November 3, 2013

Marjorie Dannenfelser
President
Susan B. Anthony List
1707 L Street, NW, Suite 550
Washington, D.C. 20036

Re: **Constitutionality of Albuquerque "Pain Capable Unborn Child Protection Ordinance"**

Dear Ms. Dannenfelser:

Alliance Defending Freedom, an alliance-building national legal ministry that defends the sanctity of human life, has been asked by Susan B. Anthony List to opine on the constitutionality of Albuquerque, New Mexico's proposed "Pain Capable Unborn Child Protection Ordinance." We understand that the proposed ordinance (herein the "Albuquerque Ordinance"), a copy of which is attached, is scheduled to be voted upon at an election on November 19, 2013. We further understand that, if eligible voters adopt this ordinance on November 19, 2013, the Albuquerque City Council intends to adopt the Albuquerque Ordinance at its December 3, 2013, meeting.

<u>Summary of Opinion</u>

It is our opinion that the Albuquerque Ordinance is constitutionally sound and should be upheld against any legal challenge should it be adopted by the voters of the City of Albuquerque.

In view of the foregoing, Alliance Defending Freedom urges the adoption of the Albuquerque Ordinance by the voters of Albuquerque and its implementation by the Albuquerque City Council.

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Background

Medical advances in recent decades have provided a greater understanding of the development of unborn children and their capacity to feel pain at various stages of growth. Indeed, a substantial and growing body of medical evidence indicates that such unborn children are capable of feeling pain. The "Detailed Findings and Authorities in Support" in Section 2 of the Albuquerque Ordinance define 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 Albuquerque Ordinance

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

The Albuquerque Ordinance 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 would consider necessary.

The Albuquerque Ordinance would, following such post-fertilization age 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 whose life is endangered by a physical disorder, illness, or injury, excluding psychological or emotional conditions, including those caused by or arising from the pregnancy itself.

The Albuquerque Ordinance defines "abortion" to mean the use or prescription of any instrument, medicine, drug, or any other substance or device to intentionally kill an unborn child or to intentionally terminate a pregnancy with an intention other than (1) after viability, to produce a live birth and preserve the life and health of the child; or (2) to remove a dead unborn child.

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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 Albuquerque Ordinance effectively limits abortions only after about 22 weeks' gestation, very near the generally accepted point of viability.

The Albuquerque Ordinance permits a physician to terminate a pregnancy under the foregoing 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.

Finally, the Albuquerque Ordinance subjects individuals, other than the woman upon whom an abortion is performed in violation of the Albuquerque Ordinance, who violate the Albuquerque Ordinance to a fine of not more than $500 and/or not more than 90 days in jail. *See* Albuquerque Code of Ordinances § 12-1-99(B) ("Any person convicted of a violation of this code for which no other penalty is set forth shall be subject to the penalty provisions set forth in 1-1-99 of this code of ordinances, unless a different specific penalty is provided.") and § 1-1-99 (penalty upon conviction is a fine of not more than $500 and/or not more than 90 days in jail).

We assume for the purposes of this opinion, that the Albuquerque City Council has the authority to adopt the Albuquerque Ordinance. We note that, in his letter unofficially commenting on the Albuquerque Ordinance, the New Mexico Attorney General does not question the authority of the Albuquerque City Council in this regard. That is because, just as a State has a legitimate interest in protecting the lives of unborn children (as well as in promoting the health of mothers), so also does a municipality have such a legitimate interest.

Insomuch as the Albuquerque Ordinance is, upon adoption by the Albuquerque City Council, thereupon effective, no additional policy or implementation guidance need be enacted by the Albuquerque City Council, and the Albuquerque Ordinance would be investigated and prosecuted by Albuquerque law enforcement authorities in the same manner as any other municipal ordinance violation.

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?, *Best Practice & Research Clinical Obstetrics & Gynaecology,* 24:5, at p. 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, *Best Practice & Research Clinical Obstetrics & Gynaecology,* 18.2, at p. 241 (2004). By twenty weeks, unborn children have pain receptors throughout their bodies. *See* Brusseau, Developmental Perspectives, *International Anesthesiology Clinics*, 46.3, at p. 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 p. 20; Anand, Fetal Pain?, *Pain: Clinical Updates,* 14:2, at p. 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, *Behavioral & Brain Sciences,* 30, at p. 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 Albuquerque Ordinance – 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, *Conscience,* 25.3, at p. 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, *Lancet,* 344, at p. 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 p. 242; Derbyshire, at p. 4; *see also* Giannakoulopoulos, at p. 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, *Continuing Education in Anaesthesia, Critical Care & Pain,* 8:2, at p. 74 (2008); Fisk, Effect of Direct Fetal Opioid Analgesia on Fetal Hormonal & Hemodynamic Stress Response to Intrauterine Needling, *Anesthesiology,* 95, at p. 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,* 31(4), at pp. 206-07 (2012). That is why doctors use analgesia or anesthesia when operating on an unborn child, including at twenty weeks' gestation. Myers, at p. 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 Albuquerque Ordinance 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 exception that it applies roughly two weeks later, even nearer to viability. *See, e.g.*, *United States v. Nixon*, 418 U.S. 683 (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 Albuquerque Ordinance,[2] 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. *Roe v. Wade*, 410 U.S. 113, 162-64 (1973), establishes a compelling State interest in protecting the lives of unborn children from the stage at which they are, as evidenced by substantial medical evidence, capable of feeling pain.

