,

Steven H. Aden
Vice President – Center for Life
Alliance Defending Freedom

Attachment – H.B. 4588

H. B. 4588

(By Delegates Perry, Reynolds, Skaff, P. Smith,
Pino, Moye, Eldridge, Campbell, Stephens, Marcum
and Barker)

[Introduced February 14, 2014; referred to the
Committee on Health and Human Resources then the Judiciary.]

A BILL to amend the Code of West Virginia, 1931, as amended, by adding thereto a new article, designated §16-2M-1, §16-2M-2, §16-2M-3, §16-2M-4, §16-2M-5, §16-2M-6, §16-2M-7, §16-2M-8, and §16-2M-9, all relating to abortions generally and protecting unborn children who are capable of experiencing pain by prohibiting abortion after twenty weeks post-fertilization except when the mother has a medical emergency; providing for civil remedies; creating misdemeanors and felonies; stating legislative findings; and providing definitions.

Be it enacted by the Legislature of West Virginia:

That the Code of West Virginia, 1931, as amended, be amended by adding thereto a new article, designated §16-2M-1, §16-2M-2, §16-2M-3, §16-2M-4, §16-2M-5, §16-2M-6, §16-2M-7, §16-2M-8 and §16-2M-9, all to

read as follows:

ARTICLE 2M. THE PAIN-CAPABLE UNBORN CHILD PROTECTION ACT.

§16-2M-1. Legislative findings.

The Legislature makes the following findings:

(1) Pain receptors (unborn child's entire body nociceptors) are present no later than sixteen weeks after fertilization and nerves link these receptors to the brain's thalamus and subcortical plate by no later than twenty weeks.

(2) By eight weeks after fertilization, the unborn child reacts to stimuli that would be recognized as painful if applied to an adult human, for example, by recoiling.

(3) In the unborn child, application of painful stimuli is associated with significant increases in stress hormones known as the stress response.

(4) Subjection to painful stimuli is associated with long- term harmful neuro developmental effects, such as altered pain sensitivity and, possibly, emotional, behavioral and learning disabilities later in life.

(5) For the purposes of surgery on unborn children, fetal anesthesia is routinely administered and is associated with a decrease in stress hormones compared to their level when painful stimuli is applied without the anesthesia.

(6) The position, asserted by some medical experts, that the unborn child is incapable of experiencing pain until a point later in pregnancy than twenty weeks after fertilization predominately rests on the assumption that the ability to experience pain depends on the cerebral cortex and requires nerve connections between the thalamus and the cortex. However, recent medical research and analysis, especially since 2007, provides strong evidence for the conclusion that a functioning cortex is not necessary to experience pain.

(7) Substantial evidence indicates that children born missing the bulk of the cerebral cortex, those with hydranencephaly, nevertheless experience pain.

(8) In adults, stimulation or ablation of the cerebral cortex does not alter pain perception while stimulation or ablation of the thalamus does.

(9) Substantial evidence indicates that structures used for pain processing in early development differ from those of adults, using different neural elements available at specific times during development, such as the subcortical plate, to fulfill the role of pain processing.

(10) Consequently, there is substantial medical evidence that an unborn child is capable of experiencing pain by twenty weeks after fertilization.

(11) It is the purpose of the state to assert a compelling state interest in protecting the lives of unborn children from the stage at which substantial medical evidence indicates that they are capable of feeling pain.

§16-2M-2. Definitions.

For purposes of this article, the following words have the following meanings:

"Attempt to perform or induce an abortion" means an act or an omission of a statutorily required act that, under the circumstances as the actor believes them to be, constitutes a substantial step in a course of conduct planned to culminate in the performance or induction of an abortion in this state in violation of the applicable provisions of this code.

"Fertilization" means the fusion of a human spermatozoon with a human ovum.

"Medical emergency" means a condition that, in reasonable medical judgment, so complicates the medical condition of a pregnant woman that it necessitates the immediate abortion of her pregnancy without first determining post-fertilization age to avert her death or for which the delay necessary to determine post-fertilization age will create serious risk of substantial and irreversible physical impairment of a major bodily function. No condition may be considered

a medical emergency if based on a claim or diagnosis that the woman will engage in conduct which would result in her death or in substantial and irreversible physical impairment of a major bodily function.

"Physician" means a person with an unlimited license to practice medicine or osteopathic medicine under the provisions of article three or fourteen, chapter thirty of this code.

"Post fertilization age" means the age of the unborn child as calculated from the fertilization of the human ovum.

"Probable post fertilization age of the unborn child" means, in reasonable medical judgment and with reasonable probability, the post fertilization age of the unborn child at the time an abortion is planned to be performed.

"Reasonable medical judgment" means a medical judgment that would be made by a reasonably prudent physician, knowledgeable about the case and the treatment possibilities with respect to the medical conditions involved.

"Unborn child" or "fetus" each mean an individual organism of the species homo sapiens from fertilization until live birth.

"Woman" means a female human being whether or not she has reached the age of majority.

§16-2M-3. Determination of post fertilization age.