Several more States are presently considering similar legislation, including Iowa, Kentucky, Maryland, and Minnesota.

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

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[2] **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.

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.").[3]

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

Whether one views an unborn child as a "life or a potential life," *Casey*, 505 U.S. at 852, 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).[4]

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 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 *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), the Court rejected *Roe*'s trimester framework, imposing instead a bifurcated pre-viability/post-

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

[4] The informal opinion of New Mexico Attorney General Gary K. King dated October 9, 2013, which opines that the Albuquerque Ordinance is unconstitutional, turns only on the question of "viability" and does not recognize, as has the U.S. Supreme Court, that 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*, 112 S.Ct. 2804; *see also Gonzales*, 550 U.S. at 146.

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, 112 S.Ct. at 2820.

This began to change with *Stenberg v. Carhart*, 530 U.S. 914 (2000). 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, *id.* 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).

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 never previously had the occasion to consider whether, after a certain stage of development where 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 City of Albuquerque, 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*.

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.

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[5] A petition for a writ of certiorari was filed on September 27, 2013, with the United States Supreme Court regarding the decision of the United States Court of Appeals for the Ninth Circuit holding unconstitutional Arizona's effort to limit abortion after 20 weeks' 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. *Horne v. Isaacson,* 884 F. Supp. 2d 961 (D. AZ), 716 F.3d 1213 (9th Cir. May 21, 2013, Docket No. 13-402 (9-27-13)).

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 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, 350 U.S. at 958-59 (Kennedy, J., dissenting).

4. The Albuquerque Ordinance States a Compelling State Interest Based on the Ability of an Unborn Child to Feel Pain

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 Albuquerque Ordinance 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 health risks which increase exponentially at higher gestations. Indeed, the incidences of major complications are highest after this point in pregnancy.

Pursuant to the Albuquerque Ordinance, 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 Albuquerque Ordinance generally prohibit a woman from obtaining an abortion before viability. Even then, the Albuquerque Ordinance permits abortions necessary to save the life of a pregnant woman 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, but not including psychological or emotional conditions.

Thus, the Albuquerque Ordinance 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 Albuquerque Ordinance will survive a facial challenge.

5. The Albuquerque Ordinance Contains the Necessary Exceptions

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."

The Albuquerque Ordinance's exception is nearly identical to that of *Gonzales*:

> (2)(B) Subject to subparagraph (C), subparagraph (A) does not apply if, in reasonable medical judgment, the abortion is necessary to save the life of a pregnant woman 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, but not including psychological or emotional conditions.
>
> (C) Notwithstanding the definitions of 'abortion' and 'attempt an abortion' in this section, a physician terminating or attempting to terminate a pregnancy under an exception provided by subparagraph (B) may do so only 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 of (i) the death of the pregnant woman; or (ii) the substantial and irreversible physical impairment of a major bodily function, not including psychological or emotional conditions, of the pregnant woman; than would other available methods.

"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 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).

In the abortion context, in *Gonzales v. Carhart*, the Supreme Court employed the presumption in favor of as-applied challenges to help shape the appropriate standard for determining whether there was a constitutional violation. *Gonzales*, 550 U.S. at 167. Writing for the majority, Justice Kennedy rejected the challenge to the partial-birth abortion ban, citing, among other things, the presumption in favor of as-applied challenges. *Id.* Rather than focus on remedy, which was not at issue, the Court concluded that "facial attacks should not [be] entertained in the first instance." *Id.* Instead, the Court indicated that the preference for as-applied challenges meant that only a woman, or potentially her doctor, facing a specific health risk could challenge the statute. *See generally Richmond Med. Ctr. for Women v. Herring*, 570 F.3d 165, 180 (4th Cir. 2009) (holding that a doctor could not challenge a Virginia abortion statute following *Gonzales* because "[h]e has not indicated that he has any particular patient in mind, nor any discrete factual circumstance that is detailed by medical records or other similarly concrete evidence").