(a) Except in the case of a medical emergency, no abortion may be performed or induced or be attempted to be performed or induced unless the physician performing or inducing it has first made a determination of the probable post fertilization age of the unborn child or relied upon such a determination made by another physician. In making this determination, the physician shall make such inquiries of the woman and perform or cause to be performed medical examinations and tests as a reasonably prudent physician, knowledgeable about the case and the medical conditions involved, would consider necessary to perform in making an accurate diagnosis with respect to post fertilization age.

(b) Failure by any physician to conform to any requirement of this section constitutes "professional incompetence" pursuant to section fourteen, article three, chapter thirty of this code.

§16-2M-4. Abortion of unborn child of twenty or more weeks post fertilization age prohibited.

(a) No person may perform or induce, or attempt to perform or induce, an abortion upon a woman when it has been determined, by the physician performing or inducing or attempting to perform or induce the abortion or by another physician upon whose determination that physician relies, that the probable post fertilization age of the woman's unborn child is twenty or more weeks unless there is reasonable medical judgment that she has a condition which so

complicates her medical condition as to necessitate the abortion of her pregnancy to avert her death or to avert serious risk of substantial and irreversible physical impairment of a major bodily function, not including psychological or emotional conditions. No greater risk may be determined to exist if it is based on a claim or diagnosis that the woman will engage in conduct which she intends to result in her death or in substantial and irreversible physical impairment of a major bodily function.

(b) When an abortion upon a woman whose unborn child has been determined to have a probable post fertilization age of twenty or more weeks is not prohibited by subsection (a) of this section, the physician shall terminate the pregnancy in the manner which, in reasonable medical judgment, provides the best opportunity for the unborn child to survive, unless, in reasonable medical judgment, termination of the pregnancy in that manner would pose a greater risk either of the death of the pregnant woman or of the substantial and irreversible physical impairment of a major bodily function, not including psychological or emotional conditions, of the woman than would other available methods. No greater risk may be determined to exist if it is based on a claim or diagnosis that the woman will engage in conduct which she intends to result in her death or in substantial and irreversible physical impairment of a major bodily

function.

§16-2M-5. Reporting.

(a) Any physician who performs or induces or attempts to perform or induce an abortion shall report to the Division of Health, on a schedule and in accordance with forms and rules adopted and promulgated by the Department of Health and Human Resources, that include:

(1) Post fertilization age:

(A) If a determination of probable post fertilization age was made, whether ultrasound was employed in making the determination, and the week of probable post fertilization age determined.

(B) If a determination of probable post fertilization age was not made, the basis of the determination that a medical emergency existed.

(2) Method of abortion:

(A) Medication abortion such as, but not limited to, mifepristone/misoprostol or methotRexate/misoprostol;

(B) Manual vacuum aspiration;

(C) Electrical vacuum aspiration;

(D) Dilation and evacuation;

(E) Combined induction abortion and dilation and evacuation;

(F) Induction abortion with prostaglandins;

(G) Induction abortion with intra-amniotic instillation such as,

but not limited to, saline or urea;

(H) Induction abortion;

(I) Intact dilation and extraction (partial-birth); or

(J) Method not listed (specify).

(3) Whether an intra-fetal injection was used in an attempt to induce fetal demise such as, but not limited to, intrafetal potassium chloride or digoxin;

(4) Age and race of the patient;

(5) If the probable post fertilization age was determined to be twenty or more weeks, the basis of the determination that the pregnant woman had a condition which so complicated her medical condition as to necessitate the abortion of her pregnancy to avert her death or to avert serious risk of substantial and irreversible physical impairment of a major bodily function, not including psychological or emotional conditions;

(6) If the probable post fertilization age was determined to be twenty or more weeks, whether the method of abortion used was one that, in reasonable medical judgment, provided the best opportunity for the unborn child to survive and, if such a method was not used, the basis of the determination that termination of the pregnancy in that manner would pose a greater risk either of the death of the pregnant woman or of the substantial and irreversible physical

impairment of a major bodily function, not including psychological or emotional conditions, of the woman than would other available methods.

(b) Reports required by subsection (a) of this section may not contain the name or the address of the patient whose pregnancy was terminated nor may the report contain any information identifying the patient, except that each report shall contain a unique medical record identifying number to enable matching the report to the patient's medical records. These reports shall be maintained in strict confidence by the department, may not be available for public inspection, and may not be made available except:

(1) To a prosecuting attorney with appropriate jurisdiction pursuant to a criminal investigation;

(2) To a prosecuting attorney pursuant to a civil investigation of the grounds for an action under subsection (b), section seven of this article; or

(3) Pursuant to court order in an action under section seven of this article.

(c) By June 30 of each year the Department of Health and Human Resources shall issue a public report providing statistics for the previous calendar year compiled from all of the reports covering that year submitted in accordance with this section for each of the items listed in subsection (a) of this section. Each report shall provide

the statistics for all previous calendar years during which this section was in effect, adjusted to reflect any additional information from late or corrected reports. The Department of Health and Human Resources shall take care to ensure that none of the information included in the public reports could reasonably lead to the identification of any pregnant woman upon whom an abortion was performed, induced or tempted.