As Justice Kennedy explained, "the proper means to consider exceptions [to the law] is by as-applied challenge" which he 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*, 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.*

The law strongly favors as-applied challenges on the grounds that they are more consistent with the goals of resolving concrete disputes and deferring as much as possible to the legislative process. *See Wash. State Grange v. Wash. State Republican Party*, 128 S. Ct. 1184, 1190–91 (2008) (discussing the preference for as-applied challenges to facial challenges); David L. Franklin, Facial Challenges, Legislative Purpose, and the Commerce Clause, 92 *Iowa L. Rev.* 41, 55–56 (2006) ("The Court has explained that the act of striking down a statute on its face stands in tension with several traditional components of the federal judicial role, including a preference for resolving concrete disputes rather than abstract or speculative questions, a deference to legislative judgments, and a reluctance to resort to the 'strong medicine' of constitutional invalidation unless absolutely necessary."); David H. Gans, Strategic Facial Challenges, 85 *B.U.L. Rev.* 1333, 1348 (2005) ("As-applied adjudication, of course, carries with it important benefits. . . . [I]t ensures that courts do not make uncertain speculations about how a law operates outside of the facts generated by the controversy before it."). Facial challenges, in contrast, should be used sparingly and only in exceptional circumstances. *See Ayotte v. Planned Parenthood of N. New England*, 546 U.S. 320, 328–30 (2006) (discussing the Court's preference for as-applied challenges); Richard H. Fallon, Jr., As-Applied and Facial Challenges and Third-Party Standing, 113 *Harv. L. Rev.* 1321, 1321 (2000) ("Traditional thinking has long held that

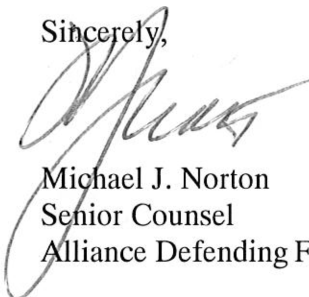
the normal if not exclusive mode of constitutional adjudication involves an as-applied challenge . . . ."); Marc E. Isserles, Overcoming Overbreadth: Facial Challenges and the Valid Rule Requirement, 48 *Am. U.L. Rev.* 359, 361 (1998) ("As the Supreme Court has made clear on numerous occasions, facial challenges are appropriate, if at all, only in exceptional circumstances."). Perhaps the best-known formulation of this idea was the Supreme Court's statement in *United States v. Salerno* that a "facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully" and will only succeed if a litigant can "establish that no set of circumstances exists under which the Act would be valid." 481 U.S. 739, 745 (1987).

6. Conclusion

As stated above, should the Albuquerque Ordinance be enacted and adopted by the Albuquerque City Council and then subsequently challenged, Alliance Defending Freedom believes that the ordinance will be upheld as constitutional by the U.S. Supreme Court.

Alliance Defending Freedom urges the passage of the Albuquerque Ordinance. Should the Albuquerque Ordinance be adopted by the people of the City of Albuquerque, Alliance Defending Freedom would be pleased to assist the citizens in defending the constitutionality of the Albuquerque Ordinance without any charge for our services.

Sincerely,



Michael J. Norton
Senior Counsel
Alliance Defending Freedom

Attachment - Proposed Ordinance

SECTION 1. SHORT TITLE

This ordinance may be cited as the "Pain Capable Unborn Child Protection Ordinance."

SECTION 2. FINDINGS AND AUTHORITIES IN SUPPORT

The Citizens of Albuquerque declare the following:

(1) Pain receptors are present throughout the unborn child's entire body and nerves link these receptors to the brain's thalamus and subcortical plate by no later than 20 weeks after fertilization.

(2) By 8 weeks after fertilization, the unborn child reacts to touch. After 20 weeks, the unborn child reacts to stimuli that would be recognized as painful if applied to an adult human.

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

(4) 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 are applied without such anesthesia. In the United States, surgery of this type is being performed by 20 weeks after fertilization and earlier in specialized units affiliated with children's hospitals.

(5) Recent medical research and analysis, especially since 2007, provides strong evidence for the conclusion that a functioning cortex is not necessary to experience pain.

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

(7) In adult humans and in animals, stimulation or ablation of the cerebral cortex does not alter pain perception, while stimulation or ablation of the thalamus does.

(8) The position, asserted by some commentators, that the unborn child remains in a coma-like sleep state that precludes the unborn child experiencing pain is inconsistent with the documented reaction of unborn children to painful stimuli and with the experience of fetal surgeons who had found it necessary to sedate the unborn child with anesthesia to prevent the unborn child from engaging in vigorous movement in reaction to invasive surgery.

(9) Consequently, there is substantial medical evidence that an unborn child is capable of experiencing pain at least by 20 weeks after fertilization, if not earlier.