(d) Any physician who fails to submit a report by the end of thirty days following the due date is subject to a late fee of $1,000 for each additional thirty day period or portion of a thirty day period the report is overdue. Any physician required to report in accordance with this article who has not submitted a report or has submitted only an incomplete report more than six months following the due date, may, in an action brought by the department, be directed by a court of competent jurisdiction to submit a complete report within a period stated by court order or be subject to civil contempt. Intentional or reckless failure by a physician to conform to any requirement of this section, other than late filing of a report, constitutes "professional incompetence" pursuant to section fourteen, article three, chapter thirty of this code. Intentional or reckless failure by a physician to submit a complete report in accordance with a court order constitutes "professional incompetence" pursuant to

section fourteen, article three, chapter thirty of this code. Intentional or reckless falsification of any report required under this section is a misdemeanor.

(e) Within ninety days of the effective date of this article, the Department of Health and Human Services shall adopt and promulgate forms and regulations to assist in compliance with this section. Subsection (a) of this section shall take effect so as to require reports regarding all abortions performed or induced on and after the first day of the first calendar month following the effective date of the rules.

§16-2M-6. Criminal penalties.

Any person who intentionally or recklessly performs or induces or attempts to perform or induce an abortion in violation of this article is guilty of a felony and, upon conviction thereof, shall be fined not more than $5,000 or imprisoned in a state correctional facility not less than one year, or both fined and imprisoned. No penalty may be assessed against the woman upon whom the abortion is performed or induced or attempted to be performed or induced.

§16-2M-7. Civil remedies.

(a) A woman upon whom an abortion has been performed or induced in violation of this article, or the father of the unborn child who was the subject of such an abortion, may maintain an action against the

person who performed or induced the abortion in intentional or reckless violation of this article for actual and punitive damages. A woman upon whom an abortion has been attempted in violation of this article may maintain an action against the person who attempted to perform or induce the abortion in an intentional or reckless violation of this article for actual and punitive damages.

(b) A cause of action for injunctive relief against a person who has intentionally or recklessly violated this article may be maintained by the woman upon whom an abortion was performed or induced or attempted to be performed or induced in violation of this article, by: (1) A person who is the spouse, parent, sibling or guardian of, or a current or former licensed health care provider of, the woman upon whom an abortion has been performed or induced or attempted to be performed or induced in violation of this article; (2) or by a prosecuting attorney with appropriate jurisdiction. The injunction prevents the abortion provider from performing or inducing or attempting to perform or induce further abortions in violation of this article in this state.

(c) If judgment is rendered in favor of the plaintiff in an action described in this section, the court shall also render judgment for a reasonable attorney's fee in favor of the plaintiff against the defendant.

(d) If judgment is rendered in favor of the defendant and the court finds that the plaintiff's suit was frivolous and brought in bad faith, the court shall also render judgment for a reasonable attorney's fee in favor of the defendant against the plaintiff.

(e) No damages or attorney's fee may be assessed against the woman upon whom an abortion was performed or induced or attempted to be performed or induced except in accordance with subsection (d) of this section.

§16-2M-8. Protection of privacy in court proceedings.

In every civil or criminal proceeding or action brought under this article, the court shall rule whether the anonymity of any woman upon whom an abortion has been performed or induced or attempted to be performed or induced shall be preserved from public disclosure if she does not give her consent to such disclosure. The court, upon motion or sua sponte, shall make a ruling and, upon determining that her anonymity should be preserved, issue orders to the parties, witnesses and counsel and direct the sealing of the record and exclusion of individuals from courtrooms or hearing rooms to the extent necessary to safeguard her identity from public disclosure. Each order shall be accompanied by specific written findings explaining why the anonymity of the woman should be preserved from public disclosure, why the order is essential to that end, how the order is narrowly tailored to serve

that interest and why no reasonable less restrictive alternative exists. In the absence of written consent of the woman upon whom an abortion has been performed or induced or attempted to be performed or induced, anyone, other than a public official, who brings an action under subsection (a) or (b), section seven of this article shall do so under a pseudonym. This section does not conceal the identity of the plaintiff or of witnesses from the defendant or from attorneys for the defendant.

§16-2M-9. Construction.

This article does not repeal, by implication or otherwise, any otherwise applicable provision of West Virginia law regulating or restricting abortion. An abortion that complies with this article but violates the provisions of or any otherwise applicable provision of West Virginia law is unlawful as provided in that provision. An abortion that complies with the provisions of or any otherwise applicable provision of West Virginia law regulating or restricting abortion but violates this article is unlawful as provided in this article. If some or all of the provisions of this article are temporarily or permanently restrained or enjoined by judicial order, all other provisions of West Virginia law regulating or restricting abortion shall be enforced as though the restrained or enjoined provisions had not been adopted: *Provided,* That whenever the temporary

or permanent restraining order of injunction is stayed or dissolved or otherwise ceases to have effect, the provisions shall have full force and effect.

NOTE: The purpose of this bill is to protect unborn children who are capable of experiencing pain by prohibiting abortion after twenty weeks post-fertilization except when the mother has a medical emergency. The bill provides for civil and criminal remedies.

This article is new; therefore, it has been completely underscored.