(10) The Citizens of Albuquerque assert a compelling governmental interest in protecting the lives of unborn children from the stage at which substantial medical evidence indicates that they are capable of feeling pain.

(11) The compelling governmental interest in protecting the lives of unborn children from the stage at which substantial medical evidence indicates that they are capable of feeling pain is asserted *in addition* to the compelling interest in protecting the lives of unborn children from the stage of viability. Neither governmental interest is intended to replace the other.

(12) The Citizens of Albuquerque are empowered by Chapter Three of New Mexico Statutes Annotated and Article Three of the Charter of the City of Albuquerque to affirmatively act to secure health and safety within its geographical borders.

SECTION 3. PAIN-CAPABLE UNBORN CHILD PROTECTION.

(a) **IN GENERAL.** - Chapter 12, Article 2, Albuquerque Code of Ordinances, is amended by inserting after section twenty-eight the following:

"§12-2-29. PAIN-CAPABLE UNBORN CHILD PROTECTION.

(a) **UNLAWFUL CONDUCT.** - Notwithstanding any other provision of law, it shall be unlawful for any person to perform an abortion or attempt to do so, unless in conformity with the requirements set

forth in subsection (b).

(b) REQUIREMENTS FOR ABORTIONS. -

(1) The physician performing or attempting the abortion shall first make a determination of the probable post-fertilization age of the unborn child or reasonably rely upon such a determination made by another physician. In making such a determination, the physician shall make such inquiries of the pregnant woman and perform or cause to be performed such medical examinations and tests as a reasonably prudent physician, knowledgeable about the case and the medical conditions involved, would consider necessary to make an accurate determination of post-fertilization age.

(2) (A) Except as provided in subparagraph (B), the abortion shall not be performed or attempted, if the probable post-fertilization age, as determined under paragraph (1), of the unborn child is 20 weeks or greater.

(B) Subject to subparagraph (C), subparagraph (A) does not apply if -

(i) in reasonable medical judgment, the abortion is necessary to save the life of a pregnant woman 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, but not including psychological or emotional conditions.

(C) Notwithstanding the definitions of 'abortion' and 'attempt an abortion' in this section, a physician terminating or attempting to terminate a pregnancy under an exception provided by subparagraph (B) may do so only 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 of -

(i) the death of the pregnant woman; or

(ii) the substantial and irreversible physical impairment of a major bodily function, not including psychological or emotional conditions, of the pregnant woman;

than would other available methods.

(c) BAR TO PROSECUTION. - A woman upon whom an abortion in violation of subsection (a) is performed or attempted may not be prosecuted under, or for a conspiracy to violate, subsection (a), or for an offense under section 2, 3, or 4 of this title based on such a violation.

(d) DEFINITIONS. - In this section the following definitions apply:

1. **ABORTION.** - The term 'abortion' means the use or prescription of any instrument, medicine, drug, or any other substance or device -
   (A) to intentionally kill the unborn child of a woman known to be pregnant; or

   (B) to intentionally terminate the pregnancy of a woman known to be pregnant, with an intention other than -

   (i) after viability to produce a live birth and preserve the life and health of the child born alive; or

   (ii) to remove a dead unborn child.

2. **ATTEMPT AN ABORTION** – The term 'attempt', with respect to an abortion, means conduct that, under the circumstances as the actor believes them to be, constitutes a

substantial step in a course of conduct planned to culminate in performing an abortion.

(2) **FERTILIZATION**. - The term 'fertilization' means the fusion of human spermatozoon with a human ovum.

(3) **PERFORM.** - The term 'perform', with respect to an abortion, includes induction of an abortion through a medical or chemical intervention including writing a prescription for a drug or device intended to result in an abortion.

(4) **PHYSICIAN**. - The term 'physician' means a person licensed to practice medicine and surgery or osteopathic medicine and surgery, or otherwise legally authorized to perform an abortion.

(5) **POST-FERTILIZATION AGE**. - The term 'post-fertilization age' means the age of the unborn child as calculated from the fusion of a human spermatozoon with a human ovum.

(6) **PROBABLE POST-FERTILIZATION AGE OF THE UNBORN CHILD.** - The term 'probable post-fertilization age of the unborn child' means what, in reasonable medical judgment, will with reasonable probability be the post-fertilization age of the unborn child at the time the abortion is planned to be performed or induced.

(7) **REASONABLE MEDICAL JUDGMENT**. - The term '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.

(8) **UNBORN CHILD.** - The term 'unborn child' means an individual organism of the species homo sapiens, beginning at fertilization, until the point of being born alive.

(9) **WOMAN.** - The term 'woman' means a female human being whether she has reached the age of majority.

(e) SEVERABILITY. - If any part or application of the Pain-Capable Unborn Protection Ordinance is held invalid, the remainder or application to other situations or persons shall not be affected."